

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL: SB 1384

INTRODUCER: Senator Altman

SUBJECT: Transfer of Tax Liabilities

DATE: April 11, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	Pre-meeting
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

SB 1384 consolidates and revises the statutes which deal with the transfer of tax liabilities.

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 tax liability related to the transfer of a business to new ownership. This bill repeals two specific statutes (sales and communications) and amends the statute relating to taxes owed.

The bill revises the requirements for a transferee to take possession of a business without assuming any outstanding tax liabilities of a transferor. Current law provides that if the transferor provides a certificate from the Department of Revenue showing that no taxes are owed and the department conducts an audit finding no liability for taxes, the transferee can take possession without assuming any tax liability. This bill allows the transferee to take the business without assuming the transferor's liabilities under either of the following two circumstances:

- The transferee receives a certificate of compliance from the transferor showing that the transferor has not received notice of audit, has filed all required tax returns, has paid the tax due from those returns, and there are no insiders in common between the transferor and the transferee; or
- The Department of Revenue conducts an audit, at the request of the transferee or transferor, and finds that the transferor is not liable for any taxes.

The bill amends s. 213.758, F.S., and repeals ss. 212.10 and 202.31, F.S.

II. Present Situation:

Transfer of Tax Liabilities

Florida Statutes currently has three statutes which describe what is required when a business is transferred or sold as it relates to tax liability. Section 212.10, F.S., governs sales and use tax liability when a business is quit or sold.¹ In 2000, s. 202.31, F.S., was enacted to govern the transfer of communications services tax liability related to communications services businesses.² Section 213.758, F.S., was enacted in 2010 as a comprehensive statute to govern the transfer of tax liability for all taxes administered by the Department of Revenue (DOR), excluding the corporate income tax.³

Section 213.758, F.S.

A taxpayer who quits a business without selling, assigning, or transferring the business must make a final return and full payment for any taxes due, excluding corporate income tax, within 15 days of quitting the business.⁴ Similarly, a taxpayer who transfers a business must make a final return and full payment for any taxes due, excluding corporate income tax, within 15 days of the date of transfer.⁵

The transferee, or group of transferees, of more than 50 percent of a business is also liable for the taxes due by the transferor, unless the transferor provides the transferee a receipt or certificate from DOR showing that the transferor is not liable for taxes and DOR conducts an audit and finds that the transferor is not liable for taxes. DOR is permitted to charge a fee to perform these audits. The maximum liability for a transferee is the greater of the fair market value of the business or the purchase price paid. However, a transferee becomes liable for outstanding taxes only for voluntary transfers. The transferee may withhold a portion of the consideration to pay the taxes to pay to the department within 30 days of the date of transfer.⁶

Transferees or taxpayers who quit a business without paying all taxes due are prohibited from engaging in any business until the tax liability is paid. DOR may request the Department of Legal Affairs (DLA) to seek an injunction to prevent further business activity until all taxes due have been paid and the injunction may be granted without notice.

Sections 202.31 and 212.10, F.S.

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. However, ss. 202.31 and s. 212.10, F.S., provide for misdemeanor criminal penalties for violations of the tax transfer provisions.⁷

¹ This statute has been in Florida law in some form since 1949. S. 10, ch. 26319, L.O.F.

² Sections 23, 58, ch. 2000-260, L.O.F. See also s. 38, ch. 2001-140, L.O.F.

³ Chapter 2010-166, L.O.F. For a list of all taxes administered by DOR, see s. 213.05, F.S. Section 220.829, F.S., governs the transfer of tax liability for corporate income taxes

⁴ Section 213.758(2), F.S., 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(3), F.S., refers to taxes, interest, or penalties levied under ch. 443, F.S., or specified in s. 213.05, F.S., excluding the corporate income tax.

⁶ 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 satisfy a debt to a financial institution.

⁷ Sections 212.10(5) and 202.31(5), F.S.

III. Effect of Proposed Changes:

Section 1 consolidates and revises the statutes which deal with the transfer of tax liabilities into s. 213.758, F.S..

Tax Liability

This bill allows the transferee to take possession of a business without assuming the transferor's outstanding tax liabilities under either of the following two circumstances:

- The transferee receives a certificate of compliance from the transferor showing that the transferor has not received notice of audit, has filed all required tax returns, has paid the tax due from those returns, and there are no insiders in common between the transferor and the transferee; or
- The Department of Revenue conducts an audit and finds that the transferor is not liable for any taxes. Either the transferee or transferor may request that the department conduct an audit, and if requested, the department must complete the audit within 90 days.

Section 213.758(6), F.S., is amended to clarify that the maximum tax liability of the transferee is the fair market value or purchase price paid for the business, whichever is greater, net of any liens or liability to non-insiders.

Injunctions

This bill requires 20 days written notice to a taxpayer before the Department of Legal Affairs may seek an injunction from a circuit court to enjoin further business activity by the taxpayer on the grounds of failure to pay taxes. Current law does not require notice before a court issues an injunction.

If a transferee is liable for unpaid tax, the bill requires that after receiving written notice by DOR of unpaid tax the transferee has 60 days to pay the tax, after which time they may not engage in any business activity within the until the tax liability is paid. However, a transferee may continue to do business if the transferee files an action as provided in ch. 72, F.S.; although a court may require the transferee to post a bond or other security.

The bill also requires 20 days written notice to a transferee before the Department of Legal Affairs may seek an injunction from a circuit court to enjoin further business activity by the transferee on the grounds of failure to pay taxes. Current law does not require a 60-day time period to pay taxes or a 20-day notice before a court issues an injunction.

Definitions

The bill creates definitions for the terms "business," "financial institution," "insider," "stock of goods," and "tax." The existing definition of "transfer" is expanded 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.

Rulemaking

The bill removes the grant of rulemaking authority to DOR provided in s. 213.758(9), F.S.

Repeal of Statutes

Section 3 repeals s. 202.31, F.S. which relates to the transfer of sales and use tax liability, and Section 4 repeals s. 212.10, F.S., which relates to the transfer of communications services tax liability. With the creation of s. 213.758, F.S., in 2010 and the changes proposed in Section 1 of the bill, these two statutes are no longer necessary. The repeal of these statutes eliminates the misdemeanor penalty provisions for violations of these statutes.

Cross-References

Section 2 amends s. 213.053, F.S., to correct a cross-reference.

Effective Date

Section 5 provides an effective date of July 1, 2011.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Article VII, s. 18 of the Florida Constitution, excuses counties and municipalities from complying with laws requiring them to spend funds or to take an action unless certain conditions are met.

Subsection (b) of the provision prohibits the Legislature from “enacting, amending, or repealing any general law if the anticipated effect” is to reduce county or municipal aggregate revenue generating authority as it existed on February 1, 1989. The exception to this prohibition is if the Legislature passes such a law by 2/3 of the membership of each chamber.

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 FY 2011-12), are exempt.

The Revenue Estimating Conference estimated that the bill would have an indeterminate negative fiscal impact annually on local governments. It is unknown at this time if the bill would meet the exemption provided in subsection (d); however, the bill may be exempt from the mandates prohibition if the bill were to be passed by 2/3 of the membership of each chamber.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

The Revenue Estimating Conference met on March 11, 2011, and adopted an indeterminate negative fiscal impact on state and local revenues for the bill.

B. Private Sector Impact:

The bill clarifies the conditions under which a transferee may be liable for unpaid tax of a transferor.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 220.829, F.S., governs the transfer of tax liability for corporate income taxes.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.