

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 429 Sales Tax Absorption

SPONSOR(S): Business & Professions Subcommittee, Ways & Means Committee, Valdés

TIED BILLS: **IDEN./SIM. BILLS:** SB 508

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Ways & Means Committee	17 Y, 0 N, As CS	Berg	Langston
2) Business & Professions Subcommittee			
3) Appropriations Committee			

SUMMARY ANALYSIS

HB 429 allows businesses to advertise that they will pay some or all of the sales tax due on behalf of their customers. A business that pays its customers' tax must provide an invoice or similar document that (1) states that the business will pay the tax and (2) separately states the amount of tax due on the sale.

Florida businesses are currently prohibited from absorbing, paying, or refunding their customers' tax, and a business that advertises or absorbs the tax is subject to penalties ranging from a second-degree misdemeanor for a first offense, to a first-degree misdemeanor for any subsequent offense.

The Revenue Estimating Conference determined that the bill will reduce General Revenue Fund receipts and local government revenues in Fiscal Year 2020-2021 and each year thereafter by an indeterminate amount.

The bill takes effect July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Florida Sales and Use Tax

Florida levies a 6 percent sales and use tax on the sale or rental of most tangible personal property, admissions,¹ transient rentals,² rental of commercial real estate,³ and a limited number of services. Chapter 212, F.S., contains statutory provisions authorizing the levy and collection of Florida's sales and use tax, as well as the exemptions and credits applicable to certain items or uses under specified circumstances. There are currently more than 270 exemptions, exclusions, deductions, and credits from the sales and use tax.⁴ Sales tax receipts accounted for 79 percent of the state's General Revenue in Fiscal Year 2019-2020.⁵

Generally, sales tax is added to the price of the taxable good or service and collected from the purchaser at the time of sale.⁶ In limited circumstances where the Department has determined that it is impracticable for the dealer to separately state the tax on a charge ticket, dealers in specified industries have the option to calculate tax using divisors, instead of adding the tax to the selling price.⁷ For example, dealers who sell alcoholic beverages have the option to calculate sales tax based on their total receipts (the calculation will vary based on whether or not the business posted notice that the sales tax was included).⁸ This allows the dealers to charge a flat dollar amount for beverages, rather than collecting change on the transactions. Similarly, concessionaires at arenas, auditoriums, or other similar places of business may charge an even dollar amount and then calculate the amount of tax due using a divisor computed by the Department of Revenue.⁹ These options are limited to industries where the Department has established divisors by rule, and in these cases the tax is still paid by the customer, not the dealer.

In addition to the state tax, s. 212.055, F.S., authorizes counties to impose nine local discretionary sales surtaxes. A surtax applies to "all transactions occurring in the county which transactions are subject to the state tax imposed on sales, use, services, rental, admissions, and other transactions by [ch. 212, F.S.], and on communications services as defined in ch. 202, F.S."¹⁰ The discretionary sales surtax is based on the tax rate imposed by the county where the taxable goods or services are sold, or are delivered into. Discretionary sales surtax rates currently levied vary by county in a range from 0.5 to 1.5 percent.¹¹

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¹ Section 212.04, F.S.

² Section 212.03, F.S.

³ Section 212.031, F.S.

⁴ Office of Economic and Demographic Research, The Florida Legislature, *Florida Tax Handbook*, 166-171 (2020), available at <http://edr.state.fl.us/Content/revenues/reports/tax-handbook/taxhandbook2020.pdf> (last visited February 13, 2020).

⁵ Office of Economic and Demographic Research, Florida Legislature, *Florida Tax Handbook*, Sources of General Revenue, 16 (2020), available at <http://edr.state.fl.us/Content/revenues/reports/tax-handbook/taxhandbook2020.pdf> (last visited February 13, 2020).

⁶ Florida Dept. of Revenue, *Who must pay tax? Partial list of taxable business activities*, available at http://floridarevenue.com/taxes/taxesfees/Pages/sales_tax.aspx (last visited April 15, 2019).

⁷ Section 212.07(2), F.S.

⁸ See Rule 12A-1.057, F.A.C., for examples.

⁹ See Rule 12A-1.080, F.A.C.

¹⁰ Section 212.054, F.S.

¹¹ Office of Economic and Demographic Research, Florida Legislature, *Florida Tax Handbook*, 2019 Local Discretionary Sales Surtax Rates in Florida's Counties, 231-232 (2020), available at <http://edr.state.fl.us/Content/revenues/reports/tax-handbook/taxhandbook2020.pdf> (last visited February 13, 2020).

Section 212.07(4), F.S., prohibits dealers from advertising, directly or indirectly, that they will absorb, pay, or refund the purchaser all or any part of the sales tax due with the sale of their property or services. A person who violates this provision, whether by advertising or refunding, is guilty of a misdemeanor of the second degree.¹² A subsequent offense constitutes a misdemeanor of the first degree.¹³

Several states, including Arizona,¹⁴ California,¹⁵ Kentucky,¹⁶ and have similar laws that prohibit dealers from absorbing or refunding taxes to a purchaser.¹⁷ However, a growing number of states permit tax absorption, including Wisconsin,¹⁸ Pennsylvania,¹⁹ and Georgia.²⁰

Businesses cite various reasons for seeking to absorb sales tax, ranging from quickly moving customers through their lines²¹ to preventing confusion during state sales tax holidays when certain items are exempt from sales tax but others are not.²²

