

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 Appropriations Subcommittee on Finance and Tax

BILL: CS/SB 316

INTRODUCER: Commerce and Tourism Committee; and Senators Detert and Margolis

SUBJECT: Taxes

DATE: April 3, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	Fav/CS
2.	Cote	Diez-Arguelles	AFT	Pre-meeting
3.			AP	
4.			RU	
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
 B. AMENDMENTS..... Technical amendments were recommended
 Amendments were recommended
 Significant amendments were recommended

I. Summary:

CS/SB 316 amends Florida’s tax laws related to sales by out-of-state retailers, the communication services tax, and the sales tax exemption for manufacturing and equipment.

The Revenue Estimating Conference (REC) adopted a positive indeterminate impact for the provisions of the bill related to sales by out-of-state retailers. Since revenue collections depend on the behavior of out-of-state retailers, the impact could also be zero. The REC determined that the reduction in the communication services tax rate will decrease revenues to the General Revenue Fund by approximately \$121.6 million on a recurring basis, with an additional \$20.5 million recurring loss to local governments. The REC has not yet determined the impact from the expansion of the machinery and equipment sales tax exemption. Staff estimates that the sales tax exemption will decrease revenues to the General Revenue Fund by approximately \$115 million on a recurring basis, with an additional \$26 million recurring loss to local governments.

Out-of-State Retailers: The bill amends Florida law to require out-of-state retailers that conduct business over the Internet to collect and remit Florida sales tax on sales made to Florida customers. Specifically, the bill creates two new situations under which an out-of-state retailer may be required to collect and remit Florida sales tax:

1. When a person with nexus to Florida does one of a number of acts, including selling a similar line of products as a dealer or operates under the same name and uses similar trademarks as a dealer, then the dealer must collect and remit Florida sales tax. However, the bill bases the requirement to collect sales tax on the fact that the activities conducted in Florida on behalf of the dealer are significantly associated with the dealer's ability to establish and maintain a market in Florida.
2. If the dealer enters into an agreement with one or more Floridians, under which the person directly or indirectly refers potential customers to the dealer for a commission or other consideration, and the cumulative gross receipts from referrals are in excess of \$10,000 during the previous 12 months, then a rebuttable presumption arises that the dealer must collect and remit Florida sales tax.

The bill revises the definition of "dealer" to include any person who uses an office, distributing house, salesroom, or house, warehouse or other place of business operated by any person other than a common carrier.

Communication Services Tax: The bill reduces the state tax rate imposed on the sale of communication services from 6.65 percent to 5.65 percent, and lowers the state tax rate imposed on the sale of direct-to-home satellite service from 10.8 percent to 9.8 percent.

Sales Tax Exemption for Machinery and Equipment: The bill expands the availability of the exemption for new or expanding businesses to businesses by eliminating the requirement for expanding businesses to increase the productive output of the business by 5 percent..

The bill requires the Department of Revenue to develop a tracking system to determine the amount of additional sales tax collected due to the provisions in this bill dealing with sales by out-of-state retailers and report its determinations annually. The Revenue Estimating Conference is required to use the information to determine the amount of sales taxes collected in the past calendar year and estimate the amount that may be collected in the next year. The bill requires the Legislature to use the information to provide tax relief in addition to that provided in the bill.

This bill amends the following sections of the Florida Statutes: 202.12, 202.12001, 203.001, 212.06, 212.08, and 212.0596.

This bill creates general law not contained in a designated section of the Florida Statutes.

