

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 Budget Subcommittee on Finance and Tax

BILL: PCB 7206

INTRODUCER: Budget Subcommittee on Finance and Tax

SUBJECT: Sales and Use Tax

DATE: January 30, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cote	Diez-Arguelles	BFT	Pre-meeting
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill amends s. 212.06, F.S. by expanding the definition of dealer, for the purpose of sales tax collection, to include any person, other than a common carrier, who maintains or uses a warehouse or other place of business in Florida.

This bill amends s. 212.0596, F.S., by expanding the list of activities that subjects a dealer to nexus in Florida and amends the current definition of “mail order sale” to include the sale of tangible personal property through the Internet. This bill requires sales tax collection by dealers that have relationships with persons in this state who conduct activities on the dealer’s behalf that are significantly associated with the dealer’s ability to establish and maintain a market for sales in Florida.

The bill also includes a “click-through” nexus provision by extending Florida sales tax to dealers who enter into agreements with residents of this state and the residents receive commissions for referring customers by a link on an Internet website, or by other means, to the dealer.

This bill provides that the Legislature shall return the amount of sales taxes collected as a result of the changes to s. 212.0596, F.S., to the taxpayers of this state by establishing sales tax holidays or other tax relief measures.

This bill will take effect July 1, 2012.

This bill substantially amends sections 212.06 and 212.0596 of the Florida Statutes.

II. Present Situation:

Florida's Sales and Use Tax

Florida law imposes a state sales and use tax at a rate of 6 percent on the retail sale price of tangible personal property.¹ The tax is imposed on all taxable sales, purchases, and uses, whether made through face-to-face store sales or by out-of-state retailers. Generally, the sales tax is collected by the seller at the time of purchase. When the sales tax is not collected at the time of purchase, states impose "use" taxes. Use taxes require residents who purchase taxable goods from another state to pay the equivalent of a sales tax in their home state.

Sales taxes due on a Floridian's purchases from out-of-state retailers are difficult to enforce because the state must rely on the retailers to collect and remit the tax due or on purchasers to remit the tax themselves. Unless the seller has a sufficient physical presence in the state, Florida cannot require the seller to collect and remit the tax. Purchasers often do not remit use tax because many are unaware of the requirement or ignore it because there is little chance the Department of Revenue will be able to detect the tax avoidance. The department's ability to enforce the use tax is limited because of the lack of information available on out-of-state retailer purchases. The most practical way for states to collect the sales tax due on out-of-state retailer purchases is to require businesses to collect these taxes at the time of sale and remit them to the department.

Existing Federal Law

The ability for Florida to compel an out-of-state retailer to collect and remit sales tax is limited by the Commerce Clause² and the Due Process Clause³ of the U.S. Constitution. In 1967, the United States Supreme Court ruled in *National Bellas Hess, Inc. v. Illinois*, 386 U.S. 753 (1967), that states lack the authority to require out-of-state retailers to collect use taxes unless a retailer has nexus in a state. Under the ruling, nexus was defined as having a "physical presence" in a state. The court determined that imposing tax collection on out-of-state retailers would impose an undue burden on interstate commerce.

The Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), reaffirmed the *Bellas Hess* decision stating that an action by a state that places undue burden on an out-of-state retailer is a violation of the interstate commerce clause.

Internet Sales and Out-of-State Retailers

Under Florida law, all sales of tangible personal property are subject to sales and use tax unless the transaction is specifically exempt. Chapter 212, F.S., does not provide an exemption for sales over the Internet. Presently, sales tax is collected on internet sales by dealers that have a physical location in Florida. If a Florida resident purchases goods on the Internet from a retailer that does not have a physical presence in Florida, then use tax applies and is due from the purchaser. However, as previously mentioned, purchasers often do not remit use taxes on purchases from out-of-state retailers.

¹ Most Florida counties also impose a discretionary sales tax rate ranging from 0.5 percent to 1.5 percent. See Sections 212.06 and 212.054, F.S.

² U.S. Const. art 1, sec. 8, cl. 3

³ U.S. Const. amend. XIV, sec. 1

Purchases of taxable items from out-of-state retailers continue to grow each year. From 2004 to 2009, retailers' e-commerce sales grew 96 percent from \$74.1 billion in 2004 to \$145.2 billion in 2009.⁴ The inability of states to collect tax on sales by out-of-state retailers that do not have nexus in Florida results in a significant state and local government revenue loss. Studies suggest that between \$280 million and \$800 million dollars of Florida state and local sales tax collections are not being remitted annually.⁵

The Florida Senate Budget Subcommittee on Finance and Tax Interim Report 2012-107 on the *Application of Florida's Sales Tax to Sales by Out-of-state Retailers* contains a discussion of the issues addressed in this bill, a summary of other states' initiatives in this area, and a description of the studies measuring the fiscal impact to the state.⁶

III. Effect of Proposed Changes:

Definition of Dealer

Section 1 expands the definition of "dealer" to apply to any person, other than a common carrier, who maintains or uses a warehouse or other place of businesses in Florida. This provision explicitly provides that the use of an instate warehouse, distribution center, or other place of business creates nexus for sales and use tax purposes.

