

**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.)

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Prepared By: The Professional Staff of the Committee on Community Affairs

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BILL: SB 1382

INTRODUCER: Senator Gruters

SUBJECT: Tax Administration

DATE: January 31, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hackett</u>	<u>Ryon</u>	<u>CA</u>	<u>Favorable</u>
2.	_____	_____	<u>FT</u>	_____
3.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 1382 makes various changes to statutes relating to the Department of Revenue (Department). The bill largely amends details related to the Department's rights and obligations before, during, and after an audit.

Regarding audits, the bill:

- Clarifies activities the Department may engage in during the 60-day period without violating the statute or receiving a waiver from the taxpayer;
- Excludes from litigation documents not submitted during an audit;
- Provides that in certain situations the failure of a taxpayer to provide documents creates a presumption that the resulting proposed final agency action by the Department is correct;
- Amends situations where the Department may serve subpoenas;
- Revises several situations where the time limit to complete an audit is tolled;
- Allows the Department to immediately suspend a dealer's resale certificate privilege in audits related to the sale of alcoholic beverages;
- Allows the Department to reopen a final assessment for the purpose of adjusting liability under certain circumstances;
- Authorizes the Department to include all taxes, penalties, interest, costs, and fees authorized by law in a garnishment or levy; and
- Provides rulemaking and emergency rulemaking authority.

The bill also makes a quantity of changes including clarifications, corrections, deletions of obsolete language, and cross reference corrections.

Except as otherwise provided by the bill, the bill takes effect July 1, 2022.

## II. Present Situation:

The present situation for each issue is described below in Section III, Effect of Proposed Changes.

## III. Effect of Proposed Changes:

### Pre-Audit Preparation

*Present Situation:* The Department of Revenue (Department) is required to provide notification to a taxpayer of an audit at least 60 days before the audit begins.<sup>1</sup> This 60-day period gives the taxpayer time to gather and prepare records, meet with their accountant, or secure the assistance of a professional. Some practitioners have argued that the Department can have no contact with the taxpayer during this 60-day period, even to answer questions asked by the taxpayer. It has also been argued that the Department must refrain from reviewing its own records or records voluntarily provided by the taxpayer prior to the end of the 60-day period or preparing internally for the audit.

*Proposed Changes:* **Section 4** creates s. 202.34(4)(f), F.S., to clarify activities the Department may engage in during the 60-day period without violating the statute or receiving a waiver from the taxpayer. The bill provides that the Department may:

- Confirm receipt of the notification of intent to audit;
- Answer any questions raised by the taxpayer or taxpayer representative;
- Confirm date and location of the audit;
- Confirm the way the taxpayer would like to provide records;
- Discuss the scope of the audit;
- Review records voluntarily provided by the taxpayer; and
- Review records already in the Department's possession.

If the taxpayer believes the Department has prematurely commenced the audit, the taxpayer must object in writing to the Department before the issuance of an assessment or else the objection is waived. If it is determined the audit was prematurely commenced, the tolling period provided for in s. 213.345, F.S., is considered lifted for the number of days equal to the difference between the date of premature commencement of audit and the 61st day after the date of the Department's notice of intent to audit.

The bill provides that the Department may adopt rules to administer s. 202.34, F.S.

### Exclusion of Records in Litigation

*Present Situation:* Current law provides that a taxpayer may contest the legality of any assessment or denial of any refund of tax, fee, surcharge, permit, interest, or penalty under the Department's purview by filing an action in circuit court, or alternatively, the taxpayer may file a petition under the applicable provisions of ch. 120, F.S.<sup>2</sup>

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<sup>1</sup> Section 202.34, F.S.

<sup>2</sup> Section 72.011(1), F.S.

Taxpayers who do not provide records during an audit as required by law are subject to the Department issuing an estimated assessment. In litigation, some taxpayers will selectively provide records to challenge the estimated assessment even though the estimate was created because of the taxpayer's own willful non-compliance with records laws.

*Effect of the Bill:* **Section 1** creates s. 72.011(1)(c), F.S., which provides that a taxpayer may not submit records pertaining to an assessment or refund claim as evidence in any proceeding under s. 72.011, F.S., if those records were available to, or required to be kept by, the taxpayer and were not timely provided to the Department when requested during the audit or protest period and before submission of a petition for hearing pursuant to ch. 120, F.S., or the filing of an action under s. 72.011(1)(a), F.S.

