

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 Community Affairs Committee

BILL: SB 170

INTRODUCER: Senator Altman

SUBJECT: Transfer of Tax Liability

DATE: September 27, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Yeatman	CA	Pre-meeting
2.			CM	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill consolidates and revises statutes governing the transfer of tax liabilities when businesses or business assets are transferred to successor owners. 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 governing tax liability related to the transfer of a business to new ownership. This bill repeals two specific tax statutes (sales and communications)¹ and amends the statute relating to taxes owed.²

The bill revises the requirements for a transferee to take possession of a business without assuming any outstanding tax liabilities of a transferor. Under current law, 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.

¹ Sections 212.10 and 202.31, F.S., respectively.

² Section 213.758, F.S.

The bill amends sections 213.758 and 213.053, Florida Statutes, and repeals sections 212.10 and 202.31, Florida Statutes.

II. Present Situation:

Transfer of Tax Liability

Three sections of the Florida Statutes outline what is required with regard to tax liability when a business is transferred or sold.

- Section 212.10, F.S., governs sales and use tax liability when a business is quit or sold.³
- In 2000, the Legislature enacted s. 202.31, F.S., to govern the transfer of communications services tax liability related to communications services businesses.⁴
- In 2010, the Legislature enacted s. 213.758, F.S., as a comprehensive statute to govern the transfer of tax liability for all taxes administered by the Department of Revenue (DOR or department), excluding the corporate income tax.⁵

Section 213.758, F.S.: Tax Liability when Quitting, Selling or Acquiring a Business

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.⁶ 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.⁷

The transferee, or group of transferees, of more than 50 percent of a business is 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.⁸

The maximum liability for a transferee is the greater of the fair market value of the business or the purchase price paid. The transferee may withhold a portion of the consideration to pay the taxes to pay DOR within 30 days of the date of transfer. A transferee becomes liable for outstanding taxes only for voluntary transfers.⁹

³ This statute has been in Florida law in some form since 1949. Section 10, ch. 26319, 1949.

⁴ Sections 23, 58, ch. 2000-260, L.O.F. See also s. 38, ch. 2001-140, L.O.F.

⁵ 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.

⁶ 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.

⁷ 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.

⁸ Section 213.758(4)(a), F.S. DOR is permitted to charge a fee to perform these audits.

⁹ Section 213.758(1)(a), F.S., defines an “involuntary transfer” as a transfer due to the foreclosure by a non-insider, that results from eminent domain or condemnation actions, pursuant to a bankruptcy proceeding, or to satisfy a debt to a financial institution.

Taxpayers who quit a business without paying all taxes due are prohibited from engaging in any business in Florida until the tax liability is paid. Transferees acquiring a business who fail to pay all taxes due face the same ban. In each of the previous cases, DOR may request the Department of Legal Affairs 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.: Tax Liability for Communications Services and Sales and Use

Sections 202.31 and 212.10, F.S., govern the transfer of tax liability for communications 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 212.10, F.S., do provide for misdemeanor criminal penalties for violations of the tax transfer provisions.¹⁰

III. Effect of Proposed Changes:

Section 1 amends s. 213.758, F.S., to clarify, consolidate and revise the statutes that deal with the transfer of tax liabilities.

Definitions

The bill creates definitions for the terms “business,” “financial institution,” “insider,” “stock of goods,” and “tax” for the purposes of s. 213.758, F.S., consistent with current administration. The bill defines “business” to require that a discrete division of a larger business be aggregated with all other divisions. The statutory definition of “insider” is expanded to include a manager of, a managing member of, or a person who controls a limited liability company or a relative thereof as defined in s. 726.102(11), F.S.

The bill also clarifies that a “transfer” includes the transfer of the assets of the business and that a transfer of more than 50 percent of a business, the assets of the business, or the stock of goods of the business is a transfer of the business.

Transfer of Tax Liabilities

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, and 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 if the audit is not a certified audit done pursuant to s. 213.285, F.S.

¹⁰ Sections 202.31(5) and 212.10(5), F.S.

In addition, the bill provides that s. 213.758, F.S., does *not* impose liability on a transferee of a business, assets of a business or stock of goods of a business when:

- the transfer is an involuntary transfer; or
- the transferee is not an insider; and
 - The asset transferred is a 1- to 4-family residential real property, real property that has not been improved with any building, or owner-occupied commercial real property; and
 - No other assets of the business are included in the transfer.

The bill amends s. 213.758(6), F.S., 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 unassumed liens or liabilities to non-insiders.

Injunctions

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 DOR, 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 DOR 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.

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

Section 3 repeals s. 202.31, 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, this statute is no longer necessary. The repeal eliminates the misdemeanor penalty provisions for violations of this statute.

Section 4 repeals s. 212.10, F.S., which relates to the transfer of sales and use tax liability. With the creation of s. 213.758, F.S., in 2010 and the changes proposed in **Section 1** of the bill, this statute is no longer necessary. The repeal eliminates the misdemeanor penalty provisions for violations of this statute.

Section 5 provides for an effective date upon becoming a law.

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 two-thirds 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 has not reviewed this legislation for purposes of the 2012 legislative session. However, the Revenue Estimating Conference reviewed similar legislation in 2011 and estimated that the 2011 bill would have had an indeterminate negative fiscal impact.¹¹ 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 Legislature were to pass the bill by two-thirds 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 has not reviewed this legislation for purposes of the 2012 legislative session. However, the Revenue Estimating Conference reviewed similar legislation in 2011 and estimated that the 2011 bill would have had an indeterminate negative fiscal impact.¹²

¹¹ Office of Economic and Demographic Research, The Florida Legislature, *Revenue Estimating Conference for 2011 Regular Session – Transfer of Tax Liability* (March 7, 2011) available at <http://edr.state.fl.us/content/conferences/revenueimpact/archives/2011/pdf/page128.pdf> (last visited September 27, 2011)

¹² *Id.*

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:

According to the DOR, during the last five years, the department has averaged 20 audits regarding the transfer of tax liabilities annually.¹³ Because the bill will limit the requirement for parties to a business transfer to request the Department to determine the transferor's liability by performing an audit, the number of audits performed by DOR is expected to decrease.¹⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹³ Department of Revenue, *Senate Bill 170 Bill Analysis* (Sep. 16, 2011) (on file with the Senate Committee on Community Affairs).

¹⁴ *Id.*