II. Present Situation:

Because Florida has no personal state income tax, the state primarily depends on consumption-based taxes for its general revenue. Sales tax collections make up over 70 percent of general revenue.¹ Forty-five states and the District of Columbia impose sales and use taxes.² States that

¹ See Florida Revenue Estimating Conference (REC), 2012 Florida Tax Handbook. Revenues from the sales and use tax for FY 2011-12 totaled over \$17 billion.

do not have a personal income tax – Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming – rely most heavily on sales tax collections.³

Florida Sales and Use Tax

Chapter 212, F.S., contains the statutory provisions authorizing the levying 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. A 6 percent sales and use tax is levied on most tangible personal property, admissions, storage, transient rentals, commercial rentals, motor vehicles, and a limited number of services.⁴ The statutes currently provide more than 200 different exemptions.⁵

A sales tax of 6 percent is levied on the sales price of tangible personal property sold at retail in Florida.⁶ Sales tax is added to the price of the taxable goods or services and is collected from the purchaser at the time of sale.

A use tax of 6 percent is levied on the cost price of tangible personal property when it is used, consumed, distributed, or stored, rather than sold, in Florida.⁷ This tax is levied when sales tax was not paid at the time of purchase. For example, use tax is owed when a person buys:⁸

- A taxable item in Florida and does not pay sales tax;
- An item tax-exempt intending to resell it, and then uses the item in a business or for personal use; or
- A taxable item outside Florida and brings or has it delivered into the state within 6 months of the purchase date, and sales tax was not paid on the purchase.

If the item brought into Florida is subject to tax, a credit is allowed for taxes paid to another state, a U.S. territory, or Washington, D.C. Credit is not given for taxes paid to another country.

The Florida Department of Revenue (DOR) is responsible for administering, collecting, and enforcing all sales taxes. Collections of discretionary sales surtaxes received by DOR are returned monthly to the county imposing the tax. Further, there are several state-shared revenue programs that allocate some portion of the state sales and use tax to local governments. A few revenue sharing programs require as a prerequisite that the county or municipality meet eligibility criteria. While general law restricts the use of some shared revenues, proceeds derived from other shared revenues may be used for the general revenue needs of local governments.⁹

² Alaska, Delaware, Montana, New Hampshire, and Oregon do not impose a state sales and use tax, although Alaska permits local governments to impose sales and use taxes.

³ New Hampshire and Tennessee both have income taxes, but the taxes are not imposed on wages or other income other than dividends and interest.

⁴ Of the limited services that are taxable, some, such as cable, are taxed at a higher rate.

⁵ For a list of exemptions and history, see REC, 2012 Florida Tax Handbook. Exemptions are estimated to total about \$10 billion.

⁶ Section 212.05(1)(a)1.a., F.S.

⁷ Section 212.05(1)(b), F.S.

⁸ Department of Revenue, Florida's Sales and Use Tax, available at http://dor.myflorida.com/dor/taxes/sales_tax.html#tab1 (last visited 1/31/2013).

⁹ For more information see REC, 2012 Florida Tax Handbook.

Local Discretionary Sales Surtax

A “surtax” is an extra tax or charge.¹⁰ Sections 212.054 and 212.055, F.S., authorize Florida counties to charge a discretionary sales surtax on all transactions subject to the state sales and use tax. Only those surtaxes specifically designated may be levied.

The maximum discretionary sales surtax that any county can levy depends upon the county’s eligibility for the taxes listed in s. 212.055, F.S. Currently, the maximum surtax actually imposed is 1.5 percent in several counties;¹¹ however, the theoretical maximum rate ranges between 2 percent and 3.5 percent, depending on the specifics of each individual county. In general, the levy of a particular tax is subject to county voter approval.

The discretionary sales surtax is based on the rate in the county where the taxable goods or services are sold, or delivered into, and is levied in addition to the state tax. The sales amount is not subject to the tax if the property or service is delivered within a county that does not impose a surtax. The surtax does not apply to a sales amount above \$5,000 on any item of tangible personal property. This \$5,000 cap does not apply to the sale of any service, rentals of real property, or transient rentals.

