

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 21, 1998 Revised: _____

Subject: Sales Tax (RAB)

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	Beggs	Smith	WM	Favorable/CS
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

SB 1690 provides specific statutory authority for Department of Revenue rules or parts thereof that have been identified by the department as subject to repeal under s. 120.536, F.S. These rules all relate to the sales and use tax.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 212.0506, 212.0515, 212.054, 212.0598, 212.06, and 213.30.

II. Present Situation:

During the 1996 legislative session a comprehensive rewrite of the Florida Administrative Procedures Act was adopted as CS/SBs 2290 and 2288. Among many other changes, the revised APA modified the standards which authorize rulemaking and included provision for periodic review of rules by agencies with rulemaking authority.

In the past, a number of court decisions held that a rule did not exceed the legislative grant of rulemaking authority if it was reasonably related to the stated purpose of the enabling legislation. Additionally, it was accepted that a rule was valid when it implemented general legislative intent or policy. Agencies had wide discretion to adopt rules whether the statutory basis for a rule was clearly conferred or implied from the enabling statute.

Section 120.536, F.S., effectively overturned this line of cases and imposed a much stricter standard for rulemaking authority. Under the new APA, existing rules and proposed rules must **implement, interpret or make specific** the particular powers and duties granted by the enabling statute. It is important to note that the revised APA is not intended to eliminate administrative rules or even to discourage rulemaking, but to ensure that administrative rules are no broader than

the enabling statute. A grant of rulemaking authority by the Legislature is necessary but not enough by itself to allow an agency to adopt a rule. Likewise, agencies need more than a statement of general legislative intent for implementing a rule. Rules must be based on specific grants of powers and not address subjects on which the Legislature was silent.

In order to temporarily shield a rule or portion of a rule from challenge under the new provisions, agencies were to report rules which they believed did not meet the new criteria by October 1, 1997.

Section 120.536(2) also lays out the second step in the process, that of legislative review. The subsection provides:

The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist.

Thus, during the 1998 Legislative Session, each agency has the responsibility to bring forward legislative proposals, as appropriate, which will provide statutory authorization for existing rules or portions thereof which the agency deems necessary but which currently exceed the agencies' rulemaking authority. The Legislature is directed to consider whether such legislation authorizing the identified rules should be enacted.

According to the Joint Administrative Procedures Committee (JAPC), there are 3500-3600 grants of rulemaking authority contained in the Florida Statutes falling roughly into two categories: specific grants and general grants. Most of them are specific grants of authority, that is, the grant of authority is found coupled in a sentence with a specific power or duty of the agency. General grants of rulemaking authority authorize rulemaking in the context of the agency's mission or as it pertains to the stated purpose of the enabling legislation. Most agencies have a general grant of rulemaking authority and numerous specific grants of rulemaking authority. In most cases, it appears that existing rules exceed statutory authority because a "specific law to be implemented" is missing from the statute, not a legislative grant of rulemaking authority.

In response to the requirements of s. 120.536, F.S., the Department of Revenue identified 78 rules or portions of rules which they found exceeded their rulemaking authority and for which they recommended that the Legislature grant such authority. This bill addresses a number of these issues. The current situation and the effect of the changes proposed by this bill are detailed in the following section.

III. Effect of Proposed Changes:

Rule 12A-1.105: Service Warranties

Present Situation:

Service warranties covering both taxable and nontaxable transactions are taxable only to the extent that they cover taxable transactions and only if such portions are separately stated. By rule, the Department of Revenue has the authority to reform a contract and find a different portion taxable, with the burden of proof that the Department's version is incorrect being on the dealer. The Department of Revenue has identified this portion of the rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, the Department would not have the power to reform service warranty contracts. If such contracts were not properly separated, the entire contract would become taxable.

Effect of Proposed Changes:

The bill amends s. 212.0506, F.S., to give the Department of Revenue the power to reform service warranty contracts in order to show properly apportioned tax. The burden of proof that the Department's version is incorrect rests with the dealer.

Rule 12A-1.006: Manufacturer's Warranties

Present Situation:

By rule, the Department allows items purchased by a manufacturer in fulfillment of a taxable manufacturer's service warranty to be purchased tax free. The statutes currently allow this treatment for only retailer's warranties. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, sales or use tax would have to be paid on the price or cost of parts used to fulfill manufacturer's warranties.

Effect of Proposed Changes:

The bill amends s. 212.0506, F.S. to exempt materials and supplies used in the performance of a factory or manufacturer's warranty if the materials are paid for by the manufacturer.

