

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 907 Transfer of Tax Liability
SPONSOR(S): Wood and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1384

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Finance & Tax Committee	23 Y, 0 N, As CS	Flieger	Langston
2) Business & Consumer Affairs Subcommittee			
3) Civil Justice Subcommittee			
4) Economic Affairs Committee			

SUMMARY ANALYSIS

HB 907 adds and modifies various definitions and provisions governing the transfer of tax liabilities in s. 213.758, F.S.

The bill revises the requirements for a transferee (buyer) to take possession of a business without assuming any outstanding tax liabilities of a transferor (seller). Under current law, this can happen if the transferor provides a certificate from the Department of Revenue (“the department”) showing that no taxes are owed, and the department conducts an audit finding no liability for taxes. The changes in the bill would allow the transferee to take the business without assuming the transferor’s liabilities under either of the following two circumstances:

1. If there are no insiders in common between the transferor and the transferee, the transferee may obtain a certificate of compliance from the department showing that a transferor:
 - has not received notice of audit,
 - has filed all required tax returns,
 - has paid the tax due from those returns
2. The transferee or transferor may request an audit of the transferor’s books and records, to be completed within 90 days by the department, in order to find that a transferee is not liable for any outstanding tax liabilities of the transferor.

If a transferee is liable for unpaid tax, the bill requires that after receiving written notice by the department of unpaid tax the transferee has 60 days to pay the tax, after which time they may not engage in any business activity within the state until the tax liability is paid. Currently, there is no 60 day notice period before the prohibition on business activity. Under current law, the Department of Legal Affairs may seek an injunction at the request of the department to prevent further business activity if a tax liability remains unpaid by either a taxpayer who quits a business without a transfer or a transferee. A circuit court can grant a temporary injunction without prior notice to such entities, shutting down further business activity of those responsible for the outstanding tax liability. The bill requires that the department provide at least 20 days’ prior written notice to the taxpayer or transferee before seeking an injunction.

The bill removes the grant of rulemaking authority to the department provided in s. 213.758(9), F.S. The bill repeals s. 202.31 and 212.10, F.S., removing the criminal penalties for violation of transfer of tax liability provisions provided for both communications services tax and sales and use tax.

The 2011 Revenue Estimating Conference estimates that the bill has a negative, indeterminate impact on state and local government revenues.

The bill will take effect July 1, 2011.

This bill may be a Mandate requiring a 2/3rds vote of the membership. See Mandates section of the analysis.

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

STORAGE NAME: h0907a.FTC

DATE: 3/21/2011

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Under current Florida law the transfer of tax liability for every tax administered by the Department of Revenue¹ (“the department”), excluding the corporate income tax, is governed by s. 202.31, 212.10, and 213.758, F.S. The law provides that a taxpayer who transfers a business or stock of goods, quits a business without benefit of a purchaser, successor or assignee, or without transferring the business or stock of goods to a transferee must file a final return and make full payment of taxes owed within 15 days after quitting the business.

Transferees or taxpayers who quit a business without transfer and who fail to pay 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 (DLA) to seek an injunction, without notice, to prevent further business activity until all taxes due have been paid.

The transferee of more than 50% of a business is liable for any tax owed by the transferor unless the transferor provides the transferee a receipt or certificate from the department showing that the transferor is not liable for taxes and the department conducts an audit and finds that the transferor is not liable for taxes. The department has the option 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. A violation of either s. 202.31 or 212.10, F.S.,² is punishable as a first degree misdemeanor.

Section 213.758(9), F.S., allows the department to adopt rules necessary to administer and enforce the law.

The section does not impose liability on those transferees who take possession due to an involuntary transfer. “Involuntary transfer” is defined as a transfer due to the foreclosure by a non-insider, from eminent domain or condemnation actions, those involved in a bankruptcy proceeding, or to a financial institution to satisfy a debt. For the purposes of determining whether a transfer is voluntary, “insider” is defined as in s. 726.102, F.S.³, and “financial institution” is defined as in s. 655.005, F.S.

