

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 617 CS

State Tax Funds

**SPONSOR(S):** Stargel

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 1602

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Finance & Tax Committee	9 Y, 0 N, w/CS	Levin	Diez-Arguelles
2) Civil Justice Committee		Kruse	Billmeier
3) Fiscal Council			
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

Section 213.756, F.S., states that “[f]unds collected from a purchaser under the representation that they 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.”

HB 617 provides that in any action by a purchaser against a retailer, dealer, or vendor for a refund or recovery of taxes collected from the purchaser, the purchaser has the burden of proving all elements of his or her claim by clear and convincing evidence. The bill also provides that it is an affirmative defense to such action when the retailer, dealer, or vendor actually remitted the amount collected by the appropriate taxing authority, less any discount or collection allowance authorized by law. The bill applies to the taxes enumerated in s. 72.011, F.S., excluding ch. 202, F.S., and that portion of ch. 303, F.S., collected thereunder, and also applies to taxes imposed under ch. 205, F.S. The bill provides for severability and for retroactive application.

The bill is designed to address circumstances in which retailers have collected and remitted a tax and are subsequently sued by a consumer who paid the tax.

This bill does not have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2005.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – This bill may limit future lawsuits against the collectors of retail taxes.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Contesting a Tax**

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 they 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, this section appears to indicate that funds collected from a purchaser as Florida tax, even if collected erroneously, are state funds and must be remitted to the Department of Revenue.

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) payment made in error. Section 215.26(2), F.S., provides the time period within which an application for refund must be submitted. A taxpayer may contest a denial of refund of tax, interest, or penalty paid under a section or chapter specified in s. 72.011(1), F.S., under the provisions of s. 72.011, F.S. Section 72.011(1), F.S., provides that a taxpayer may contest the legality of any assessment or denial of refund of tax, fee, surcharge, permit, interest, or penalty by filing an action in circuit court, or, alternatively, by filing a petition under the applicable provisions of chapter 120. The section sets out a list of tax statutes that are affected by this statute. Once an action has been initiated in circuit court, no action may be brought under chapter 120.

In any action filed in circuit court, the plaintiff must pay the tax, penalty, and accrued interest assessed by the department or county which is not being contested by the taxpayer, and either:

1. Pay into the registry of the court the amount of the contested assessment, including penalties and accrued interest, unless waived in writing by the applicable department or county official; or
2. File with the complaint a cash bond or a surety bond for the amount of the contested assessment.<sup>1</sup>

Specific provisions within the taxing statutes may limit or provide procedural prerequisites for obtaining a refund. For example, s. 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. Also, s. 206.41(5), F.S., provides the administrative procedures for obtaining a refund of the state tax on motor fuel.

#### **HB 617**

The bill re-designates the existing language of s. 213.756, F.S., as subsection (1) and adds new subsection (2), which provides that:

- in any action by a purchaser against a retailer, dealer, or vendor for a refund or recovery of taxes collected from the purchaser, the purchaser has the burden of proving all elements of its claim by clear and convincing evidence (in most civil actions, a plaintiff is required to prove his or her case by a preponderance of the evidence, which is a lower burden than clear and convincing evidence);
- it is an affirmative defense when the retailer, dealer, or vendor remitted the amount collected by the appropriate taxing authority, less and discount or collection allowance authorized by law;

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<sup>1</sup> Section 72.011(3), F.S.

- the sole remedy is an action for damages measured by the difference between what the retailer, dealer, or vendor collected as a tax and what the person remitted, plus discounts or collection allowances.

The bill's provisions apply to the taxes stated in s. 72.011, F.S., excluding ch. 202, F.S., and that portion of ch. 303, F.S., collected thereunder, and also applies to taxes imposed under ch. 205, F.S. The bill also provides that it does not change the law regarding standing to claim a refund.

Proponents of the bill state that it is illogical for a retailer to be drawn into a complaint about a refund or legality of a tax when the retailer has submitted the tax to the appropriate collecting authority and no longer has the funds demanded by the purchaser.

#### C. SECTION DIRECTORY:

Section 1. Amends s. 213.756, F.S., to add a new section that provides: that a plaintiff must prove all elements of his or her claim by clear and convincing evidence; that the sole remedy for damages to a plaintiff; an affirmative defense for a retailer, dealer, or vendor; a cross-reference to which taxes are covered by the bill; and that the bill's provisions do not change the law regarding standing to claim a refund.

Section 2. Provides a severability clause.

Section 3. Provides an effective date of July 1, 2005, and states that the bill applies to any action filed on or after the effective date, and retroactively to any case pending as of the effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

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

Private sector retailers, dealers, and vendors will have a new affirmative defense to any civil action brought against them regarding the collection of state taxes.

#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

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

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

**Retroactivity:** The provisions of the bill apply to cases pending as of the effective date of the bill. The bill does not differentiate if the matter is in trial as of the effective date of the bill. Florida courts have found that the Legislature has the authority to apply law retroactively as long as the new law does not impair a vested right.<sup>2</sup> Courts have used a weighing process to decide whether to sustain the retroactive application of a statute that has three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.<sup>3</sup> Arguably, if a person, who has a case pending as of the effective date of the bill, is unable to meet the new burden of proof of providing clear and convincing evidence, and that person's case is then dismissed, that person has lost the right he or she had to bring a claim prior to the bill's enactment. As part of his or her case, a claimant will have to overcome the affirmative defense established in the bill which would not have been required prior to the bill's passage. However, at the point in time a plaintiff still has a case pending, the plaintiff has not been awarded something of value (e.g., a jury award) that the Legislature would be taking away. But, if a plaintiff is to succeed, a plaintiff must meet the higher obligation created by the bill. Additionally, if successful, a plaintiff will only be able to recover damages as specified by the bill.

**Access to Courts:** Art. I, s. 21, in the Declaration of Rights in the Florida Constitution, provides that the courts shall be open to all for redress of any injury. The Florida Supreme Court has interpreted this provision to limit the Legislature's ability to cap damages in civil actions or place barriers to a litigant filing certain actions. In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court considered the Legislature's power to abolish causes of action. At issue in *Kluger* was a statute which abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded \$550. *Kluger*, 281 So. 2d at 2-3. The court found that where a right to access to courts for redress of a particular injury predates the adoption of the declaration of rights in the 1968 constitution, the Legislature may not abolish the right without providing a reasonable alternative, unless the Legislature can show (1) an overwhelming public necessity to abolish the right, and (2) no alternative method of meeting such public necessity. Because the right to recover for property damage caused by auto accidents predated the 1968 adoption of the declaration of rights, the court held that the restriction on that cause of action violated the access to courts provision.

It can be argued that the bill's requirement that a plaintiff provide clear and convincing evidence to prove all elements of his or her claim violates the access to courts provision. The bill requires a plaintiff to make certain showings, which a plaintiff would not have to make prior to the bill's passage, or have the action dismissed. The bill has not provided any findings to indicate that an overwhelming public necessity exists. Further, the bill does not provide any alternative to a plaintiff who fails to meet the burden of proof.

#### B. RULE-MAKING AUTHORITY:

None.

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<sup>2</sup> *Dept. of Transportation v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981). *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 277 (Fla. 1978) (citing *McCord v. Smith*, 43 So. 2d 704, 708-709 (Fla. 1949)).

<sup>3</sup> *Supra Knowles* at 1158.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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

The Finance and Tax Committee met on March 29, 2005 and adopted a strike-all amendment, as well as an amendment to the strike-all, which clarified that remittance of the tax collected by the retailer, dealer, or vendor to the taxing authority constituted an affirmative defense. The strike-all clarified that the only remedy available to the purchaser is damages for the difference between what the retailer, dealer, or vendor collected and what they remitted to the taxing authority, less plus any discount or collection allowance. It also added a section on severability and a section which provides for retroactive application of the bill.