

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

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Prepared By: Government Efficiency Appropriations Committee

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BILL: CS/SB 1602

SPONSOR: Commerce and Consumer Services Committee and Senator Baker

SUBJECT: State Tax Funds

DATE: April 19, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Siebert</u>	<u>Cooper</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Keating</u>	<u>Johansen</u>	<u>GE</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This committee substitute provides that, in any action by a purchaser against a retailer, dealer, or vendor, to recover taxes collected:

- The purchaser has the burden of proving all elements by clear and convincing evidence;
- The damages available is the difference between what was collected and what was paid to the taxing authority; and
- It is an affirmative defense if the tax collected by the retailer, dealer, or vendor from the purchaser was remitted to the appropriate taxing authority.

This committee substitute substantially amends s. 213.756 of the Florida Statutes.

## II. Present Situation:

Chapter 213, F.S., contains statutes of general application to Florida revenue laws. Section 213.756, F.S., provides that “[f]unds collected from a purchaser under the representation that the funds are taxes provided for under the state revenue laws are state funds from the moment of collection and are not subject to refund absent proof that such funds have been refunded previously to the purchaser.” Thus, s. 213.756, F.S., indicates that:

- Funds collected from a purchaser as Florida tax, even if collected erroneously, are state funds and must be remitted to the department; and
- A dealer must submit proof to the department that the purchaser has been refunded in order to be eligible for a refund.

Section 215.26(1), F.S., provides that the Chief Financial Officer may refund to the person who paid the funds any: (a) overpayment of tax, license, or account due; (b) payment where no tax

license, or account is due; and (c) a payment made in error. Current law also provides for specific time periods within which an application for refund must be submitted.<sup>1</sup>

Specific provisions within the taxing statutes may limit or provide procedural prerequisites for obtaining a refund. Section 212.17(3), F.S., provides that a dealer must take a credit or obtain a refund for any sales tax paid by the dealer on the unpaid balance due on worthless accounts within 12 months following the month in which the bad debt has been charged off for federal income tax purposes. Section 206.41(5), F.S., provides the administrative procedures for obtaining a refund of the state tax on motor fuel.

### **Communications Services Tax**

Section 202.23(2), F.S., expressly states that s. 202.23, F.S., “provides the sole and exclusive procedure and remedy for a purchaser who claims that a dealer has collected communications services taxes imposed or administered” under ch. 202, F.S., which were not due. A purchaser of communications services seeking a refund or credit is required to look to its dealer, unless the tax was paid directly to the department.<sup>2</sup> Such request must be made within three years following collection of the tax, and may be submitted if:

- the dealer charged and collected the tax with respect to a transaction or charge that was not subject to the communications services taxes imposed by chs. 202 or 203, F.S., or applied a tax rate in excess of the lawful rate;
- the purchaser or the transaction was exempt or immune from such taxes;
- the purchaser was assigned to the incorrect local taxing jurisdiction for purposes of the taxes authorized in s. 202.19, F.S.; or
- the purchaser paid the tax in error.<sup>3</sup>

A dealer that has issued a credit or refund to a purchaser pursuant to s. 202.23, F.S., must apply to the department for a refund within the period provided in s. 215.26, F.S., or take a credit within three years after the date of remittance or sixty days following the issuance of a credit or refund to the purchaser, whichever occurs later.<sup>4</sup> A purchaser seeking a refund of communications services tax paid directly to the department must apply to the department in accordance with s. 215.26, F.S.<sup>5</sup>

An action may only be maintained by or on behalf of a purchaser against a dealer, a municipality, a county, or the state if the purchaser pleads and proves that the procedures in s. 202.23(1), F.S., have been exhausted and that the dealer has failed to comply with that subsection.<sup>6</sup> In any such action, it is a complete defense that the dealer, a municipality, a county, or the state has refunded the taxes claimed or credited the purchaser’s account.<sup>7</sup> Section 202.23(2), F.S., also provides a complete defense to a purchaser’s action when the dealer used

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<sup>1</sup> Section 215.26(2), F.S.

<sup>2</sup> Section 202.23(1), F.S.

<sup>3</sup> *Id.*

<sup>4</sup> Section 202.23(3), F.S.

<sup>5</sup> Section 202.23(6), F.S.

<sup>6</sup> Section 202.23(2), F.S.

<sup>7</sup> *Id.*

one of the statutorily approved methods for assigning the purchaser to a local taxing jurisdiction contained in s. 202.22, F.S. Actions must be commenced within 180 days following the date of the dealer's written response under s. 202.23(1)(f), F.S., or within one year following submission of the purchaser's request to the dealer if the dealer does not issue a timely written response.<sup>8</sup>

### **Section 72.011, F.S.**

Section 72.011(1)(a), F.S., enumerates several taxes that a taxpayer may contest the legality of the assessment or denial of refund of by filing an action in circuit court or the Division of Administrative Hearings, pursuant to ch. 120, F.S. These taxes include the taxes that are levied by the state and collected through the Department of Revenue.

### **Local Occupational License Taxes**

Chapter 205, F.S., authorizes counties and municipalities to issue local occupational licenses, and levy occupational license taxes for the privilege of engaging in or managing any business, profession or occupation within its jurisdiction. In most cases, this tax is locally administered and is based on a set fee, as prescribed by ordinance. However, in at least two cities (Panama City and Panama City Beach) the levy is based on a percentage of the gross receipts from specified businesses, and consequently, is collected by the Department of Revenue in the same manner as the state (and local, if applicable) sales tax.

## **III. Effect of Proposed Changes:**

**Section 1** amends s. 213.756, F.S., to provide that in any action by a purchaser against a retailer, dealer, or vendor to obtain a refund of or to otherwise recover taxes, fees, or surcharges collected by the retailer, dealer, or vendor from the purchaser:

- The purchaser has the burden of proving all elements by clear and convincing evidence;
- The damages available is the difference between what was collected and what was paid to the taxing authority plus any discount or collection allowance authorized by law and taken by the retailer, dealer, or vendor; and
- It is an affirmative defense if the tax collected by the retailer, dealer, or vendor from the purchaser was remitted to the appropriate taxing authority.

This section applies to all taxes enumerated in s. 72.011, F.S., excluding chapter 202 and that portion of chapter 203 (gross receipts tax) that is collected under chapter 202, and to those taxes imposed under ch. 205, F.S.

The standing regarding a claim for a refund is not changed by this section.

**Section 2** provides that the provision and applications of the act are severable.

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<sup>8</sup> Section 202.23(2), F.S.

**Section 3** provides an effective date of July 1, 2005 and will apply retroactively to actions that have been initiated on or after that date. .

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

If enacted, certain retailers, dealers, and vendors would not be unwilling participants in tax refund litigation.

C. Government Sector Impact:

If the amount of current and future litigation is reduced as a result of this bill, there may be a savings in the administration of State Courts. However, this could shift litigation away from retailers, dealers and vendors to the Department of Revenue.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

## **VIII. Summary of Amendments:**

None.

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

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