Internet Sales and Out of State Vendors¹²

Under Florida law, each sale is subject to sales tax unless a transaction is specifically exempt. Sales made over the Internet are not exempt from the provisions of ch. 212, F.S.¹³ When the sales tax is not collected at the time of purchase, states impose “use” taxes. Use taxes are difficult for states to enforce because states must rely on out-of-state vendors to collect the tax or purchasers to remit the tax themselves. Out-of-state vendors argue that states have no jurisdiction over them. A state’s ability to compel an out-of-state seller to collect and remit sales tax is limited by the Commerce Clause and the Due Process Clause of the U.S. Constitution.¹⁴ The U.S. Supreme Court has held that the states’ disparate state and local sales tax systems make collecting taxes an undue burden on out-of-state retailers.¹⁵

In order for sales occurring over the Internet to be subject to the sales tax, there must be sufficient nexus between the seller and the state. Nexus has been found to exist when a seller:

- Has agents in this state who solicit or transact business on behalf of the seller and as a result receive orders for merchandise to be delivered to the purchaser in this state;

¹⁰ Black’s Law Dictionary (9th ed., 2009), tax.

¹¹ See DOR Form DR-15 DSS, Discretionary Sales Surtax Information, available at <http://dor.myflorida.com/dor/forms/2013/dr15dss.pdf> (last visited 1/31/2013).

¹² For an in depth analysis, see Senate Budget Subcommittee on Finance and Tax, Interim Report 2012-107: Application of Florida’s Sales Tax to Sales by Out-of-State Retailers (August 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/BFT1072012-107ft.pdf> (last visited 1/28/2013).

¹³ See DOR, Florida Consumer Information website on remitting use tax for Internet sales, available at <http://dor.myflorida.com/dor/taxes/consumer.html> (last visited 1/31/2013).

¹⁴ Due Process requires some minimal contact with the taxing state for a taxing statute to be upheld. Upholding a statute against a Commerce Clause challenge is dependent upon satisfying a 4-part test: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to a service provided by the taxing state. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), rehearing denied, 430 U.S. 976 (1977).

¹⁵ See Closing the Online Tax Loophole, Blackston, Michelle, NCSL’s State Legislatures, April 2008.

- Has a physical location in this state;
- Delivers merchandise into this state in vehicles which are leased or owned by the seller;
- Owns land or buildings located in this state;
- Stores merchandise in this state for sale or use; or
- Rents or leases merchandise that is located in Florida in the possession of a lessee.¹⁶

Section 212.0596, F.S., imposes sales tax on a “mail order sale,” which is defined to mean “a sale of tangible personal property, ordered by mail or other means of communication, from a dealer who receives the order in another state of the United States, or in a commonwealth, territory, or other area under the jurisdiction of the United States, and transports the property or causes the property to be transported, whether or not by mail, from any jurisdiction of the United States, including this state, to a person in this state, including the person who ordered the property.”¹⁷

Section 212.0596(2), F.S., requires dealers doing mail order business in Florida to collect and remit Florida sales tax if the dealer has nexus with Florida, and provides what activities constitute nexus for purposes of mail order sales. These include:

- The dealer has agents in Florida who solicit or transact business on behalf of the dealer;
- The property was delivered in Florida in fulfillment of a sales contract entered into in Florida;
- The dealer creates nexus with Florida by purposefully or systematically exploiting Florida’s market by any media assisted, media facilitated, or media solicited means;
- Another U.S. jurisdiction uses its taxing power over the retailer in support of Florida’s taxing power;
- The dealer is subject to service of process; or
- The dealer without nexus with Florida is a corporation that is a member of an affiliated group of corporations under s. 1504 of the Internal Revenue Code and whose members are eligible to file a consolidated federal corporate income tax return.

If the person selling the property into this state does not have sufficient nexus or is not registered with DOR as a dealer to collect sales tax, and the goods are delivered in Florida, then use tax applies and is due from the purchaser.

