

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1384

INTRODUCER: Commerce and Tourism Committee and Senator Altman

SUBJECT: Transfer of Tax Liabilities

DATE: April 22, 2011 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	Fav/CS
2.	Maclure	Maclure	JU	Favorable
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

Committee Substitute for Senate Bill 1384 consolidates and revises statutes governing the transfer of tax 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 governing tax liability related to the transfer of a business to new ownership. This bill repeals two specific tax statutes (sales and communications) and amends the statute relating to taxes owed.

The bill revises the requirements for a transferee to take possession of a business without assuming any outstanding tax liabilities of a transferor. Current law provides that if the transferor provides a certificate from the Department of Revenue showing that no taxes are owed, 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 two circumstances:

- The transferee receives a certificate of compliance from the transferor showing that the transferor has not received notice of audit, has filed all required tax returns, has paid the tax

due from those returns, and there are no insiders in common between the transferor and the transferee; or

- The Department of Revenue conducts an audit, at the request of the transferee or transferor, and finds that the transferor is not liable for any taxes.

The bill amends sections 213.758 and 213.053, Florida Statutes, and repeals sections 212.10 and 202.31, Florida Statutes.

II. Present Situation:

Transfer of Tax Liabilities

The Florida Statutes currently have three sections that describe what is required with regard to tax liability when a business is transferred or sold.

- Section 212.10, F.S., governs sales and use tax liability when a business is quit or sold.¹
- In 2000, the Legislature enacted s. 202.31, F.S., to govern the transfer of communications services tax liability related to communications services businesses.²
- In 2010, the Legislature enacted s. 213.758, F.S., as a comprehensive statute to govern the transfer of tax liability for all taxes administered by the Department of Revenue (DOR or department), excluding the corporate income tax.³

Section 213.758, F.S.

A taxpayer who quits a business without selling, assigning, or transferring the business must make a final return and full payment for any taxes due, excluding corporate income tax, within 15 days of quitting the business.⁴ Similarly, a taxpayer who transfers a business must make a final return and full payment for any taxes due, excluding corporate income tax, within 15 days of the date of transfer.⁵

The transferee, or group of transferees, of more than 50 percent of a business is also liable for the taxes due by the transferor, unless the transferor provides the transferee a receipt or certificate from DOR showing that the transferor is not liable for taxes and DOR conducts an audit and finds that the transferor is not liable for taxes. The department is permitted to charge a fee to perform these audits. The maximum liability for a transferee is the greater of the fair market value of the business or the purchase price paid. However, a transferee becomes liable for

¹ This statute has been in Florida law in some form since 1949. Section 10, ch. 26319, 1949.

² Sections 23, 58, ch. 2000-260, L.O.F. See also s. 38, ch. 2001-140, L.O.F.

³ Chapter 2010-166, L.O.F. For a list of all taxes administered by DOR, see s. 213.05, F.S. Section 220.829, F.S., governs the transfer of tax liability for corporate income taxes

⁴ Section 213.758(2), F.S., 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.

⁵ Section 213.758(3), F.S., refers to taxes, interest, or penalties levied under ch. 443, F.S., or specified in s. 213.05, F.S., excluding the corporate income tax.

outstanding taxes only for voluntary transfers. The transferee may withhold a portion of the consideration to pay the taxes to pay to the department within 30 days of the date of transfer.⁶

Transferees or taxpayers who quit a business without paying all taxes due are prohibited from engaging in any business until the tax liability is paid. The department may request the Department of Legal Affairs to seek an injunction to prevent further business activity until all taxes due have been paid, and the injunction may be granted without notice.

Sections 202.31 and 212.10, F.S.

Sections 202.31 and 212.10, F.S., govern the transfer of tax liability for communications 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. However, ss. 202.31 and 212.10, F.S., provide for misdemeanor criminal penalties for violations of the tax transfer provisions.⁷

III. Effect of Proposed Changes:

Transfer of Tax Liabilities

Section 1 consolidates and revises the statutes that deal with the transfer of tax liabilities into s. 213.758, F.S.

This bill allows the transferee to take possession of a business without assuming the transferor's outstanding tax liabilities under either of the following two circumstances:

- The transferee receives a certificate of compliance from the transferor showing that the transferor has not received notice of audit, has filed all required tax returns, and has paid the tax due from those returns, and there are no insiders in common between the transferor and the transferee; or
- The Department of Revenue (DOR or department) conducts an audit and finds that the transferor is not liable for any taxes. 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 if the audit is not a certified audit done pursuant to s. 213.285, F.S.