### **Documentary Stamp Tax Consideration Determination**

*Present Situation:* Many real property transactions include the transfer of tangible personal property. The parties to a transaction typically pay documentary stamp tax on the full consideration at the time of transfer unless the consideration attributable to tangible personal property is specifically agreed to at the time of transfer. In some cases one or both parties will seek a refund of tax paid on the total consideration arguing without contemporaneous documentation that a portion of the consideration was paid for tangible personal property. In a recent case the court ruled in the Department's favor upholding the refund denial on the basis that the taxpayer failed to establish via evidence that the consideration upon which the taxes were paid was not the actual consideration given in exchange for the real property.<sup>3</sup>

*Proposed Changes:* **Section 3** amends s. 201.02, F.S., consistent with the court's ruling and decisions from other jurisdictions, to clarify existing law that the parties to any document evidencing the transfer of real property shall establish the consideration for the real property before the transfer or the delivery of any document evidencing the transfer of the real property.

The bill directs the Department to adopt rules governing the implementation and operation of s. 201.02, F.S.

### **Delivery of Administrative Subpoenas and Extension of Tolling**

*Present Situation:* The Department has the statutory authority to issue an "administrative subpoena" to compel production of records and documents when taxpayers refuse to provide books and records, despite the legal requirement to do so. However, this tool is rarely used because a contest of the administrative subpoena in circuit court will cause the Department to miss other statutory deadlines and may run out the statute of limitations on the audit assessment.

Instead, the Department uses its authority to issue an estimated assessment which results in the use of additional resources for both the taxpayer and the Department in resolving disputed issues.

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<sup>3</sup> 1701 Collins Miami Owner, LLC, v. Dept of Revenue, 321 So.3d 875 (Fla. 1 DCA 2021).

*Proposed Change:* **Section 5** amends s. 202.36(4)(a), F.S., to provide that the failure of a taxpayer to provide documents available to, or required to be kept by, the taxpayer and requested by a subpoena issued under s. 202.36, F.S., creates a presumption that the resulting proposed final agency action by the Department, as to the requested documents, is correct and that the requested documents not produced by the taxpayer would be adverse to the taxpayer's position as to the proposed final agency action. The Department may create estimates for purposes of assessment if a taxpayer fails to provide documents requested by a subpoena issued under s. 202.36, F.S. The presumption and authority to create estimates under s. 202.36(4)(a), F.S., are not triggered merely because a taxpayer or its representative requests a conference to negotiate the production of a sample of records demanded by a subpoena.

**Section 6** amends Section 206.14(4), F.S., to provide that the failure of a taxpayer to provide documents available to, or required to be kept by, the taxpayer and requested by a subpoena issued under s. 206.14, F.S., creates a presumption that the resulting proposed final agency action by the Department, as to the requested documents, is correct and that the requested documents not produced by the taxpayer would be adverse to the taxpayer's position as to the proposed final agency action. The Department may create estimates for purposes of assessment if a taxpayer fails to provide documents requested by a subpoena issued under s. 206.14, F.S.

**Section 8** amends s. 211.125(3)(b)3., F.S., to provide that the failure of a taxpayer to provide documents available to, or required to be kept by, the taxpayer and requested by a subpoena issued under s. 211.125, F.S., creates a presumption that the resulting proposed final agency action by the Department, as to the requested documents, is correct and that the requested documents not produced by the taxpayer would be adverse to the taxpayer's position as to the proposed final agency action. The Department may create estimates for purposes of assessment if a taxpayer fails to provide documents requested by a subpoena issued under s. 211.125, F.S.

**Section 12** amends s. 212.14(7)(a), F.S., to provide that the failure of a taxpayer to provide documents available to, or required to be kept by, the taxpayer and requested by a subpoena issued under s. 212.14, F.S., creates a presumption that the resulting proposed final agency action by the Department, as to the requested documents, is correct and that the requested documents not produced by the taxpayer would be adverse to the taxpayer's position as to the proposed final agency action. The Department may create estimates for purposes of assessment if a taxpayer fails to provide documents requested by a subpoena issued under s. 212.14, F.S. The presumption and authority to create estimates under s. 212.14(7)(a), F.S., are not triggered merely because a taxpayer or its representative requests a conference to negotiate the production of a sample of records demanded by a subpoena.

