

HOUSE OF REPRESENTATIVES STAFF ANALYSIS - Revised

BILL #: HB 433 CS

Tax on Gross Receipts for Utility Services

SPONSOR(S): Davis

TIED BILLS:

IDEN./SIM. BILLS: SB 1244

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Utilities & Telecommunications Committee	12 Y, 0 N, w/CS	Holt	Holt
2) Finance & Tax Committee			
3) Commerce Council			
4)			
5)			

SUMMARY ANALYSIS

Since 1990, the deregulation of natural gas markets has allowed some consumers to make purchases of gas that may not be subject to the Florida gross receipts tax, depending on how the transactions are structured. Charges for transportation of natural gas purchased in non-taxable transactions are also not taxable. Florida companies that sell natural gas delivered to a Florida address are placed at a competitive disadvantage because their sales are taxed, causing consumers who buy from those companies to pay higher prices for natural gas. Funding for public education capital outlay is also reduced by the purchase of untaxed natural gas by Florida consumers.<sup>1</sup> Although retail deregulation of electric markets has not yet occurred in Florida, a shift in the regulation of electricity could lead to a similar unequal taxing situation.

The bill imposes gross receipts tax on all utility services delivered to in-state retail consumers. Broaden by the bill are the definitions of "utility services" and "distribution companies." The definition of "utility services" includes transportation, delivery, transmission, and distribution of electricity, natural or manufactured gas. "Distribution company" means any person owning or operating local electric or natural or manufactured gas utility distribution facilities within this state for the transmission, delivery, and sale of electricity or natural or manufactured gas. The term does not include natural gas transmission companies that are subject to the jurisdiction of the Federal Energy Regulatory Commission. Rulemaking authority is grant to the Department of Revenue (DOR) to implement the provisions for remittance of tax by distribution companies and retail consumers.

The bill provides amnesty provisions for the registration and remittance of unpaid gross receipts tax, under certain circumstances, and rulemaking authority is granted to DOR to implement these provisions.

The bill has a positive fiscal impact on state government; however, the fiscal impact to local government is yet to be determined.

The bill prospectively adds inoperative provisions as back-stop language, so that the same tax inequities do not arise in the event that Florida deregulates the retail sales of electricity.

The act shall take effect October 1, 2005.

<sup>1</sup> Implications of the Absence of a Use Tax on Utilities for Education Funding, Report Number 2005-132, by Senate Committee on Government Efficiency Appropriations.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: - The bill grants rulemaking authority to the DOR to implement the provisions relating to the remittance of tax and amnesty. The bill would also broaden the responsibilities of the DOR.

Ensure lower taxes – The bill imposes a gross receipt utility tax on previously untaxed utility transactions.

#### B. EFFECT OF PROPOSED CHANGES:

##### GENERAL BACKGROUND:

Utility services were initially all regulated monopolies, and enactment of the gross receipts tax addressed those regulated markets. Moreover, the “gross receipts tax was a stable revenue source, and collection of the tax from utility providers was efficient and easy to administer.”<sup>2</sup> The tax is imposed on the person supplying the taxable services and is a pass through to the consumer. Section 203.01(4), F.S., provides for a separately stated line item on the consumer’s bill which indicates the tax as a component part of the total charge. “The law also provides for taxation of electricity produced by cogeneration or by small power producers, or any person other than a co-generator or small producer who produces electrical energy for his or her own use.”<sup>3</sup> (ss. 203.01(d), 203.01(e))

Out-of-state purchases for in-state use of natural or manufactured gas are not subject to gross receipts tax. Such purchases of natural gas “have been occurring since 1990, and have become a significant part of the market . . . and this creates significant problems:

- There is unequal treatment of natural gas users, with those who purchase from local distribution companies paying a price that includes tax and those who purchase from third-party suppliers or marketers outside the state paying a lower, untaxed price;
- Local distribution companies are disadvantaged compared to out-of-state suppliers; and
- Funding for school construction is reduced.”<sup>4</sup>

##### PRESENT SITUATION:

The DOR has provided the following overview of the present taxing situation:

Chapter 203, F.S., imposes a tax on the gross receipts from every person that receives payment for utility and communications services. Utility services include electricity, natural gas, and manufactured gas for light, heat, or power. The term “gross receipts” has not been interpreted to include transportation services.