Rule 12A-1044: Sales of Tangible Personal Property Through Vending Machines

Present Situation:

The sales tax rate applicable to sales through vending machines is higher than 6% to account for the fact that tax for inexpensive items is usually at a higher rate due to the price "breaks" where tax is increased by one cent. The statutory rate for food through vending machines is 6.45% and for beverages is 6.65%. By rule, the tax for tangible personal property items sold through vending machines is set at 6.59%. Also, the rule allows charitable sellers of food or beverages costing less

than 25 cents not to submit annual certificates. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, vending machine dealers selling food, beverages, and tangible personal property would either have to remit tax based on the actual selling price of the tangible personal property or calculate tax based on the higher beverage rate. Charitable sellers of food and beverages costing less than 25 cents would have to submit annual certificates.

Effect of Proposed Changes:

The bill amends s. 212.0515, F.S., to set the tax rate for items of tangible personal property sold through vending machines at 6.59%. The bill would also allow charitable sellers of food and beverages costing less than 25 cents not to submit annual certificates.

Rule 12A-15.013: Vessels and Railroads in Interstate Commerce

Present Situation:

By rule, the local discretionary sales surtax on purchases for interstate railroads and vessels is calculated by looking to the county in which the taxable goods were purchased and applying the prorated Florida share of the purchases of interstate railroads and vessels to arrive at the local tax. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, proration would be calculated on the basis of mileage traveled within a county. This would be very difficult if not impossible to determine.

Effect of Proposed Changes:

The bill amends s. 212.0515, F.S., to require proration of the local discretionary sales surtax using the statewide taxable ratio and applying it to purchases within a county.

Rule 12A-1.064(3): Air Carrier Special Provisions

Present Situation:

Air carriers using mileage apportionment for corporate income tax purposes can elect to pay sales tax based on the factor calculated for corporate income tax purposes during the previous fiscal year applied to system-wide taxable purchases. By rule, in their first year of operation, air carriers are allowed to estimate this apportionment factor and then pay additional tax or receive a refund based on actual mileage. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing

language is not passed, this special provision would not be available to air carriers in their first year of operation.

Effect of Proposed Changes:

The bill amends s. 212.0598, F.S., to allow air carriers to use an estimate of the ratio of Florida to system-wide miles to use for sales tax purposes. In such cases, the air carrier must pay additional tax or receive a refund based on the actual ratio for that year.

Rule 12A-1.051: Calculation of Cost Price.

Present Situation:

Certain industries manufacture or produce items of tangible personal property for their own use in contracts of the improvement of real property. By rule, specific provision has been made for some of these industries to pay sales tax based on a formula reflecting general practice within the industry rather than the specifics of each contract. This provides certainty for the industry when calculating sales tax and makes it easier for the Department to audit. The Department of Revenue has identified portions of this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, sales and use tax would have to be determined on the basis of each specific transaction.

Effect of Proposed Changes:

The bill amends s. 212.06, F.S., to permit the Department of Revenue to establish cost price amounts for industry groups that manufacture or fabricate tangible personal property for their own use in the performance of contracts for improvements to real property. Such cost price calculations are to be reviewed every 5 years. The bill provides definitions of “real property” and “fixtures.”

Rule 12A-1.0161: Sales of Services Taxed in Other States

Present Situation:

Sales of tangible personal property are exempt from sales tax in Florida if an equal or greater sales tax has been paid in another state. By rule, sales of services are also treated in this manner. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, sales of services taxed in another state would also be subject to full sales tax in Florida.

Effect of Proposed Changes:

The bill amends s. 212.06(7), F.S., to exempt sales of services that have been taxed in another state at an equal or higher rate than Florida's.

Rule 12A-1.007(8): Sales Tax Presumption for Motor Vehicles

Present Situation:

By rule, motor vehicles registered in Florida are considered to be used in the state and subject to sales tax. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, tax free registration would be allowed in Florida if the vehicle was to be used out-of-state.

Effect of Proposed Changes:

The bill amends s. 212.06(10), F.S., to create a presumption that sales tax is applicable if a motor vehicle is registered in Florida.

Rule 12A-1.007(10): Aircraft Purchased for Sale But Used by Dealer

Present Situation:

By rule, if a registered aircraft dealer purchases an airplane for resale but uses it either for his own use or for rent while it is waiting to be sold, the dealer must pay sales tax to the state computed by applying the 6% sales tax rate to 1 percent of the airplane's value for each month the airplane is used. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, any use by a dealer of an airplane purchased for resale would subject the dealer to full sales tax on the value of the plane.