**Section 20** amends s. 220.735(4), F.S., to provide that the failure of a taxpayer to provide documents available to, or required to be kept by, the taxpayer and requested by a subpoena issued under s. 220.735, F.S., creates a presumption that the resulting proposed final agency action by the Department, as to the requested documents, is correct and that the requested documents not produced by the taxpayer would be adverse to the taxpayer's position as to the proposed final agency action. The Department may create estimates for purposes of assessment if a taxpayer fails to provide documents requested by a subpoena issued under s. 220.735, F.S.

*Present Situation:* For the purpose of administering and enforcing the provisions of the revenue laws of this state, the Department's Executive Director, or any of his or her assistants designated in writing by the Executive Director, shall be authorized to serve subpoenas and subpoenas duces tecum issued by the state attorney relating to investigations concerning the taxes enumerated in s. 213.05, F.S.<sup>4</sup>

*Proposed Change:* **Section 13** creates s. 213.051(2), F.S. to provide that in addition to the procedures for service prescribed by ch. 48, F.S., the department may serve subpoenas it issues pursuant to ss. 202.36, 206.14, 211.125, 212.14, and 220.735, F.S., upon any business registered with the Department at the address on file with the Department if it received correspondence from the business from that address within 30 days after issuance of the subpoena or if the address is listed with the Department of State Division of Corporations as a principal or business address. If a business' address is not in this state, service is made upon proof of delivery by registered mail or under the notice provisions of s. 213.0537, F.S.

*Present Situation:* The statute of limitations for assessment and refund purposes is tolled for a period of 1 year if the Department has issued a notice of intent to conduct an audit or investigation of a taxpayer's account within the applicable period of time provided by ss. 95.091(3) or 215.26(2), F.S.

*Proposed Changes:* **Section 17** amends s. 213.345, F.S., to provide that the 1-year period is tolled upon receipt of written objections to the subpoena and for the entire pendency of any action that seeks an order to enforce compliance with or to challenge any subpoena issued by the Department compelling the attendance and testimony of witnesses and the production of books, records, written materials, and electronically recorded information.

The bill further provides that if the Department issues a notice explaining its audit findings under s. 213.34(2)(a), F.S., based on an estimate because the taxpayer has failed or refuses to provide records, the audit will be deemed to have commenced for purposes of s. 213.345, F.S. In the event the Department issues an assessment beyond the tolling period, the assessment will be considered late and the assessment shall be reduced by the amount of those taxes, penalties, and interest for reporting periods outside of the limitations period, as modified by any other tolling or extension provisions.

### **Tolling Periods, Exit Conferences, and Automatic Repayment of Overpayments**

*Present Situation:* The Department is required to issue an assessment capable of becoming final 60 days prior to the end of the tolling of the audit period. The Department's rules provide taxpayers with a notice prior to the issuance of the Notice of Proposed Assessment and 30 days to request a conference with the auditor to resolve as many issues as possible before the taxpayer must take more formal actions to contest the assessment. Additional documentation is often provided during this period resulting in revisions to the liability. The statute does not require this pre-notice and does not allow for an extension of the tolling of the statute of limitations during this process.

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<sup>4</sup> Section 213.051, F.S.

A District court decision held that an assessment was untimely where the assessment was not issued 60 days prior to the expiration of an extended statute of limitations. This decision is inconsistent with the operation of other statutes controlling application of the statute of limitations on the audit process and creates an inconsistency with assessments issued without an extension. The confusion makes it less likely for the Department to engage in extensions at the request of taxpayers and may result in less opportunity for taxpayers to resolve issues in the field.

When a compliance audit results in an overpayment, credit or refund, except for corporate income/franchise tax (Ch. 220, F.S.), the taxpayer is required to complete an Application for Refund before the refund can be issued by the Department.

*Proposed Changes:* **Section 16** amends s. 213.34(2), F.S., to provide that during the course of an audit, but before the issuance of an assessment other than a jeopardy assessment, the Department shall issue to the taxpayer a notice explaining the audit findings. No later than 14 days after the issuance of the notice, the taxpayer may request in writing an exit conference at a mutually agreeable date and time with the Department's audit staff to discuss the audit findings. The exit conference must be conducted no later than 30 days after the date of the notice, unless the taxpayer and the Department enter into an agreement to extend the audit tolling period pursuant to s. 213.23, F.S. The taxpayer shall be given an opportunity at or before the exit conference to provide additional information and documents to the Department to rebut the audit findings. Upon the mutual written agreement between the Department and the taxpayer to extend the audit tolling period pursuant to s. 213.23, F.S., the exit conference may be continued to allow the taxpayer additional time to provide information and documents to the Department. The Department shall review any information provided by the taxpayer and, if the Department revises the audit findings, a copy of the revised audit findings must be provided to the taxpayer. Such revision of the audit findings does not provide a right to any additional conference.