Effect of Proposed Changes

HB 907 provides a number of new and revised definitions to the transfer of tax liability statute found in s. 213.758(1). The bill defines the term “business” to require that a discrete division of a larger business be aggregated with all other divisions that are not separate legal entities. The definition of “financial institution” is expanded to include any person who controls, is controlled by, or is under common control with a financial institution⁴. The term “insider” is broadened from the current definition provided by s. 726.102(7), F.S., to also encompass a member, manager, or managing member of a limited liability company. The bill adds a definition for “stock of goods” as an inventory of a business held for sale to customers in the ordinary course of business. The bill also clarifies the definition of “transfer” 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.

The bill allows a transferee to avoid liability for the unpaid tax of the transferor if they receive a “certificate of compliance” from the department showing that the transferor has not received a notice of

¹ As listed in s. 213.05, F.S.

² Providing for transfer of tax liability for the Communications Services Tax and Sales and Use Tax, respectively.

³ Under that section, “insider” includes relatives, fellow partners in a partnership, officers of a corporation, and affiliates.

⁴ The statute currently uses “financial institution” solely as defined by s. 655.005, F.S.

audit and that the transferor has filed all required tax returns, and has paid all tax arising from those returns. The transferor and transferee also must not have any insiders in common. Alternatively, the transferee would be exempt from liability if the department finds that the transferor is not liable for any taxes after an audit. 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.

Sections 213.758(2) and 213.758(4), F.S, are amended to require 60 days notice by the department to a noncompliant transferee of the transferee's failure to pay taxes before the transferee is prohibited from engaging in business. The bill also requires 20 days written notice to a taxpayer who quits a business without transfer or to a noncompliant transferee before DLA may seek an injunction enjoining further business activity by the transferee or taxpayer.

Section 213.758(6), F.S., is amended 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.

The bill amends s. 213.758(9), F.S., removing the department's authority to promulgate rules for the transfer of tax liability statute.

Lastly, the bill repeals s. 202.31 and 212.10, F.S. These sections currently govern the transfer of tax liability for communications and services tax and sales and use tax, respectively, taxes which are also currently governed by similar provisions under s. 213.758, F.S. The current procedures for administration of the taxes provided by s. 202.31 and 212.10, F.S., would be in conflict with the new administrative procedures established by the bill. Sections 202.31 and 212.10, F.S., also include provisions regarding administrative garnishment that is provided for in s. 213.67, F.S. The repeal of these sections eliminates the criminal penalty provisions for violations of these sections currently in law.

B. SECTION DIRECTORY:

Section 1. Amends s. 213.758, F.S., requiring the department to provide notification to noncompliant taxpayers before a circuit court may enjoin further business activity. Specifies conditions under which transferees of a business are not liable for certain taxes owed. Removes rulemaking authority.

Section 2. Repeals s. 202.31 and 212.10, F.S.

Section 3. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference estimates that the bill has a negative, indeterminate impact on state government revenues.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The Revenue Estimating Conference estimates that the bill has a negative, indeterminate impact on local government revenues.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will provide businesses' and legal entities with an easier transfer process when engaging in mergers and acquisitions of other businesses that may have outstanding tax liabilities.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision may apply because this bill reduces the authority local governments have to collect taxes from transferees who take possession of a business that has outstanding tax liability. The bill does not appear to qualify for an exemption or exception. Therefore, the bill must have a 2/3rds vote of the membership of each house.

3. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill removes rule making authority currently found in s. 213.758, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The removal of the department's authority to create rules may not allow for the proper implementation of the certificate of compliance referenced in s. 213.758(4)(a)(1), F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2010, the Finance & Tax Committee passed two amendments.

- The first amendment fixed a typographical error.
- The second removed language which required the department to charge a fee for audits requested by the transferee or transferor.

This analysis is updated to reflect the above amendments.