

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 435 Taxes On Prepaid Calling Arrangements

SPONSOR(S): Davis

TIED BILLS: **IDEN./SIM. BILLS:** SB 290

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy & Utilities Subcommittee	12 Y, 0 N	Keating	Collins
2) Finance & Tax Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

Under current law, both state and local communications services tax (CST) and state gross receipts tax apply to the sales price of each communications service which originates and terminates in this state, or originates or terminates in this state and is charged to a service address in this state. However, the retail sale of a "prepaid calling arrangement," as defined in the law, is not subject to these taxes. Instead, it is subject to the sales tax. Combined CST and gross receipts taxes applicable to communications services can range from 9.47% to 16.29%, depending on the local CST applied to a particular transaction. Sales tax applies to prepaid calling arrangements at a rate of 6%.

In a 2012 Tax Information Publication (TIP), the Florida Department of Revenue (DOR) provided examples of prepaid communications service plans that it deems not within the definition of "prepaid calling arrangement." These examples include: service that includes text messaging, multimedia messaging, web, email, etc.; unlimited calling plans that do not decline with usage; services or plans that are not sold in predetermined units or dollars; and services or plans that are not originated using an access number or authorization code. Based on this TIP, it appears that at least some communications services providers or retailers have collected and remitted the sales tax for certain prepaid services or plans that DOR deems to be outside the definition of "prepaid calling arrangement" and therefore subject to the CST.

The bill amends the definition of "prepaid calling arrangement" in chapter 202, F.S. (relating to the CST and applicable to the gross receipts tax) and chapter 212, F.S. (relating to the sales tax), effectively broadening the definition of "prepaid calling arrangement" for tax purposes in two primary ways: (1) by including prepaid communications services other than those that consist exclusively of telephone calls; and (2) by including prepaid services that are originated by any means, rather than those originated only through use of an access number, authorization code, or similar means. These changes appear to reflect that current prepaid services may include services other than telephone calls, such as messaging, web access, and email, and that current means of access to such services do not rely solely on access numbers and codes. The bill provides that these amendments are intended to be remedial in nature and apply retroactively, but do not provide a basis for an assessment of any tax not paid or create a right to a refund or credit of any tax paid before the effective date of this act.

The Revenue Estimating Conference has not estimated the revenue impacts of this bill on state and local governments. DOR has estimated a non-recurring expenditure of \$45,721 to produce and mail an updated Tax Information Publication.

The county/municipality mandates provision of Art. VII, section 18, of the Florida Constitution may apply because this bill redefines the types of services to which existing local communications services tax rates apply; however, the bill's impact on the authority of counties or municipalities to raise revenue in the aggregate may be insignificant, as it is uncertain whether and to what extent these tax rates have historically been applied to the types of services at issue.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

In 2000, the Legislature enacted Chapter 202, F.S., the Communications Services Tax Simplification Law, which became effective October 1, 2001. The law simplified and restructured numerous state and local taxes and fees imposed on communications services, such as landline and wireless telephone services, cable television, and direct-to-home satellite service.

Under the law, the state communications services tax (state CST) rate of 6.65 percent is applied to the sales price of each communications service which originates and terminates in this state, or originates or terminates in this state and is charged to a service address in this state.¹ Additionally, the governing authority of each county and municipality may, by ordinance, levy a discretionary communications services tax (local CST) on these services.² The local CST rate varies depending on the location of the customer. Currently, local CST rates range from 0.30% to 7.12%. Local CST rates can be found by selecting the "Jurisdiction Rate Table" link at http://dor.myflorida.com/dor/taxes/local_tax_rates.html.

