

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #: HB 103 (SB 170)

FINAL HOUSE FLOOR ACTION:

SPONSOR(S): Wood (Altman)

115 Y's 0 N's

**COMPANION SB 170
BILLS:**

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

HB 103 passed the House on February 3, 2012, and subsequently passed the Senate on March 7, 2012. The bill provides for consolidation of statutes governing the sales of businesses and circumstances where the purchaser of a business takes the business without assuming the seller's 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 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.

Current law provides that if the transferor provides a certificate from the Department of Revenue showing that the business does not owe taxes 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 circumstances:

- If the transferor and the transferee do not have common insiders, 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, and 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 transferor is not liable for any outstanding tax liabilities.

This bill repeals misdemeanor criminal penalties for violations of the statutes governing sales of businesses.

The 2012 Revenue Estimating Conference estimated the bill to have a negative, indeterminate impact on state and local government revenues.

The bill was approved by the Governor on April 6, 2012, ch. 2012-55, Laws of Florida. The effective date of the bill is upon becoming law.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

When a person buys a business, the buyer (transferee) is liable for unpaid business taxes, such as sales taxes, that the seller (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 the transfer of tax liability related to communications services companies.³ In 2010, the Legislature enacted s. 213.758, F.S., governing the transfer of tax liability in other situations. This bill resolves any conflict between the three statutes.

Together, ss. 202.31, 212.10, and 213.758, F.S., govern the transfer of tax liability for every tax administered by the Department of Revenue⁴ ("the department"), excluding the corporate income tax. Section 213.758(2), F.S., provides that a taxpayer who is liable for any tax, interest, penalty, surcharge, or fee⁵ 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 and there is no time requirement for the Department to complete the audit.⁶ The maximum liability for a transferee is the greater of the fair market value of the business or the purchase price paid.⁷

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., also include 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.⁸

Effect of Proposed Changes

In general, this bill repeals the tax liability statutes specific to sales and communications services businesses and amends the statute relating to all taxes owed to the state in order to consolidate all transfer of tax liabilities provisions into a single section of the Florida Statutes. Specifically:

¹ See s. 212.10, F.S.

² See s. 10, ch. 26319, L.O.F. 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 Section 213.758(1)(a), F.S., 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.

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, 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.⁹

This bill prohibits transferees or taxpayers who quit a business without paying all taxes due from engaging in any business until the tax liability is paid.¹⁰ The department may request the Department of Legal Affairs (DLA), with 20 days written notice, to seek an injunction to prevent further business activity until all taxes due have been paid and the injunction may be granted without notice.¹¹

This bill amends s. 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.

This bill creates a new exemption from liability when the transferee is not an insider and the assets transferred are limited to:

- A one- to four-family residential real property and furnishing and fixtures within;
- Real property that has not been improved with a building; or
- Owner-occupied commercial real property.

This exception does not apply if such assets are accompanied by a transfer of other business assets.

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.¹² The term "insider" encompasses a member, manager, managing member of a limited liability company, or a relative of such a person, as defined in s. 726.102(11), F.S.¹³ 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. This bill defines "involuntary transfer" as a transfer of a business, assets of a business, or stock of goods of a business made without the consent of the transferor in the following situations:

- Foreclosure of a security interest of a non-insider;
- Eminent domain or condemnation;
- Dissolution of marriage, foreclosure under Chapter 702, F.S., or bankruptcy;

⁹ Section 213.758(4)(a)2, F.S., authorizes the Department to charge a fee for an audit requested by the transferee or transferor. There is no set amount for the Department to charge and the Department has not promulgated rules to put a transferor or transferee on notice as to how much an audit will cost.

¹⁰ Sections 213.758(2), (4)(c), F.S.

¹¹ Sections 213.758(2), (4), F.S.

¹² The statute currently uses "financial institution" solely as defined by s. 655.005, F.S.

¹³ Section 726.102(11), F.S., defines "relative" as "an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree."

- A transfer to a financial institution if the transfer is made to satisfy transferor's debt to the financial institution; or
- A transfer to a third party to satisfy the transferor's debt to a financial institution, to the extent that it satisfies the indebtedness.

Repeal of Statutes

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

Effective Date

This bill provides that the bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference estimated that this bill has an indeterminate negative fiscal impact on state government revenues.¹⁴

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The Revenue Estimating Conference estimated that this bill has an indeterminate negative fiscal impact on local government revenues.¹⁵

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

¹⁴ Revenue Estimating Conference, *2012 Impact Conference Results*, p. 30, Oct. 26, 2011.

¹⁵ *Id.*