The gross receipts tax on gas and electricity administered under Chapter 203, F.S. is imposed on the provider of the services. Unlike the sales tax imposed in Chapter 212, F.S., there is no compensating use tax imposed on the purchaser if the provider fails to remit the tax. Also, subsection 203.01(3), F.S.

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<sup>2</sup> Implications of the Absence of a Use Tax on Utilities for Education Funding, Report Number 2005-132, by Senate Committee on Government Efficiency Appropriations

<sup>3</sup> i.d.

<sup>4</sup> i.d.

provides exclusions from gross receipts tax for sales to utility companies for resale and other resale transactions.

Finally, since October 1, 2001, the gross receipts tax on communications services is administered under Chapter 202, F.S. The previous tax was imposed on a narrower base of “telecommunication services.”

#### EFFECTS OF PROPOSED CHANGE:

The bill amends ss. 203.01, 203.12, F.S., relating to tax on gross receipts for utility and communication services.

#### Section 1:

The bill amends sub-paragraph 1. of paragraph 203.01(1)(a), F.S., to impose a tax on the gross receipts from utility services that is delivered to in-state retail consumers. This tax is to be levied as provided in paragraphs (b) – (j) of the subsection. Previous paragraphs (c) – (e) are renumbered as paragraphs (g) – (i) and amended to correct cross-references to renumbered paragraphs. New paragraph (j) amends existing paragraph (f).

New paragraph (c) proposes a tax be imposed on the gross receipts of a distribution company for its sale and delivery of utility services to an in-state consumer, who pays a charge for both the electricity and the transportation. The distribution company shall on the last day of each month report and remit to the DOR the taxes levied during the preceding month for gross receipts taxes on such transactions.

New paragraph (d) provides that a tax be imposed on the gross receipts of a distribution company that receives payment from an in-state retail consumer for the delivery of electricity, unless the payment is subject to paragraph (c). A tax calculation formula is also provided in this paragraph based on the number of kilowatt hours delivered by the appropriate posted, or DOR adopted, index price and applying the gross receipts tax rate. Also, under certain circumstances, a refund provision is included in this paragraph.

Refund provision: the amount of tax due under this paragraph shall be reduced by the amount of any gross receipts tax, or similar tax, imposed on and paid by the person delivering the electricity, whether imposed by Florida, another state, U.S. territory, or the District of Columbia. This reduction in gross receipts tax is available to the retail consumer as a refund pursuant to s. 215.26, F.S., and it does not inure to the benefit of the person delivering the electricity. (215.26, F.S.- Repayment of funds paid into State Treasury through error).The DOR shall establish rules for demonstrating proof of payment and the amount of refund.

New paragraph (e) provides that a tax be imposed on the gross receipts of a distribution company for the sale or transportation of natural or manufactured gas to an in-state consumer, who pays a charge for the sale or the transportation of the gas. A tax calculation formula is also provided in this paragraph based on the volume of gas, the appropriate posted, or DOR adopted, index price, and by applying the gross receipts tax rate. The tax due shall be administered, paid, and reported in same manner as paragraph (c). Also, under certain circumstances, a refund provision is included in this paragraph.

Refund provision: the amount of tax due under this paragraph shall be reduced by the amount of any gross receipts tax, or similar tax, imposed on and paid by the person whom the consumer received the natural or manufactured gas, whether imposed by Florida, another state, U.S. territory, or the District of Columbia. This reduction in gross receipts tax is available to the retail consumer as a refund pursuant to s. 215.26, F.S., and it does not inure to the benefit of the person delivering the gas. (215.26, F.S.- Repayment of funds paid into State Treasury through error).The DOR shall establish rules for demonstrating proof of payment and the amount of refund.

New paragraph (f) provides that a tax be imposed on any person who imports electricity, natural or manufactured gas, or severs natural gas for that person's own use or consumption as a substitute for purchasing in-state taxable utility, transportation, or delivery services and who cannot demonstrate payment of the tax being made elsewhere. Such person must register with DOR and monthly pay into the State Treasury, an amount calculated as follows: the cost price of the importation times the gross receipts tax rate. The term "cost price" has the meaning ascribed in s. 212.02(4), F.S.:

(4) "Cost price" means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service costs, transportation charges, or any expenses whatsoever.

