

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 103 Transfer of Tax Liability
SPONSOR(S): Wood
TIED BILLS: None **IDEN./SIM. BILLS:** SB 170

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N	Cary	Bond
2) Economic Affairs Committee	18 Y, 0 N	Fennell	Tinker
3) Finance & Tax Committee			

SUMMARY ANALYSIS

In general, a person who buys a business (transferee) assumes the tax liabilities of the seller (transferor), unless an exception applies. Current law provides three different statutes relating to state tax liability on a transfer of a business to new ownership. One applies to sales tax liability, one to communications services tax, and one to state taxes in general.

House Bill 103 repeals the two specific statutes (sales tax and communications services tax) and amends the statute relating to all taxes owed to the state.

The bill allows the transferee to take the business without assuming the transferor's liabilities under either of the following circumstances:

- If the transferor and the transferee do not have insiders in common, the transferor may provide the transferee a receipt or certificate of compliance from the Department of Revenue showing that a transferor has not received notice of audit, has filed all required tax returns, and has paid the tax due from those returns; or
- The transferee or transferor may request an audit of the transferor's books and records, to be completed within 90 days by the Department of Revenue, in order to find that a transferor is not liable for any outstanding tax liabilities.

The bill creates a new exemption from liability when the transferee is not an insider and the assets transferred are limited to:

- A one- to four-family residential real property and furnishing and fixtures within;
- Real property that has not been improved with a building; or
- Owner-occupied commercial real property.

This exception does not apply if such assets are accompanied by a transfer of other business assets.

On October 26, 2011, the Revenue Estimating Conference estimated that the bill had a negative, indeterminate impact on state and local government revenues.

The bill may implicate the constitutional limit on bills creating a local government mandate.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

When a person buys a business, the buyer (transferee) is liable for unpaid business taxes, such as sales taxes, that the seller (transferor) owes.¹ In 2000, the Legislature passed s. 202.31, F.S., governing the transfer of tax liability related to communications services companies.² In 2010, the Legislature enacted s. 213.758, F.S., governing the transfer of tax liability in other situations.

Together, ss. 202.31, 212.10, and 213.758, F.S. govern the transfer of tax liability for every tax administered by the Department of Revenue³ ("the department"), excluding the corporate income tax. Section 213.758(2), F.S., provides that a taxpayer who is liable for any tax, interest, penalty, surcharge, or fee⁴ who quits a business without the benefit of a purchaser, successor, or assignee, or without transferring the business or stock of goods to a transferee must make a final return and pay the amount due within 15 days.

The transferee of more than 50% of a business is liable for any tax owed by the transferor unless the transferor provides the transferee a receipt or certificate from the department showing that the transferor is not liable for taxes and the department conducts an audit and finds that the transferor is not liable for taxes. The department may charge a fee to perform these audits and there is no time requirement for the Department to complete the audit.⁵ The maximum liability for a transferee is the greater of the fair market value of the business or the purchase price paid.⁶

Sections 202.31 and 212.10, F.S., govern the transfer of tax liability for communications and services tax and sales and use tax, respectively. The procedures pursuant to those statutes are substantially similar to those in s. 213.758, F.S. Sections 202.31 and s. 212.10, F.S., also include misdemeanor criminal penalties for violations of the tax transfer provisions contained in those statutes.

Section 213.758, F.S., does not impose liability on those transferees who take possession due to an involuntary transfer.⁷

Effect of Proposed Changes

In general, this bill repeals the tax liability statutes specific to sales and communications services businesses. In addition, the bill amends the statute relating to all taxes owed to the state in order to consolidate all transfer of tax liabilities provisions into a single section of the Florida Statutes.

Tax Liability

If the transferor and transferee do not have any insiders in common, this bill allows a transferee to avoid liability for the unpaid tax of the transferor if the transferee receives a "certificate of compliance" from the department showing that the transferor has not received a notice of audit, has filed all required tax returns, and has paid all tax arising from those returns. The transferee may also be exempt from liability if the department performs an audit and finds that the transferor has no tax liability. Either the

¹ See s. 212.10, F.S.

² See ss. 23.58, ch. 2000-260, L.O.F.

³ As listed in s. 213.05, F.S.

⁴ The statute refers to taxes, interest, penalties, surcharges, or fees pursuant to ch. 443, F.S., or described in s. 72.011(1), F.S., excluding the corporate income tax.

⁵ Section 213.758(4), F.S.

⁶ Section 213.758(6), F.S.

⁷ Section 213.758(1)(a) defines an involuntary transfer as a transfer due to the foreclosure by a non-insider, from eminent domain or condemnation actions, those involved in a bankruptcy proceeding, or to a financial institution to satisfy a debt.

transferee or transferor may request that the department conduct such an audit, and if requested, the department must complete the audit within 90 days.⁸

This bill also creates a new exemption from liability when the transferee is not an insider and the assets transferred are limited to:

- A one- to four-family residential real property and furnishing and fixtures within;
- Real property that has not been improved with a building; or
- Owner-occupied commercial real property.