The section also includes minor clarifying changes.

Mail Order Sales

Section 2 amends the current definition of a "mail order sale" in s. 212.0596, F.S. to explicitly include a sale of tangible personal property by the Internet.

Section 212.0596, F.S. also specifies a list of activities that subjects a dealer to nexus in Florida. Under current law, a dealer is required to collect sales tax when the dealer has agents or representatives in Florida who solicit business or transact business on their behalf. This bill deletes some obsolete items and expands the list to include activities that demonstrate a sufficient connection or relationship to this state or its residents.

Specifically, the bill provides that a dealer is required to collect sales tax when any person, other than a person acting in the capacity of a common carrier, has substantial nexus with this state and:

- Sells a similar line of products as the dealer and does so under the same name or a similar business name;
- Maintains an office, distribution facility, warehouse or storage place, or similar place of business in this state to facilitate the delivery of property or services sold by the dealer to the dealer's customers;

⁴ <http://www.census.gov/econ/estats/2009/historical/2009ht5.pdf>

⁵ See the Florida Senate Budget Subcommittee on Finance and Tax Interim Report 2012-107 on the *Application of Florida's Sales Tax to Sales by Out-of-state Retailers*.

⁶ The report can be found at: <http://www.flsenate.gov/Committees/InterimProjects/2012/>

- Uses trademarks, service marks or trade names in this state that are the same or substantially similar to those used by the dealer;
- Delivers, installs, assembles, or performs maintenance services for the dealer's customers in this state;
- Facilitates the dealer's delivery of property to customers in this state by allowing the dealer's customers to pick up property sold by the person at an office, distribution facility, warehouse, storage place, or similar place of business maintained by the person in this state; or
- Conducts any other activities in this state that are significantly associated with the dealer's ability to establish and maintain a market in this state for the dealer's sales.

The bill further states that a dealer is not required to collect or remit sales or use tax unless the dealer has a physical presence in this state or the activities conducted in this state on the dealer's behalf are significantly associated with the dealer's ability to establish and maintain a market for sales in Florida.

Click-Through Nexus

Section 2 of the bill also imposes a sales tax collection requirement on every dealer who makes a mail order in Florida if the dealer enters into an agreement with one or more residents of Florida under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by an Internet-based link, a Web site, or otherwise. This requirement applies if the cumulative receipts from all of the dealer's sales to customers in Florida referred pursuant to such agreement are in excess of \$10,000 during the 12 months preceding the establishment of an agreement with a Florida resident. This provision does not apply if the dealer can demonstrate that residents with whom the dealer has an agreement did not engage in any activity within the state that was significantly associated with the dealer's ability to establish or maintain a market in Florida.

By extending Florida sales tax nexus to dealers who have such agreements, the bill requires them to collect Florida sales tax on all their taxable sales in Florida.

Revenue Neutrality

Section 3 of the bill provides a mechanism for the legislature to return any taxes collected as a result of this bill to Florida taxpayers.

The Department of Revenue, in consultation with the Revenue Estimating Conference, must develop a tracking system to determine the amount of sales tax collected by out-of-state dealers who would not be required to collect and remit sales taxes in the absence of this bill. The Revenue Estimating Conference will use the information provided by the department to determine the amount of sales taxes remitted in the previous calendar year and estimate the amount of sales taxes collected that will be expected in the following fiscal year. The bill directs the legislature to return the amount determined by the Revenue Estimating Conference to the taxpayers of Florida by establishing one or more tax holidays or other tax relief measures.

Effective Date

Section 4 provides an effective date of July 1, 2012.

Other Potential Implications:**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It remains unclear whether states can impose sales and use tax collection requirement on out-of-state retailers by applying the changes proposed in this bill. Lawsuits have been filed in New York and Illinois challenging the constitutionality of similar laws on the grounds that the laws violate the Commerce Clause⁷, the Due Process Clause⁸, and the Equal Protection Clause⁹ of the U.S. Constitution.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

At this time, the Revenue Estimating Conference (REC) has not reviewed the fiscal impact of this bill. However, the impact of this bill is uncertain since it depends on whether a dealer establishes or maintains a presence in Florida. In many states, similar legislation has been unsuccessful in generating additional tax collections because out-of-state retailers have terminated their relationships with in state residents or have closed their warehouses and businesses in the state.

B. Private Sector Impact:

Any tax revenues collected due to the provisions of this bill will be returned to the taxpayers of this state through sales tax holidays or other tax relief efforts.

Dealers who currently do not collect and remit sales tax in Florida will be required to collect and remit sales tax to the Department of Revenue if they establish or maintain a physical presence in Florida or have relationships with in state residents acting on their behalf.

⁷ U.S. Const. art 1, sec. 8, cl.3

⁸ U.S. Const. amend. XIV, sec. 1

⁹ U.S. Const. amend. XIV, sec 1

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.