According to the U.S. Census Bureau about 70 percent of U.S. households have Internet access.¹⁸ The U.S. Census Bureau estimated that national e-commerce sales over the last 4 quarters exceeded \$216 billion dollars. However, e-commerce sales make up only about 5 percent of total retail sales in the U.S.¹⁹

The issue of sales and use taxes on e-commerce is important to the states for three main reasons:

¹⁶ Depending on the jurisdiction, courts have found that these situations satisfy nexus while others have found that they were insufficient alone.

¹⁷ Section 212.0596(1), F.S.

¹⁸ 2010 data available at <http://www.census.gov/population/www/socdemo/computer.html> (last visited 1/28/2013).

¹⁹ Quarterly Retail E-Commerce Sales, 3rd Quarter 2012, available at http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (last visited 1/28/2013).

- The continued growth in e-commerce points to an increasing number of transactions on which sales taxes will not be collected, resulting in sales tax revenue losses for state and local governments;
- Since out-of-state sellers do not have to collect sales taxes, except in states where they have “nexus,” they enjoy a competitive advantage over “brick and mortar” local businesses; and
- Because of on-line retailers, consumers who can afford access to the Internet escape paying sales and use taxes while forcing those without access to shoulder a heavier burden of the sales tax.²⁰

Studies estimate differing amounts of lost sales tax revenue. The most recent study, a September 2011 report by Arudin, Laffer, and Moore Econometrics, estimated tax revenue losses of \$374 million in 2010 and between \$449.6 million and \$454.0 million in 2012.²¹ Other studies suggest that between \$280 million to \$800 million dollars of Florida state and local sales tax collections are not being remitted annually.²² The actual amount of lost sales tax revenue is difficult to determine due to the more than 200 sales tax exemptions in Florida law and the 67 different state and local taxing jurisdictions in the state. Because of the numerous exemptions and taxing jurisdictions, an out-of-state retailer may find it difficult to collect and remit sales taxes. There are about 7,500 different taxing jurisdictions at the state and local levels in the U.S.

Federal Involvement in the Issue

Since the power to regulate interstate commerce resides at the federal level, federal legislation appears to be the only comprehensive solution for states to have the authority to require out-of-state retailers to collect sales tax. Multiple bills have been filed in Congress over the years to try to address the issue, but none have been voted on by either the U.S. House of Representatives or U.S. Senate.²³

Actions of Other States

Other states have attempted to address the issue of taxing sales by out-of-state retailers through various methods.

Some states have passed legislation to fully participate in the Streamlined Sales and Use Tax Agreement (SSUTA).²⁴ These states have “modernized” their sales and use tax structures to create a uniform, simplified taxing system that would apply to all businesses collecting sales and use taxes. However, participation in collecting sales tax under the agreement is voluntary for

²⁰Graham Williams, “Streamlined Sales Tax for the New Economy,” National Conference of State Legislatures, Nov./Dec. 2000, Vol. 8, No. 44.

²¹ Report on file with the Senate Commerce and Tourism Committee.

²² See the Florida Senate Budget Subcommittee on Finance and Tax Interim Report 2012-107 on the *Application of Florida’s Sales Tax to Sales by Out-of-state Retailers*.

²³ Legislation was filed most recently in the 112th Congress titled the “Main Street Fairness Act,” that authorized states that were members of the SSUTA to require out-of-state retailers to collect and remit state sales and use tax. See H.R. 2701 and S. 1452 (112th Congress). No related legislation has been filed in the 113th Congress as of the publication of this analysis.

²⁴ Florida legislative action in response to this project includes s. 213.27, F.S., which grants DOR authority to enter into contracts with public or private vendors to develop and implement a voluntary system for sales and use tax collection and administration (ch. 2000-355, L.O.F.), and ch. 2001-225, L.O.F., which among other things, created the Simplified Sales and Use Tax Act, authorizing Florida to participate in the next phase of discussions with other states for the purposes of developing the project. See the SSUTA website for more information: <http://www.streamlinedsalestax.org/>.

sellers who do not have a physical presence or “nexus” within a state. Currently, over 1,000 businesses have voluntarily agreed to collect taxes on out-of-state sales. The end goal of the effort is for Congress to require collection from all sellers for all types of commerce.