The state and local CST are charged when the taxable service is sold at retail and are computed on each taxable sale for the purpose of remitting the tax due.³ However, the definition of the term "sales price" expressly excludes the "sale or recharge of a prepaid calling arrangement," so communications service tax is not collected on the sale of a prepaid calling arrangement.⁴ The term "prepaid calling arrangement" is defined to mean "the separately stated retail sale by advance payment of communications services that consist exclusively of telephone calls originated by using an access number, authorization code, or other means that may be manually, electronically, or otherwise entered and that are sold in predetermined units or dollars of which the number declines with use in a known amount."⁵

Chapter 212, F.S., provides for the application of the sales tax to certain activities. Under this law, a sales tax rate of 6 percent is applicable to charges for prepaid calling arrangements.⁶ This tax is collected at the time of sale and remitted by the selling dealer. The definition of the term "prepaid calling arrangement" in Chapter 212, F.S., is almost identical to the definition provided in Chapter 202, F.S. It is defined to mean "the separately stated retail sale by advance payment of communications services that consist exclusively of telephone calls originated by using an access number, authorization code, or other means that may be manually, electronically, or otherwise entered and that are sold in predetermined units or dollars whose number declines with use in a known amount."⁷

Section 203.01, F.S., provides for a gross receipts tax on communications services delivered to a retail consumer in this state. This tax is applied to the same services and transactions subject to the CST and to communications services sold to residential households. The tax is applied to the sales price of communications services when sold at retail, as those terms are defined in Chapter 202, F.S., and is due and payable at the same time as the CST. The rate applied to communications services is 2.37 percent. An additional rate of 0.15 percent is applied to communication services subject to state and local CST. With such sales, a communication services dealer may collect a combined CST rate of 6.8 percent comprised of the 6.65 percent for the state CST and the 0.15 percent additional gross receipts tax.⁸

¹ Section 202.12, F.S.

² Section 202.19, F.S.

³ Pursuant to s. 202.125(1), F.S., the separately stated sales price of communications services sold to residential households is exempt from this tax.

⁴ Section 202.11(13)(b)4., F.S.

⁵ Section 202.11(9), F.S.

⁶ Section 212.05(1)(e)1., F.S.

⁷ *Id.*

⁸ Section 202.12001, F.S.

In summary, sales of prepaid calling plans or services that meet the definition of a “prepaid calling arrangement” are subject to the sales tax (6%) but are excluded from imposition of the state CST (6.65%) and gross receipts tax (2.37 % for residential service, 2.52% for all others) and the local CST (variable rate) applicable to other communications services.

In a 2012 Tax Information Publication, the Florida Department of Revenue (DOR) provided examples of prepaid communications service plans that it deems not within the definition of “prepaid calling arrangement.”⁹ The publication states that:

Examples of such plans that do **not** fall under this definition include, but are **not** limited to:

- Service that includes text messaging, multimedia messaging, web, email, etc.
- Unlimited calling plans that do **not** decline with usage
- Services or plans that are **not** sold in predetermined units or dollars; or
- Services or plans that are **not** originated using an access number or authorization code.

A sale of a prepaid card or prepaid arrangement that does not fall under the definition of a “prepaid calling arrangement” is not subject to [sales tax]. Instead, sales of such plans are subject to CST, because Florida’s CST law generally applies to services that allow the transmission, conveyance, or routing of voice, data, audio, or video.

The publication further states:

Taxpayers (including communications service providers and retailers) who have not collected and remitted CST on sales of prepaid plans and services that do not fall within the “prepaid calling arrangement” definition are encouraged to contact [DOR] under the Voluntary Disclosure Program to take advantage of compromise authority prior to discovery on audit.¹⁰

Thus, it appears that at least some communications service providers or retailers have collected and remitted the sales tax for certain services or plans that DOR deems to be outside the definition of “prepaid calling arrangement” and therefore subject to the CST.

Effect of Proposed Changes

The bill amends s. 202.11, F.S., to define the term “prepaid calling arrangement” to mean “access to communications services which must be paid for in advance of using such services and which is sold in predetermined units or dollars that expire on a predetermined schedule or that are decremented on a predetermined basis in exchange for such access.” The bill amends s. 212.05, F.S., to define the term “prepaid calling arrangement” as having the same meaning as provided for in s. 202.11, F.S.

The bill effectively broadens the definition of “prepaid calling arrangement” for tax purposes in two primary ways: (1) by including prepaid communications services other than those that consist exclusively of telephone calls; and (2) by including prepaid services that are originated by any means, rather than those originated only through use of an access number, authorization code, or similar means. These changes appear to reflect that current prepaid services may include services other than

⁹ Florida Department of Revenue TIP # 12ADM-02, issued March 27, 2012.