The amount of tax due under this paragraph, however, shall be reduced by the amount of any gross receipts tax, or similar tax, imposed on and paid by the person from whom the importation was purchased, or any person who provided delivery or transportation service in connection with the importation. The DOR shall establish rules for demonstrating proof of payment and the amount of reduction.

New paragraph (j) is amended to delete the words "telephone or telecommunication system described in paragraph (c)" and to add the words "communications services dealers reporting taxes administered under chapter 202" as conforming language. This change is consistent with administration of the communications services tax under chapter 202, F.S.

Subsection 203.01(3)(a), F.S., is amended to provide exemptions. An exemption is provided to the gross receipts tax charges for transportation of natural or manufactured gas to a public or private utility, municipal corporation, or rural cooperative for resale or for use as a fuel to generate electricity. The bill renumbers the resale provision of paragraph (b) to subparagraph 2. and amends the provisions to also exclude from the gross receipts tax charges delivery of electricity to a public or private utility, municipal corporation, or rural cooperative for resale as part of an electrical interchange agreement or contract between such utilities for the purpose of transferring more economically generated power.

Also, in s. 203.01(3)(a), F.S., the bill deletes the words "in this state" throughout revised paragraph (a). Under current law, there is a resale provision that exempts sales to utilities when the sale of gas or electricity is purchased for resale to a retail consumer. The DOR rule interpreting this resale provision is Rule 12B-6.001(2). That rule provides that tax does not apply to the "receipts from the sale within this state of natural gas or electricity. . .for resale." The current statute is ambiguous because the "in the state" language appears to modify where the resale occurs versus where the original sale occurs. The bill clarifies statutory language to track the rule and current practice of exempting sales of utilities in Florida for resale by deleting the words.

These exemptions are provided the person deriving gross receipts from such sale demonstrates that a sale, transportation, or delivery for resale complies with the following requirements: the sale, transportation, or delivery for resale must be in strict compliance with the DOR rules and regulations; and any sale subject to the gross receipts utility tax that is not in compliance shall be subject to the tax at the appropriate utility rate.

Additional exclusions from the gross receipts tax are included in new paragraphs (b), (c), and (d). Paragraph (b) provides for wholesale sales of electric transmission service; paragraph (c) provides for the use of natural gas in production of oil or gas, or the use of natural or manufactured gas, when used and consumed in providing such services; or (d) which provides for the sale, transportation to, or use of, natural or manufactured gas by any person eligible for an exemption under s. 212.08(7)(ff)2., F.S. for use as an energy source or a raw material.

Section 2:

The bill amends s. 203.012, F.S. to add a new subsection (1) that provides the following definition for "distribution company" as used in the chapter:

"Distribution company" means any person owning or operating local electric or natural or manufactured gas utility distribution facilities within this state for the transmission, delivery, and sale of electricity or natural or manufactured gas. The term does not include natural gas transmission companies that are subject to the jurisdiction of the Federal Energy Regulatory Commission.

The bill renumbers previous subsection (1) to create new subsection (3). The new subsection (3) renumbers the definition of "utility service" in s. 203.012, F.S. This amended definition for "utility service" includes the transportation, delivery, transmission, and distribution of electricity or natural or manufactured gas. The amended definition of "utility service" does not include separately stated charges for tangible personal property or services which are not charges for natural or manufactured gas, electricity, transportation, delivery, transmission, or distribution of electricity or gas.

#### Section 3:

The bill grants emergency rulemaking authority to the DOR to implement the provisions for the remittance of tax by distribution companies and self-accrual of tax by retail consumers. Emergency rules shall remain in effect for six months after the date of adoption and may be renewed pending the adoption of permanent rules.

#### Section 4:

The bill grants emergency rulemaking authority to the DOR to implement the amnesty provisions. The bill provides an amnesty for the registration and remittance for unpaid gross receipts tax that may otherwise be due, for the sale or the transportation of natural gas, for use or consumption, in-state for sales prior to October 1, 2005. The seller must register with the DOR and apply for amnesty on or before October 1, 2005.

Amnesty is available only for persons that are not regulated by the Public Service Commission, for transactions where a written agreement provided for transfer of title to the gas outside the state, or for sales of transportation services associated with sales of gas. Amnesty is not available for taxes that were billed or collected as itemized charges to consumers. Amnesty is also not available for assessments of previously paid taxes, penalty, and interest, unless the assessment is not final or has been timely challenged.