Other states have enacted laws which attempt to establish the necessary nexus to require an out-of-state seller to collect and remit sales taxes. Generally it appears that there are three approaches:

1. Establish nexus through affiliates of an out-of-state retailer. When a state resident is an “affiliate” of an out-of-state retailer and the total sales by the out-of-state retailer that result from all referrals from affiliates in the state exceed a certain total (generally \$10,000), then the retailer must collect and remit state sales tax. Total sales by the out-of-state retailer as a result of referrals must exceed the threshold before tax is required to be collected by the out-of-state retailer.
2. Establish nexus through commission arrangements by Internet retailers with other websites owned by state residents for referring sales (also known as “click-through” nexus). Similar to the affiliate relationship with out-of-state retailers, this approach also requires sales of a certain amount before liability for collection of state sales tax arises.
3. Require the retailer to notify the customer that sales and use tax may be due in the customer’s state. This approach does not require collection of sales tax by the retailer. Instead the retailer is required to provide notice to the consumer, and in one state is also required to remit information to the state department of revenue related to sales to that state’s residents.

Some states have enacted one of the approaches listed above or a hybrid. Some states take the approach of establishing nexus through existing state laws related to mail order sales. Pennsylvania is attempting to require out-of-state retailers to collect sales tax under the state’s existing law.²⁵

Other states have elected to exempt certain retailers from collecting and remitting sales tax if the seller agrees to make a substantial investment in the state in the form of a distribution center and create a certain number of jobs. For example, South Carolina’s statute requires a \$125 million investment and 2,000 new jobs in exchange for exemption from sales tax collections until 2016. However, Internet retailers must notify a purchaser in a confirmation email that the purchaser may owe South Carolina use tax on the total sales price.

States that have enacted laws or taken the above approaches have been challenged by out-of-state retailers for violation of the U.S. Constitution. While some retailers have been awarded an injunction from enforcement of the state’s statutes, there have been no final decisions affording a resolution of the issues. In 2012, Amazon began to collect and remit sales taxes in some states (or to provide a service to its sellers to collect and remit sales tax), while also lobbying Congress to enact federal legislation to require out-of-state sellers to collect and remit sales tax.

Communication Services Tax

²⁵ See Pennsylvania Department of Revenue, Nexus Resources for Retailers, available at http://www.revenue.state.pa.us/portal/server.pt/community/nexus_resources/20610 (last visited 1/20/2012).

Communication services include telecommunications, cable, direct-to-home satellite, and related services.²⁶

Generally, the communication services tax includes a state tax portion of 6.65 percent and a state gross receipts tax portion of 2.52 percent for a combined rate of 9.17 percent.²⁷ In addition, local governments may impose a local tax rate of up to 7.12 percent.²⁸

Direct-to-home satellite service is taxed at a rate of 10.8 percent, and is also subject to the 2.37 percent gross receipts tax. Since local tax does not apply to these services, the total tax rate for direct-to-home satellite services is 13.17 percent.

Local, long distance, and toll telephone services sold to a residential household are exempt from the 6.65 percent state tax and 0.15 percent gross receipts tax.²⁹

A portion of the state taxes collected – including taxes collected on direct-to-home satellite service – are deposited into the general revenue fund and a portion is distributed to local governments.³⁰ Gross receipts tax collections are deposited into the Public Education Capital Outlay and Debt Service Trust Fund and are used for the capital funding of public schools, community colleges, and universities. DOR provides tax collection services for local government, and local communication services taxes are distributed to local governments.

Sales Tax Exemption for Machinery and Equipment

Florida statutes currently provide more than 200 different exemptions from the sales and use tax. Currently the purchase of industrial machinery and equipment³¹ is exempt from sales and use tax when it is purchased for certain uses by new or expanding businesses.³²

For new businesses, the purchase must be made for:

- Exclusive use by a new business in spaceport activities;³³ or
- Use by a new business that manufacturers, processes, compounds, or produces for sale items of tangible personal property at fixed locations.