¹⁰ Florida's voluntary disclosure program allows a taxpayer to report previously unpaid or underpaid tax liabilities for any tax administered by DOR, providing the taxpayer an opportunity to voluntarily pay the taxes without being penalized. When the tax and interest liabilities have been paid, all penalties will be waived unless tax has been collected and not remitted. DOR will look back three years immediately preceding the postmark date of the voluntary disclosure request. All taxes administered by the DOR are eligible. See http://dor.myflorida.com/dor/taxes/voluntary_disclosure.html.

telephone calls, such as messaging, web access, and email, and that current means of access to such services do not rely solely on access numbers and codes.

In its analysis of the bill, DOR states that services such as Video on Demand, cable television, and direct-to-home satellite service – while not “calling” services – could fall within the bill’s definition of “prepaid calling arrangements.” DOR states that these examples represent communications services that can be paid for in advance of use, sold in predetermined dollars, and expire on a predetermined schedule (i.e., within 24 hours or monthly).

The bill provides that these amendments are intended to be remedial in nature and apply retroactively, but do not provide a basis for an assessment of any tax not paid or create a right to a refund or credit of any tax paid before the effective date of this act. Thus, it appears that any communications services provider or retailer that collected and remitted the sales tax, rather than the CST, for services or plans that DOR deems to be outside the definition of “prepaid calling arrangement” would not be assessed for any CST not collected and remitted.

B. SECTION DIRECTORY:

Section 1. Amends s. 202.11, F.S., revising the definition of “prepaid calling arrangement.”

Section 2. Amends s. 212.05, F.S., relating to sales, storage, and use tax.

Section 3. Creates an undesignated section of law, providing for remedial and retroactive application of the act.

Section 4. Provides an effective date of July 1, 2013, except as provided in Section 3 of the act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference has not estimated the revenue impacts of this bill on state government.

2. Expenditures:

DOR has indicated that a non-recurring expenditure of \$45,721 will be necessary to cover in-house production and mailing of an updated Tax Information Publication to approximately 110,525 sales tax dealers and communications services providers.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The Revenue Estimating Conference has not estimated the revenue impacts of this bill on local governments.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Communications services providers that offer prepaid calling arrangements, as defined by the bill, will not bear the responsibility or cost of identifying, for each sale of such services, the appropriate local government for purposes of collecting and remitting the local CST that may otherwise apply to such

arrangements. Further, such providers will be relieved of potential assessments or fines by DOR for any CST not collected and remitted on prepaid calling arrangements as defined by the bill.

D. FISCAL COMMENTS:

It is not clear how the Revenue Estimating Conference will evaluate the revenue impacts of this bill. As noted in the Substantive Analysis, it appears that at least some communications services providers or retailers have collected and remitted the sales tax for certain prepaid services or plans that DOR deems to be subject to the higher CST rate. An argument can be made that if all or most sellers have not collected the CST on these services in the past, then the difference between past revenues and projected revenues under the bill should not be significant. However, an opposing argument can be made that if current law provides for taxation of these services at the CST rate, then the bill will result in a level of revenues lower than that which otherwise would have been collected.

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 redefines the types of services to which existing local Communications Services tax rates apply; however, the bill's impact on the authority of counties or municipalities to raise revenue in the aggregate may be insignificant, as it is uncertain whether and to what extent these tax rates have historically been applied to the types of services at issue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

In its analysis of the bill, DOR states that services such as Video on Demand, cable television, and direct-to-home satellite service – while not “calling” services – could fall within the bill's definition of “prepaid calling arrangements.” DOR states that these examples represent communications services that can be paid for in advance of use, sold in predetermined dollars, and expire on a predetermined schedule (i.e., within 24 hours or monthly). It is not clear if the bill intends to exempt such services from the CST.

DOR also states that the bill does not specify whether a communications service, to meet the definition of a “prepaid calling arrangement,” must be discontinued at the expiration of the predetermined schedule or at a point where the decrement at a predetermined basis is exhausted or complete.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES