

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 809 Communications Services Taxes

**SPONSOR(S):** Finance & Tax Committee, Grant

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 1060

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Finance & Tax Committee	23 Y, 0 N	Flieger	Langston
2) Energy & Utilities Subcommittee	13 Y, 0 N	Keating	Collins
3) State Affairs Committee			

### SUMMARY ANALYSIS

CS/HB 809 updates and modernizes a number of definitions related to the communications services tax:

- The term “cable service” is replaced with “video service.”
- The term “internet access” is defined through reference to federal statute.
- Definitions for the terms “digital good” and “digital service” are provided and both terms are exempted from the communications services tax.
- The definition of “sales price” is revised to allow additional nontaxable items to be billed together in a single line item on a customer’s invoice without the entire amount of the line item being taxable.

The provisions that govern the assignment of customers to local taxing jurisdictions for the purpose of imposing the applicable local communications services tax are revised to modify the liability of a communications services tax dealer in the event of underpayment of the tax resulting from the dealer assigning a service address to the incorrect local taxing jurisdiction.

The bill makes these revised definitions and liability provisions retroactive and remedial.

The 2012 Revenue Estimating Conference estimates that the changes to dealer liability for incorrectly assigned service addresses will have a negative impact to local governments of -\$4.3 million in FY 2012-13 and a recurring negative impact of -\$4.7 million. Other changes made by the bill will have a negative indeterminate effect on local government revenues.

The bill has an effective date of July 1, 2012.

**This bill may be a county or municipality mandate requiring a two-thirds vote of the membership of the House. See Section III.A.1. of the analysis.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Present Situation**

Chapter 202, F.S., provides that the sale of communications services,<sup>1</sup> except direct-to-home satellite service,<sup>2</sup> is subject to a state communications services tax (“CST”), gross receipts tax, and a locally levied CST. Federal law prohibits direct-to-home satellite sales from being subject to a local CST. Collected local and state communications services taxes are remitted to the Department of Revenue (“the department”), who distributes the proceeds to the appropriate jurisdictions.<sup>3</sup>

The revenue collected pursuant to this tax (except for 37 percent of the direct-to-home satellite tax revenue) is distributed by the same formula as the state sales tax, as provided by s. 212.20(6), F.S. Approximately 10.8 percent is distributed to local governments through county and municipal revenue sharing, the Local Government Half-cent Sales Tax Clearing Trust Fund, and the distribution to counties of \$29,915,500 that was formerly funded from pari-mutuel tax revenues. Smaller amounts are distributed to qualified counties for emergency distributions, selected sports facilities, and to the Public Employee Relations Trust Fund. The remainder of state CST remitted goes into the General Revenue Fund.

The state CST is currently set at a rate of 6.65 percent.<sup>4</sup> The gross receipt tax is 2.37 percent plus an additional 0.15 percent, for a combined rate of 2.52 percent.<sup>5</sup> Thus, the state CST and gross receipt tax are imposed at a combined rate of 9.17 percent. Local CST rates, as authorized in s. 202.19, F.S., vary widely, ranging from 0.1% to 7.0%.<sup>6</sup>

Direct-to-home satellite service sales are subject to a state CST at a rate of 10.8 percent<sup>7</sup> and a gross receipt tax of 2.37 percent,<sup>8</sup> for a combined rate of 13.17 percent.

Prior to 2001, much of what is now taxed under ch. 202, F.S. as communication services was subject to the state sales and use tax imposed by ch. 212, F.S. The Communications Services Tax Simplification Law<sup>9</sup> revamped definitions and consolidated the taxation of communications services into ch. 202, F.S.

Current law defines communications services as “the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance.”<sup>10</sup> Section 202.11(2), F.S., lists a number of specifically excluded items,

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<sup>1</sup> For purposes of ch. 202, F.S., “communications services” is defined in s. 202.11(2), F.S., as “the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added.”

<sup>2</sup> For purposes of ch. 202, F.S., direct-to-home satellite service is defined in 47 U.S.C. s. 303(v) as the distribution or broadcasting of programming or services by satellite directly to the subscriber’s premises without the use of ground receiving or distribution equipment, except at the subscriber’s premises or in the uplink process to the satellite.

<sup>3</sup> Section 202.18, F.S.

<sup>4</sup> Section 202.12(1)(a), F.S.

<sup>5</sup> Section 203.01(1)(b), F.S.

<sup>6</sup> Local CST rates can be found at the “Jurisdiction Rate Table” at [http://dor.myflorida.com/dor/taxes/local\\_tax\\_rates.html](http://dor.myflorida.com/dor/taxes/local_tax_rates.html).

<sup>7</sup> Section 202.12(1)(b), F.S.

<sup>8</sup> Section 203.01(1)(b), F.S.

<sup>9</sup> Chapter 2000-260, L.O.F.