The machinery and equipment must be purchased before the date the business begins productive operations and delivery of the tax-exempt items must be made within 12 months of that date.

For expanding businesses, the purchase must be made for:

²⁶ Chapter 202, F.S.

²⁷ See ss. 202.12(1)(a) and 203.01(1)(b), F.S. The gross receipts tax is 2.37 percent, plus an additional 0.15 percent for certain services.

²⁸ Section 202.19, F.S.

²⁹ Sections 202.125 and 203.01(1)(b)3., F.S.

³⁰ Section 202.18, F.S.

³¹ Exempt purchases are limited to tangible personal property that has a depreciable life of 3 or more years. See s. 212.08(5)(b)6.a., F.S.

³² Section 212.08(5)(b), F.S. The exemption does apply to phosphate or other solid minerals severance, mining, or processing operations.

³³ The term “spaceport activities” is defined in s. 212.02(22), F.S.

- Exclusive use by an expanding facility engaged in spaceport activities; or
- Use in an expanding manufacturing facility or plant unit which manufactures, processes, compounds, or produces for sale items of tangible personal property at fixed locations in Florida.

For an expanding business, the machinery and equipment must be used to increase the productive output of the expanded facility or business by 5 percent or more. Productive output is measured for a 12-month period selected by the business after installing the machinery or equipment (within 2 years of the installation) that is compared to the output level for the 12-months immediately preceding the installation of the items.³⁴

Businesses must apply to DOR for a temporary tax permit, which must be returned to DOR after all the machinery and equipment is purchased. If a qualifying business fails to apply for the permit or if DOR incorrectly determines that the business was not qualified for the permit, a business can still receive the exemption through a tax refund. DOR may conduct an audit to ensure that the purchases were made pursuant to the requirements for the exemption. If DOR finds that the purchases did not meet the requirements for the exemption, the amount of taxes exempted at the time of purchase become immediately due, plus penalties and interest.

The exemption does not apply to machinery or equipment purchased or used by electric utility companies, communications companies, oil or gas exploration or production operations, publishing firms that do not export at least 50 percent of their finished product out of the state, or any firm subject to regulation by the Division of Hotels and Restaurants of the Department of Business and Professional Regulation.

III. Effect of Proposed Changes:

CS/SB 316 amends Florida's tax laws related to sales by out-of-state retailers, the communication services tax, and the sales tax exemption for manufacturing and equipment.

Communication Services Tax

Section 1 amends s. 202.12, F.S., to reduce the tax rate imposed on the sale of communication services from 6.65 percent to 5.65 percent, and the tax rate imposed on the sale of direct-to-home satellite service from 10.8 percent to 9.8 percent.

Sections 2 and 3 amend ss. 202.12001 and 203.001, F.S., respectively, to make conforming changes to reflect the reduced rate for the communication services tax.

Sections 1, 2, and 3 are effective January 1, 2014.

Out-of-state Retailers

The bill amends Florida law to require out-of-state retailers that conduct business over the Internet to collect and remit Florida sales tax on sales made to Florida customers.

³⁴ Section 212.08(5)(b)6.b., F.S.

Section 4 amends s. 212.0596, F.S., to provide that a “mail order sale” includes the sale of tangible personal property over the Internet.

The bill revises provisions related to when dealers who make mail order sales are required to collect and remit Florida sales tax. The bill provides that a representative of a dealer, in addition to an agent, soliciting or transacting business in the state may cause the dealer to have nexus for mail order sales.

Additionally, the bill creates two new situations:

Affiliates –

When a person with nexus to Florida sells a similar line of products as a dealer; does business under the same name and uses similar trademarks; maintains an office, warehouse, or similar place of business to facilitate the delivery of property sold by the dealer; facilitates delivery or pick-up of the property in Florida; assembles, installs, or performs maintenance services for the dealer in Florida; or conducts other activities in Florida that are “significantly associated with the dealer’s ability to establish and maintain a market in Florida,” then the dealer must collect and remit Florida sales tax.