#### Section 5:

Provides the act will take effect October 1, 2005.

### C. SECTION DIRECTORY:

Section 1. Amends s. 203.01, F.S., to address tax on gross receipts for utility and communications services, provides exemptions.

Section 2. Amends s. 203.012, F.S., provides definitions.

Section 3. Provides DOR with emergency rulemaking authority to implement the provisions of s. 203.01, F.S., which provides for remittance of tax by distribution companies and retail consumers.

Section 4. Provides for amnesty registration and remittance of tax.

Section 5. Provides the act will take effect October 1, 2005.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The Revenue Estimating Conference met on 2/14/05, and it determined that the proposed legislation has the following fiscal impacts:

State Impact – All Funds	FY 2005-06 Annualized	FY 2005-06 Cash	FY 2006-07 Cash
	\$2.9 million	\$.61 million	\$1.07 million

Note: The numbers are reported in the positive.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

Indeterminate at this time.

#### 2. Expenditures:

Indeterminate at this time.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Gas purchased outside of Florida and transported by local distribution companies would be subject to the gross receipts utility tax. Gas that is purchased out-of-state that is not transported by local distribution companies would be subject to the tax also.

Funding for the public education capital outlay will increase from the additional tax collection.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

#### 2. Other:

None.

### B. RULE-MAKING AUTHORITY:

Rulemaking authority is granted to the DOR to: 1) implement the provisions relating to remittance of tax by distribution companies and self-accrual of tax by retail consumers; and 2) implement provisions relating to amnesty registration and remittance of tax.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill is not consistent in the terminology used to describe the retail consumer of utility services. The following amendments have been recommended to provide uniformity.

On page 3, line 71, strike "final" and insert "retail" in lieu thereof, in both occurrences, as follows:

~~final~~ retail consumer by a distribution company and the ~~final~~ retail consumer.

On page 3, line 74, insert "retail" between "the" and "consumer".

On page 4, line 105, insert "retail" before "consumer" at the beginning of said line.

On page 4 line 108, strike "final".

On page 6 line 143, insert "retail" at the beginning of said line.

On page 6, line 146, strike "final".

Additional comments and recommendations were by the DOR as follows:

1. Because of the difficulty for the DOR to identify those taxpayers that are required to self-accrue gross receipts tax on natural gas purchases and transportation, the following is suggested as a new subsection 203.01(9):

(9) Any person that engages in the transportation of natural or manufactured gas is required to furnish annually to the Department of Revenue a list of customers to whom transportation services were provided in the prior year and the addresses of such customers. This reporting requirement does not apply to distribution companies. Any person required to furnish such a list may elect to identify only those customers who take direct delivery without purchasing interconnection services from a distribution company. Such reports shall be subject to the confidentiality provisions of s. 213.053. The Department of Revenue is authorized to adopt rules concerning the format and procedures for submission of the required list.

2. A method for qualified manufacturers to claim exclusion from gross receipts tax should be provided. The following amendment addresses this issue. On p. 10, line 262, insert at the end of said line:

Possession by a seller of natural or manufactured gas or by any person providing transportation or delivery of natural or manufactured gas of a written certification by the purchaser, certifying the purchaser's entitlement to the exclusion permitted by this paragraph, relieves the seller or person providing transportation or delivery from the responsibility of remitting tax on the nontaxable amounts, and the department shall look solely to the purchaser for recovery of such tax if it determines that the purchaser was not entitled to the exclusion. The certification shall include an acknowledgment by the purchaser that it will be liable for tax pursuant to paragraph (f) of subsection (1) of this section if the requirements for exclusion are not met.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2005, the Committee on Utilities and Telecommunications favorably adopted six technical amendments to HB 433, and the bill was made a committee substitute. The amendments establish uniformity

in the terminology used to describe the type of consumer identified in the bill. The amendments were as follows:

Amendment 1: strike "final" and insert "retail" in lieu thereof, in both occurrences, as follows:

~~final~~ retail consumer by a distribution company and the ~~final~~ retail consumer.

Amendment 2: insert "retail" between "the" and "consumer".

Amendment 3: insert "retail" before "consumer" at the beginning of said line.

Amendment 4: strike "final".

Amendment 5: insert "retail" at the beginning of said line.

Amendment 6: strike "final".