The bill amends s. 213.758(6), F.S., to clarify 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.

Injunctions

Under the bill, a circuit court shall issue a temporary injunction to enjoin further business activity by the taxpayer on the grounds of failure to pay taxes if DOR has provided the taxpayer with 20 days' written notice. Under the current law and the bill, the Department of Legal Affairs is

⁶ Section 213.758(1)(a), F.S., defines an "involuntary transfer" as a transfer due to the foreclosure by a non-insider, that results from eminent domain or condemnation actions, pursuant to a bankruptcy proceeding, or to satisfy a debt to a financial institution.

⁷ Sections 202.31(5) and 212.10(5), F.S.

authorized to seek an injunction from a circuit court at the request of DOR. Current law does not require notice before a court issues an injunction.

For transferees, the bill permits the Department of Legal Affairs, at the request of DOR, to seek an injunction from a circuit court to enjoin further business activity by the transferee on the grounds of failure to pay taxes if:

- The assessment against the transferee is final and either the time for contesting the assessment under s. 72.011, F.S., has passed or such a contest was filed and resulted in a final and nonappealable judgment sustaining the assessment; and
- The DOR has provided at least 20 days' written notice of intention to seek an injunction.

Current law does not require a 20-day notice before a court issues an injunction against a transferee.

Definitions

The bill creates definitions for the terms "business," "financial institution," "insider," "stock of goods," and "tax." The existing definition of "transfer" is expanded 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.

Repeal of Statutes

Section 3 repeals s. 202.31, F.S. which relates to the transfer of sales and use tax liability, and Section 4 repeals s. 212.10, F.S., which relates to the transfer of communications services tax liability. With the creation of s. 213.758, F.S., in 2010 and the changes proposed in Section 1 of the bill, these two statutes are no longer necessary. The repeal of these statutes eliminates the misdemeanor penalty provisions for violations of these statutes.

Cross-References

Section 2 amends s. 213.053, F.S., to correct a cross-reference.

Effective Date

Section 5 provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18 of the Florida Constitution, excuses counties and municipalities from complying with laws requiring them to spend funds or to take an action unless certain conditions are met.

Subsection (b) of the provision prohibits the Legislature from enacting, amending, or repealing any general law if the anticipated effect is to reduce county or municipal

aggregate revenue generating authority as it existed on February 1, 1989. The exception to this prohibition is if the Legislature passes such a law by two-thirds of the membership of each chamber.

Subsection (d) provides an exemption from this prohibition. Laws determined to have an “insignificant fiscal impact,” which means an amount not greater than the average statewide population for the applicable fiscal year times \$0.10 (which is \$1.88 million for FY 2011-12), are exempt.

The Revenue Estimating Conference estimated that the bill would have an indeterminate negative fiscal impact annually on local governments. It is unknown at this time if the bill would meet the exemption provided in subsection (d); however, the bill may be exempt from the mandates prohibition if the Legislature were to pass the bill by two-thirds of the membership of each chamber.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference met on March 11, 2011, and adopted an indeterminate negative fiscal impact on state and local revenues for the bill as originally filed.⁸

B. Private Sector Impact:

The bill clarifies the conditions under which a transferee may be liable for unpaid tax of a transferor.

C. Government Sector Impact:

See “Tax/Fee Issues” above.

VI. Technical Deficiencies:

None.

⁸ Office of Economic and Demographic Research, the Florida Legislature, Revenue Estimating Conference/Impact Conference, Analysis of SB 1384 & HB 907 (Mar. 7, 2011), *available at* <http://edr.state.fl.us/Content/conferences/revenueimpact/pdf/page128.pdf> (last visited April 19, 2011).

VII. Related Issues:

Section 220.829, F.S., governs the transfer of tax liability for corporate income taxes.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Commerce and Tourism on April 12, 2011:**

The committee substitute differs from the bill as originally filed in the following ways:

- It makes several changes in wording;
- Removes the requirement that a transferee must pay the taxes within 60 days of written notice from the Department of Revenue (DOR);
- Removes language that specifically says that the transferee or taxpayer cannot continue to do business in Florida if it has not paid taxes owed; DOR must seek an injunction to enjoin the transferee or taxpayer from continuing to do business, which is current law; and
- Removes the provision that allows the court to require a transferee to maintain a bond.

B. Amendments:

None.