Proposed Changes

The bill amends s. 212.07(4), F.S., to remove the prohibition on a dealer advertising or holding out that the dealer will absorb sales tax or refund a purchaser of the payment of sales tax. The bill allows a dealer to advertise that the dealer will pay all or any part of the applicable sales tax on behalf of the purchaser, or refund the sales tax for the purchaser, subject to the following conditions:

- First, the dealer must expressly state on any charge ticket, sales slip, invoice, or other tangible evidence of sale provided to the purchaser that the dealer will pay the tax imposed in ch. 212, F.S. The dealer must not imply or state that the sale is exempt from taxes imposed in ch. 212, F.S.; and
- Second, the dealer must provide the amount of tax that was due on the charge ticket, sales slip, invoice, or other tangible evidence of sale given to the purchaser.

If a dealer violates this provision, they are guilty of a misdemeanor of the second degree. A subsequent offense constitutes a misdemeanor of the first degree.

The bill also amends s. 212.15, F.S., to expand the criminal offense of failure to remit collected taxes to the department to include taxes absorbed by the dealer. Depending on the amount of revenue stolen,

¹² Section 775.082(4)(b), F.S., “For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days” and s. 775.083(1)(e), F.S., “\$500, when the conviction is of a misdemeanor of the second degree...”

¹³ Section 775.082(4)(a), F.S., “For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year” and s. 775.083(1)(d), F.S., “\$1,000, when the conviction is of a misdemeanor of the first degree.”

¹⁴ AZ Rev. Stat. § 42-5165, available at

<https://www.azleg.gov/viewdocument/?docName=http%3A%2F%2Fwww.azleg.gov%2Fars%2F42%2F05165.htm> (last visited February 13, 2020).

¹⁵ CA Rev. & Tax Code § 6205 (2020), available at <https://www.cdta.ca.gov/lawguides/vol1/sutl/6205.html> (last visited February 13, 2020).

¹⁶ KY Rev. Stat. §139.220 (2011), available at <https://law.justia.com/codes/kentucky/2011/139-00/139-220> (last visited February 13, 2020).

¹⁷ Gail Cole, *Absorbing Sales Tax* (Jul. 22, 2019), <https://www.avalara.com/us/en/blog/2015/11/absorbing-sales-tax-wacky-tax-wednesday.html> (last visited February 13, 2020).

¹⁸ WI Dep’t. of Revenue, *Sales and Use Tax Report at 2* (Jul. 2011), available at <https://www.revenue.wi.gov/SalesUseTaxReport/11-2.pdf> (last visited February 13, 2020).

¹⁹ PA Act 2019-13 §7 (eff. Jul. 1, 2019). See also, Pa. Dep’t. of Revenue, *State Tax Summary* (Jul. 2019), available at https://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/TaxSummaries/Documents/2019_tax_summary.pdf (last visited February 13, 2020).

²⁰ GA Code. §48-8-36 (2015), available at <https://law.justia.com/codes/georgia/2015/title-48/chapter-8/article-1/part-2/section-48-8-36/> (last visited February 13, 2020).

²¹ *MJR Group, LLC v. Mich. Dep’t. of Treasury*, No. 329119, 2016 WL 7611479 (Mich. Ct. App. Dec. 29, 2016), available at <https://law.justia.com/cases/michigan/court-of-appeals-unpublished/2016/329119.html> (last visited February 13, 2020).

²² Slim Smith, *Statewide ‘Sales Tax Holiday’ set for July 31-Aug. 1* (Jul. 22, 2015), <https://www.washingtontimes.com/news/2015/jul/22/statewide-sales-tax-holiday-set-for-july-31-aug-1/> (last visited February 13, 2020).

and whether the dealer has prior offenses, he or she is subject to penalties ranging from a second-degree misdemeanor to a first-degree felony.²³

The bill has an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1. Amends s. 212.07(4), F.S., to allow dealers to pay sales tax on behalf of customers if certain conditions are met.

Section 2. Amends 212.15, F.S., to provide criminal penalties for failure to remit absorbed taxes.

Section 3. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference determined that the bill will reduce General Revenue Fund receipts in Fiscal Year 2020-2021 and each year thereafter by an indeterminate amount.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Local government revenues are estimated to decrease by an indeterminate amount in Fiscal Year 2020-2021 and each year thereafter.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

²³ If a dealer fails to remit absorbed taxes totaling less than \$300, the offense is a misdemeanor in the second degree. If the total amount of stolen revenue is \$300 or more but less than \$20,000, the offense is a felony of the third degree. If the total amount of stolen revenue is \$20,000 or greater but less than \$100,000, the offense is a felony of the second degree. If the amount of stolen revenue is \$100,000 or greater, the offense is a felony of the first degree.

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of Revenue has general rulemaking authority to create rules governing the taxes it administers.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 19, 2020, the Ways and Means Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Replaces the word “absorb” with “pay.”
- Removes the concept that a dealer can advertise that he or she will refund all or part of the tax when a dealer has elected to pay the tax on behalf of the purchaser.
- Expressly requires a dealer to separately state the sale price on a receipt.
- Provides that a contrary law may not affect the ability for a dealer to pay the sales tax on behalf of the purchaser.

This analysis is written to the committee substitute as reported favorably by the Ways and Means Committee.