Effect of Proposed Changes:

The bill creates s. 212.06(13), F.S., to allow registered aircraft dealers who purchase an airplane for resale and use the airplane for their own use to pay sales tax computed by applying the 6% sales tax rate to 1 percent of the airplane's value for each month the airplane is used. Payment of such sales tax does not affect the dealer's responsibility to collect sales tax on any rentals or leases of the airplane.

Rule 12-18.008: Reward Procedures for Coin Operated Machines

Present Situation:

A reward is provided for reporting coin operated machines not having a notice stating the machine operator's sales tax identification number. By rule, immediate family members of Department employees are not eligible for this reward. The Department of Revenue has identified this rule as exceeding the rulemaking authority permitted by s. 120.536, F.S., and will initiate proceedings pursuant to that statute to repeal the rule if no authorizing legislation is enacted by January 1, 1999. If authorizing language is not passed, family members of Department of Revenue employees would be eligible for the reward.

Effect of Proposed Changes:

The bill amends s. 212.0515(3), F.S., to state that no one receiving information on a vending machine not having proper sales tax identification is eligible for the reward.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18(b) of the Florida Constitution requires a two-thirds vote of the membership of each house of the Legislature to enact general laws if the anticipated effect is to reduce revenue raising authority of counties or municipalities, as such authority existed on February 1, 1989. Since the revenue raising authority addressed in this bill results from rules to be repealed in 1999, the bill does not affect local revenue raising authority as it existed in 1989 and therefore does not qualify as a mandate under section 18.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

This bill provides statutory authority for a number of the rules identified by the Department of Revenue as exceeding their rulemaking authority permitted by s. 120.536, F.S. If these rules are allowed to be repealed, as current law requires, there would be a significant increase in sales tax revenue beginning in the 1999-00 fiscal year. This bill provides statutory authority for these rules and would have the effect of eliminating any revenue increases caused by the rule repeal process. The following table shows estimates of the fiscal impact of providing statutory authorization for these rules. While these estimates show a revenue decrease,

passage of the bill will not affect the budget process. The revenue estimates being used for the appropriations bill have not recognized any revenue impact from these issues.

Issue/Fund	General Revenue		Trust		Local		Total	
	1st Year \$	Recurring \$	1st Year \$	Recurring \$	1st Year \$	Recurring \$	1st Year \$	Recurring \$
1. Service Warranties	0.0	**	0.0	**	0.0	**	0.0	**
2. Manu. Warranties	0.0	(29.0)	0.0	(.1)	0.0	(4.1)	0.0	(33.2)
3. Vending Mach. TPP	0.0	**	0.0	**	0.0	**	0.0	**
4. Interstate Commerce	0.0	0.0	0.0	0.0	0.0	(.7)	0.0	(.7)
5. Air Carriers	0.0	**	0.0	**	0.0	**	0.0	**
6. Cost Price Calc.	0.0	**	0.0	**	0.0	**	0.0	**
7. Services - Oth. States	0.0	*	0.0	*	0.0	*	0.0	*
8. MV's Regis. In FL	0.0	*	0.0	*	0.0	*	0.0	*
9. Aircraft - Dealer Use	0.0	(1.2)	0.0	*	0.0	(.2)	0.0	(1.4)
10. Rewards - Coin Op.	<u>0.0</u>	<u>*</u>	<u>0.0</u>	<u>*</u>	<u>0.0</u>	<u>*</u>	<u>0.0</u>	<u>*</u>
Total	0.0	(30.2)	0.0	(.1)	0.0	(5.0)	0.0	(35.3)

* Insignificant
** Indeterminate

B. Private Sector Impact:

This bill would counteract the effect of the rule repeal process for those issues addressed, resulting in lower taxes and reduced administrative burden than would have occurred in many industries had the rules been repealed. Industries with revenue impact include those where manufacturer's warranties are offered for the repair of tangible personal property and aircraft dealers. Operators of vending machines selling tangible personal property, businesses manufacturing items for their own use in making improvements to real property, and businesses offering service warranties covering both real and tangible personal property should experience reduced administration burden.

C. Government Sector Impact:

The Department of Revenue should experience reduced sales tax administrative burden in a number of areas including certain vending machines, manufacturers of items for their own use in improving real property, and service warranties covering both real and tangible personal property.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