<sup>10</sup> Section 202.11(2), F.S.

such as information services, bad check and late payment charges, internet access services (currently undefined in statute), and the sale or rental of tangible personal property, which are not subject to the communications services tax.

### Digital Goods and Services

There is no provision in ch. 202, F.S., defining “digital goods” or “digital services” or providing for their communications services tax treatment.

### Situsing

Currently, communications services dealers must assign customers to local tax jurisdictions (“siting”) so that the correct local CST rate can be applied to each sale. Section 202.22, F.S., provides that a dealer who uses one of three specific methods to determine to which local taxing jurisdiction a customer’s service address should be assigned and who exercises due diligence in that use is held harmless from any taxes, penalties, and interest that result from incorrect assignment of a customer. The three methods are:

- Employing an electronic database provided by the department.
- Employing a database developed by the dealer or supplied by a vendor that has been certified by the department.<sup>11</sup>
- Employing enhanced zip codes to assign each street address, address range, post office box, or post office box range in the dealer’s service area to a specific local taxing jurisdiction.<sup>12</sup>

A dealer that does not use one of the approved methods may be held liable for any tax, interest, or penalty which is due as a result of incorrectly assigning service addresses among jurisdictions. However, a dealer is not liable for taxes, interest, or penalties to the extent that such amount was collected and remitted with respect to a tax imposed by another jurisdiction.

A dealer who uses one of the three methods is granted a collection allowance deduction of 0.75 percent of the amount of tax due, while a dealer who does not use one of these methods is permitted to deduct only 0.25 percent.

### Taxation of items that are not separately stated

Federal law exempts internet access from state or local taxation.<sup>13</sup> In complying with that directive, s. 202.11(13)(b)8., F.S., allows charges for Internet access services that are not separately itemized on a customer’s bill but which can be reasonably identified from the selling dealer’s books and records to be excluded from the taxable sale. However, s. 202.11(13), F.S., defines the “sales price” as the total amount charged by a dealer, including any services that are part of the sale.

Thus, if a single line item contains both communications services and products that are not communications services, the CST is imposed on that entire sale unless the non-communications service product is Internet access and the charges for Internet access can be reasonably identified. If a dealer wishes to carve out nontaxable items,<sup>14</sup> those items would need to be separately stated.

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<sup>11</sup> The certification process currently involves testing the accuracy of the third-party database against the master database maintained by the department.

<sup>12</sup> Section 202.22(1)(a)-(c), F.S.

<sup>13</sup> 47 U.S.C. §151.

<sup>14</sup> E.g., the sale or rental of personal property such as a cable box.

## Effect of Proposed Changes

The bill makes a number of definitional and terminology updates. The bill redefines “cable service” as “video service,”<sup>15</sup> and language is changed throughout ch. 202, F.S., to conform to that redefinition. The previously undefined term “Internet access service” is defined to have the same meaning as “Internet access” as used in the relevant federal law.<sup>16</sup>

The bill also updates the legislative intent contained in s. 202.105, F.S.

## Digital Goods and Services

The bill defines the terms “digital goods” and “digital services” and adds both to the list of items that are excluded from the definition of “communication services” in s. 202.11, F.S.

The bill defines “digital good” to mean any downloaded good or product that is delivered or transferred by means other than tangible storage media, including downloaded games, software, music,<sup>17</sup> or other digital content. The term does not include video service, which remains taxable.

The bill defines “digital service” as any service, other than video service, that is provided electronically, including remotely provided access to or use of software or another digital good. Digital services also include the following services, if they are provided remotely: monitoring, security, distance learning, energy management, medical diagnostic, mechanical diagnostic, and vehicle tracking services.

## Situsing

The bill modifies the requirements of s. 202.22, F.S., relating to a dealer that does not use one of the three approved situsing methods. A dealer who incorrectly assigns a customer to a local CST taxing jurisdiction may be held liable for the net aggregate underpaid local CST tax and any penalties or interest due as a result of that incorrect assignment only if:

- The failure to use one of the approved situsing methods results in a net aggregate underpayment of local tax, and
- The department has first determined the amount misallocated by the dealer between all jurisdictions.

The bill also provides that if a dealer does use one of the three methods described in s. 202.22(1), F.S., with or without due diligence, the department may not deny that dealer’s collection allowance because of incorrectly assigned customers.

The bill requires the department to make monthly reports on jurisdiction-by-jurisdiction gross taxable sales and net tax information available to the public.