This exception does not apply if such assets are accompanied by a transfer of other business assets.

Under the bill, a circuit court shall issue a temporary injunction to enjoin further business activity by the taxpayer on the grounds of failure to pay taxes if DOR has provided the taxpayer with 20 days' written notice. Under the current law and the bill, the Department of Legal Affairs is authorized to seek an injunction from a circuit court at the request of DOR. Current law does not require notice before a court issues an injunction.

For transferees, the bill permits the Department of Legal Affairs, at the request of the department, to seek an injunction from a circuit court to enjoin further business activity by the transferee on the grounds of failure to pay taxes if:

- The assessment against the transferee is final and either the time for contesting the assessment under s. 72.011, F.S., has passed or such a contest was filed and resulted in a final and nonappealable judgment sustaining the assessment; and
- The department has provided at least 20 days' written notice of intention to seek an injunction.

Current law does not require a 20-day notice before a court issues an injunction against a transferee.

This bill provides that the maximum tax liability of the transferee is the greater of:

- The fair market value of the business, assets of the business, or stock of goods of the business, net of any liens or liability to non-insiders; and
- The purchase price paid for the business, assets of the business, or stock of goods of the business, net of any liens or liability to non-insiders.

Definitions

This bill defines the term "business" to require that a discrete division of a larger business be aggregated with all other divisions that are not separate legal entities. The definition of "financial institution" includes any person who controls, is controlled by, or is under common control with a financial institution.⁹ The term "insider" encompasses a member, manager, managing member of a limited liability company, or a relative of such a person, as defined in s. 726.102(11), F.S.¹⁰ The bill defines "stock of goods" as an inventory of a business held for sale to customers in the ordinary course of business. This bill defines "transfer" to include that a business is transferred when there is a transfer of more than 50 percent of the business, the assets of the business, or the stock of goods of the business. This bill defines "involuntary transfer" as a transfer of a business, assets of a business, or stock of goods of a business made without the consent of the transferor in the following situations:

⁸ Section 213.758(4)(a)2 authorizes the Department to charge a fee for an audit requested by the transferee or transferor. There is no set amount for the Department to charge and the Department has not promulgated rules to put a transferor or transferee on notice as to how much an audit will cost.

⁹ The statute currently uses "financial institution" solely as defined by s. 655.005, F.S.

¹⁰ Section 726.102(11), F.S. defines "relative" as "an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree."

- Foreclosure of a security interest of a non-insider;
- Eminent domain or condemnation;
- Dissolution of marriage, foreclosure under Chapter 702, F.S., or bankruptcy;
- A transfer to a financial institution if the transfer is made to satisfy transferor's debt to the financial institution; or
- A transfer to a third party to satisfy the transferor's debt to a financial institution, to the extent that it satisfies the indebtedness.

Repeal of Statutes

This bill repeals ss. 202.31 and 212.10, F.S. The repeal of these sections eliminates the misdemeanor criminal penalty provisions for violations of these sections.

Effective Date

This bill provides that the bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1 amends s. 213.758, F.S., relating to transfer of tax liabilities.

Section 2 amends s. 213.053, F.S., relating to confidentiality and record sharing.

Section 3 repeals s. 202.31, F.S., relating to sale of communications services businesses.

Section 4 repeals s. 212.10, F.S., relating to sale of sales (dealer) businesses.

Section 5 provides that the bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

On October 26, 2011, the Revenue Estimating Conference estimated the bill had an indeterminate negative fiscal impact on state government revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

On October 26, 2011, the Revenue Estimating Conference estimated the bill had an indeterminate negative fiscal impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Local governments are given a share of sales tax revenue, and may impose additional sales taxes that are collected by the state on behalf of the local governments. It is possible that this bill may implicate the mandates provision at art. VII, s. 18(b) of the State Constitution, which provides:

(b) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate; as such authority exists on February 1, 1989.

Subsection (d) provides an exemption from this prohibition. Laws determined to have an "insignificant fiscal impact," which means an amount not greater than the average statewide population for the applicable fiscal year times \$0.10 (which is \$1.88 million for the FY 2011-12), are exempt. If the bill passes with a 2/3rds vote of the membership of the House of Representatives and the Senate, it will not be subject to a mandates objection.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill appears to create a need for rulemaking or rulemaking authority, though there are currently no rules relating to the existing statute. There is a provision in s. 213.758(4)(a)2, F.S. that allows the department to adopt rules necessary to administer the section. The department has declared that any rulemaking would not have an adverse impact on small business or significantly increase regulatory costs.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.