The bill provides that a dealer is required to collect and remit sales tax if the dealer:

- Has a physical presence in the state, or
- The activities conducted in Florida on behalf of the dealer are significantly associated with the dealer’s ability to establish and maintain a market in Florida.

Commission Arrangements –

If the dealer enters into an agreement with one or more Floridians, under which the person directly or indirectly refers potential customers to the dealer for a commission or other consideration, and the cumulative gross receipts for referrals are in excess of \$10,000 during the previous 12 months, then a rebuttable presumption arises that the dealer must collect and remit Florida sales tax. Such referrals may be made by a link on a website, an in-person presentation, telemarketing, or otherwise.

The dealer may rebut the presumption by submitting evidence that the Floridians with which the dealer has agreements did not engage in activity that was significantly associated with the dealer’s ability to establish and maintain a market in Florida for the previous 12 months. Such evidence may include sworn affidavits from the Floridians attesting that they did not engage in any solicitation in Florida on the dealer’s behalf in the previous year.

Section 5 amends s. 212.06, F.S., revising the definition of “dealer” to include a person who uses, within this state, an office, distributing house, salesroom, or house, warehouse or other place of business operated by a person other than a common carrier acting in the capacity of a common carrier. This section also makes stylistic changes.

Sales Tax Exemption for Machinery and Equipment

Section 6 amends s. 212.08(5), F.S., to expand the availability of the sales tax exemption for machinery and equipment from new or expanding businesses to all businesses. Under the bill, industrial machinery and equipment is exempt from sales tax when it is purchased for use:

- In a business that manufactures, processes, compounds, or produces for sale tangible personal property at a fixed location; or
- In a spaceport activity, defined as an activity directed or sponsored by Space Florida on spaceport territory pursuant to its powers and responsibilities under the Space Florida Act.³⁵

At the time of purchase, in order to claim the exemption, the purchaser must present a signed certificate that states that the exempt items are for exclusive use as provided above. The certificate relieves the seller of any liability to collect the tax, and if DOR later determines that tax was due, it must pursue payment from the purchaser.

Such expansion eliminates the 5 percent productivity requirement for expanding businesses to qualify for the sales tax exemption. The bill eliminates the provisions to apply to DOR for a tax exemption permit.

The bill makes conforming changes to the sales tax exemptions for machinery and equipment used under federal contract and for business property used in an enterprise zone.

Tax Relief

Section 7 provides a mechanism for the Legislature to return any taxes collected as a result of the provisions of this bill dealing with sales by out-of-state retailers to Florida taxpayers.

DOR, in consultation with the Revenue Estimating Conference, must develop a tracking system to determine the amount of sales tax collected by out-of-state dealers who would not be required to collect and remit sales taxes in the absence of the bill. The Revenue Estimating Conference will use the information provided by DOR to determine the amount of sales taxes remitted in the previous calendar year and estimate the amount of sales taxes collected that will be expected in the following fiscal year. The Legislature is required to use the estimates to reduce taxes in an amount not less than the amount estimated by the Revenue Estimating Conference, taking into account the reductions already provided for in the bill to the communication services tax and the sales tax exemption for machinery and equipment.

Effective Date

Section 8 provides an effective date of July 1, 2013, except as otherwise provided in the bill.

³⁵ Section 212.02(22), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Subsection (b) of s. 18, Art. VII, Florida Constitution, provides that except upon approval of each house of the Legislature by two-thirds vote 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 revenue in the aggregate, as such authority existed on February 1, 1989.

The bill provides a sales tax exemption for machinery and equipment that will reduce the municipalities' and counties' local option sales tax collections, thereby reducing their revenue-raising authority. Staff estimates that the exemption will reduce counties' authority to raise revenue as such authority existed on February 1, 1989, by \$6.1 million annually. Therefore, this bill may be a mandate, requiring a two-thirds vote of the membership of each house of the Legislature for final passage.

