HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 907 Transfer of Tax Liability
SPONSOR(S): Finance & Tax Committee; Wood
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1384

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Finance & Tax Committee	23 Y, 0 N, As CS	Flieger	Langston
2) Civil Justice Subcommittee		Billmeier	Bond
3) Economic Affairs 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 related to the 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. This bill repeals the two specific statutes (sales and communications) and amends the statute relating to all taxes owed to the state.

This 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:

- If the there are no insiders in common between the transferor and the transferee, the transferee may obtain a certificate of compliance from the Department of Revenue showing that a transferor has not received notice of audit, has filed all required tax returns, 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 transferee is not liable for any outstanding tax liabilities of the transferor.

If a transferee is found liable for unpaid tax of the transferor, this bill requires that the transferee has 60 days after receiving written notice of the unpaid tax to pay the tax. After 60 days, the transferee may not engage in any business activity in the state until the tax liability is paid.

The repealed specific statutes regarding transfer of tax liability contain misdemeanor penalties related to violations of the law on transfer of tax liability. This bill repeals the criminal penalties.

The 2011 Revenue Estimating Conference estimates that the bill has a negative, indeterminate impact on state and local government revenues.

It is possible that this bill may implicate the constitutional limit on bills creating a local government mandate.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

When a person buys a business, the buyer, or transferee, is liable for unpaid business taxes, such as sales taxes, that the seller, or transferor, owes.[1] The Legislature passed the first statute related to this subject in 1949.[2] In 2000, the Legislature passed s. 202.31, F.S., governing tax liability related to communications services companies.[3] In 2010, the Legislature adopted s. 213.758, F.S., governing the transfer of tax liability in other situations. This bill resolves any conflict between the three statutes.

The transfer of tax liability for every tax administered by the Department of Revenue[4] ("the department"), excluding the corporate income tax, is governed by ss. 202.31, 212.10, and 213.758, F.S. Section 213.758(2), F.S., provides that a taxpayer who is liable for any tax, interest, penalty, surcharge, or fee[5] 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.[6] The maximum liability for a transferee is the greater of the fair market value of the business or the purchase price paid.[7]

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.[8] The department 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.[9]

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., provide for 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.[10]

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[1] *See* s. 212.10, F.S.
[2] *See* s. 10, ch. 26319, 1949.
[3] *See* ss. 23,58, ch. 2000-260, L.O.F.
[4] As listed in s. 213.05, F.S.
[5] 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.
[6] Section 213.758(4), F.S.
[7] Section 213.758(6), F.S.
[8] Sections 213.758(2), (4)(c), F.S.
[9] Sections 213.758(2), (4), F.S.
[10] 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.

Effect of Proposed Changes

Tax Liability

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 and that the transferor has filed all required tax returns, and has paid all tax arising from those returns. The transferor and transferee also must not have any insiders in common. Alternatively, a transferee may be exempt from liability if the department finds that the transferor is not liable for any taxes after an audit. 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.

This bill amend s. 213.758(4), F.S, to require 60 days notice by the department to a noncompliant transferee of the transferee's failure to pay taxes before the transferee is prohibited from engaging in business in the state.

This bill requires 20 days written notice to a person before the Department of Legal Affairs may seek an injunction enjoining further business activity by the transferee or taxpayer on the grounds of failure to pay state taxes.

This bill amends section 213.758(6), F.S., to provide 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.

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.[11] The term "insider" encompasses a member, manager, or managing member of a limited liability company. 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.

Rulemaking

This bill removes the department's authority to promulgate rules relating to s. 213.758, F.S.

Repeal of Statutes

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

Effective Date

This bill provides an effective date of July 1, 2011.

B. SECTION DIRECTORY:

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

Section 2 repeals s. 202.31, F.S., and s. 212.10, F.S.

Section 3 provides an effective date of July 1, 2011.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Revenue Estimating Conference estimates that the bill has an indeterminate negative fiscal impact on state government revenues.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The Revenue Estimating Conference estimates that the bill has an indeterminate negative fiscal impact on local government revenues.

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:

   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.

   It is possible that this bill may have the effect of reducing the authority of local governments to raise revenues if this bill has the effect of reducing the ability of the state to collect taxes from transferees who have purchased a business in those circumstances where the transferor business owner has illegally misrepresented the taxes owed and then is uncollectible.

   If this bill is found to be a mandate, it is also possible that this bill qualifies for an exception to the mandates provision in that this bill may have an "insignificant fiscal impact." See art. VII, s. 18(d) of the State Constitution. There is no definition of what constitutes an insignificant fiscal impact. 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:

This bill removes rule making authority currently found in s. 213.758, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The removal of the department's authority to create rules may not allow for the proper implementation of the certificate of compliance referenced in s. 213.758(4)(a)(1), F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2010, the Finance & Tax Committee adopted two amendments:

- The first amendment fixed a typographical error.
- The second removed language which required the department to charge a fee for audits requested by the transferee or transferor.

This analysis reflects the committee substitute.