## Taxation of items that are not separately stated

The bill revises the definition of “sales price” in renumbered s. 202.11(15), F.S., to expand the existing provisions relating to what charges a dealer may exclude from the taxable sales price of

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<sup>15</sup> “Video service” is defined in the bill to mean “the transmission of video, audio, or other programming service to a purchaser, and the purchaser interaction, if any, required for the selection or use of a programming service, regardless of whether the programming is transmitted over facilities owned or operated by the video service provider or over facilities owned or operated by another dealer of communications services. The term includes point-to-point and point-to-multipoint distribution services through which programming is transmitted or broadcast by microwave or other equipment directly to the purchaser’s premises, but the term does not include direct-to-home satellite service. The term includes basic, extended, premium, pay-per-view, digital video, two-way cable, and music services.”

<sup>16</sup> 47 U.S.C. §151.

<sup>17</sup> Including ringtones, etc.

communications services.<sup>18</sup> The bill provides that a dealer may exclude charges for any good or service that is exempt from the CST, except those listed in renumbered s. 202.11(15)(a), F.S.,<sup>19</sup> so long as those exempt items can be reasonably identified from the selling dealer's books and records. The bill extends the list of allowable excluded charges that do not need to be separately stated from Internet access to any good or service that is not otherwise taxable.

### Remedial and Retroactive Nature of Changes

The definition changes, modification of taxation of items not separately stated, and new situsing procedures contained within the bill are remedial and retroactive but do not provide a basis for a right to a refund or credit for any tax paid, nor do they provide the basis for an assessment of tax not paid.

#### B. SECTION DIRECTORY:

**Section 1 .** Amends s. 202.105, F.S., modifying legislative intent.

**Section 2.** Amends s. 202.11, F.S., modifying definitions, including cable service, digital good, digital service, sales price, and video service.

**Section 3.** Amends s. 202.125, F.S., conforming terminology to changed definitions.

**Section 4.** Amends s. 202.16, F.S., conforming terminology to changed definitions.

**Section 5.** Amends s. 202.24, F.S., conforming adjustment process to new situsing procedures.

**Section 6.** Amends s. 202.18, F.S., clarifying public records status of certain confidential information.

**Section 7.** Amends s. 202.195, F.S., clarifying public records status of certain confidential information.

**Section 8.** Amends s. 202.22, F.S., modifying situsing procedure for assigning customer service addresses to local taxing jurisdictions, changing the liability dealers of communications services have in cases of incorrectly assigned service addresses.

**Section 9.** Amends s. 202.231, F.S., requiring the department to make monthly reports available to the public.

**Section 10.** Amends s. 202.24, F.S., conforming terminology to changed definitions.

**Section 11.** Amends s. 202.26, F.S., changing a cross-reference.

**Section 12.** Amends s. 203.01, F.S., changing a cross-reference.

**Section 13.** Amends s. 610.118, F.S., changing a cross-reference.

**Section 14.** Amends s. 624.105, F.S., changing a cross-reference.

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<sup>18</sup> Currently solely applicable to the cost of Internet access.

<sup>19</sup> Section 202.11(15)(a), as revised in the bill, establishes that charges for the following items are included in the sales price of communications services:

1. The connection, movement, change, or termination of communications services.
2. The detailed billing of communications services.
3. The sale of directory listings in connection with a communications service.
4. Central office and custom calling features.
5. Voice mail and other messaging service.
6. Directory assistance.
7. The service of sending or receiving a document commonly referred to as a facsimile or "fax," except when performed during the course of providing professional or advertising services.

**Section 15.** Establishes that some of the changes above are of a remedial nature and have retroactive application.

**Section 16.** Provides an effective date of July 1, 2012.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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

#### **1. Revenues:**

The 2012 Revenue Estimating Conference estimates that the bill will have a negative indeterminate impact on state revenues.

#### **2. Expenditures:**

None.

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

#### **1. Revenues:**

The 2012 Revenue Estimating Conference estimates the changes to dealer liability for incorrectly assigned service addresses will have a negative recurring impact to local governments of -\$4.3 million in FY 2012-13 and a recurring negative impact of -\$4.7 million. Other changes made by the bill will have a negative indeterminate effect on local government revenues.

#### **2. Expenditures:**

None.

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

The changes to the siting process may decrease the administrative burden placed on communications services dealers.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

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

The county/municipality mandates provision of Art. VII, section 18, of the Florida Constitution may apply because this bill may reduce the revenues collected by local governments by revising the liability dealers of communications services have in cases of underpayment due to incorrect assigned of service addresses. This bill does not appear to qualify under any exemption or exception. If the bill does qualify as a mandate, final passage must be approved by two-thirds of the membership of each house of the Legislature.

#### **2. Other:**

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS / COMMITTEE SUBSTITUTE CHANGES**

On January 26, 2012, the Finance and Tax Committee adopted a proposed committee substitute that included the following changes to the original bill:

- Removes the elimination of the situsing database procedure and replaces that with significant modifications to when a dealer has liability for incorrectly assigning a customer's service address to a local taxing jurisdiction.
- Removes a change to the definition of "prepaid calling arrangement."

These changes are reflected in the committee substitute that is the subject of this analysis.