Subsection (d) of s. 18, Art. VII, Florida Constitution, sets forth exemptions from the mandates requirement. None of the exemptions apply to this bill.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Many of the states that have enacted similar laws have become involved in lawsuits challenging the constitutionality of the laws. If this bill were to become law, Florida may be subject to such lawsuits. As discussed above in the Present Situation, a state's ability to compel an out-of-state seller to collect and remit sales tax is primarily limited by the Commerce Clause of the U.S. Constitution.³⁶

Upholding a statute against a Commerce Clause challenge is dependent upon satisfaction of a 4-part test: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to a service provided by the taxing state. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

The nexus requirement outlined in Complete Auto has generally been interpreted to require that in order to require an out-of-state retailer to collect sales tax, the retailer must have a "physical presence" in the state.³⁷

³⁶ See AMJUR STATELOCL s. 157; 71 A.L.R.5th 671.

³⁷ See Quill Corporation v. North Dakota, 504 U.S. 298 (1992).

In Scripto, Inc. v. Carson, the U.S. Supreme Court held that an out-of-state retailer with agents in Florida was a dealer required to collect and remit Florida sales tax.³⁸ The agents of the out-of-state retailer represented the retailer pursuant to a contract that authorized the Florida merchants to solicit orders and otherwise obtain business for the retailer in Florida in return for compensation to be paid in the form of a commission.

The U.S. Supreme Court held in Tyler Pipe Industries, Inc., v. Washington State Dept. of Revenue, that “the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales.”³⁹ The Court found that this standard was satisfied because of the activities of the business’s sales representatives in the state.

Many of the cases related to this issue were decided before the emergence of the Internet, and thus it is unclear how the case law should be applied to sales over the Internet. Many of the states that have enacted similar laws have become involved in lawsuits challenging the constitutionality of their laws. There have been no final decisions affording a resolution of the issues.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference (REC) adopted a positive indeterminate impact for the provisions of the bill related to sales by out-of-state retailers. Since revenue collections depend on the behavior of out-of-state retailers, the impact could also be zero.

The REC also determined that the reduction in the communication services tax rate will decrease revenues to the General Revenue Fund by approximately \$121.6 million on a recurring basis, with an additional \$20.5 million recurring loss to local governments.

The REC has not yet determined the impact from the expansion of the machinery and equipment sales tax exemption. Staff estimates that eliminating the requirement for expanding businesses to increase the productive output of the business by 5 percent will decrease revenues to the General Revenue Fund by approximately \$115 million on a recurring basis, with an additional \$26 million recurring loss to local governments.

B. Private Sector Impact:

Businesses and consumers would benefit from the reduction in the communication services tax and the expansion of the machinery and equipment sales tax exemption.

³⁸ Scripto, Inc., v. Carson, 362 U.S. 207, 211 (1960).

³⁹ Tyler Pipe Industries, Inc., v. Washington State Dept. of Revenue, 483 U.S. 232, 250 – 251 (1987).

C. **Government Sector Impact:**

This provisions in this bill related to sales by out-of-state retailers will require the Department of Revenue to amend its sales tax registration process and develop a tracking system to track the revenues remitted by out-of-state retailers.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

VIII. **None. Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

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

CS by Commerce and Tourism on February 5, 2013:

The committee substitute differs from the bill as originally filed in the following ways:

- Restores current law related to nexus established for a dealer that is affiliated with a corporation doing business in Florida;
- Reduces the rate charged against the sales price of communication services and direct-to-home satellite services, and makes conforming changes; these provisions are effective on January 1, 2014; and
- Expands the sales tax on machinery and equipment to all businesses by eliminating the 5 percent productivity requirement for expanding businesses to qualify for the exemption.

B. **Amendments:**

None.