Section 16 also provides that if an exit conference is timely requested in writing, the limitations in s. 95.091(3), F.S., are tolled an additional 30 days. If the Department fails to offer a taxpayer the opportunity to hold an exit conference despite a timely written request, the limitations period in s. 95.091(3), F.S., may not be tolled for the additional 30 days. If the assessment is issued outside of the limitations period, the assessment must be reduced by the amount of those taxes, penalties, and interest for reporting periods outside of the limitations period, as modified by any other tolling or extension provisions.

If a request for an exit conference is not timely made, the right to a conference is waived. A taxpayer may also affirmatively waive its right to an exit conference. Failure to hold an exit conference does not preclude the Department from issuing an assessment.

The Department may adopt rules to implement s. 213.34(2), F.S.

Section 16 finally creates s. 213.34(5), F.S., which provides that if, after offsetting the overpayment of any tax during an audit against a deficiency of any tax, penalty, or interest during the same audit period, the Department's audit finds that the tax paid is more than the correct amount, the Department must refund the overpayment that is within the applicable period provided by s. 215.26, F.S. Such action by the Department does not prevent a taxpayer from

challenging the amount of the refund pursuant to chs. 120 and 213, F.S., or applying for a refund of additional tax within the applicable period. This provision will eliminate the requirement for a taxpayer to submit a refund application to obtain a refund discovered as the result of a compliance audit.

### **Refusal to Give Records During Audit and Penalties**

*Present Situation:* Section 212.13(2), F.S., provides that dealers must maintain records as required by the Department for the reasonable administration of ch. 212, F.S. During sales tax audits by the Department, some dealers selling alcoholic beverages and tobacco advise Department auditors that they have no records as to purchases, sales, or tax collected for these regulated products. Florida tax and alcohol and beverage laws require dealers to maintain and produce certain records. Without records, the Department is unable to conduct the audit and must resort to estimating the dealer's compliance.

Pursuant to s. 212.13(5), F.S., the Department is required to provide notification to a taxpayer of an audit at least 60 days before the audit begins. This 60-day period gives the taxpayer time to gather and prepare records, meet with their accountant, or secure the assistance of a professional. Some practitioners have argued that the Department can have no contact with the taxpayer during this 60-day period, even to answer questions asked by the taxpayer. It has also been argued that the Department must refrain from reviewing its own records or records voluntarily provided by the taxpayer prior to the end of the 60-day period or preparing internally for the audit.

*Proposed Changes:* **Section 11** creates s. 212.13(2)(b), F.S., which will allow the Department to immediately suspend a dealer's privilege to hold a resale certificate and purchase products tax exempt for resale on 30 days' notice when a dealer asserts that they have no records or refuse to provide records related to their purchase and/or sale of alcoholic beverages and tobacco. The dealer would still be able to purchase non-alcohol and non-tobacco products and take a credit for taxes paid against sales tax collected and remitted on the resale of the products. The bill will also allow the Division of Alcoholic Beverages and Tobacco within the Department of Business and Professional Regulation to remove the dealer's license to sell these regulated products for failure to maintain required records. A dealer that has had its resale certificate suspended may apply to the Department within 30 days after the receipt of the notice of suspension for an administrative hearing pursuant to ch. 120, F.S.

Section 11 also creates s. 212.13(5)(f), F.S., to clarify activities the Department may engage in during the 60-day period without violating the statute or receiving a waiver from the taxpayer. The bill provides that the Department may:

- Confirm receipt of the notification of intent to audit,
- Answer any questions raised by the taxpayer or taxpayer representative,
- Confirm date and location of the audit,
- Confirm the way the taxpayer would like to provide records,
- Discuss the scope of the audit,
- Review records voluntarily provided by the taxpayer, and
- Review records already in the Department's possession.

If the taxpayer believes the Department has prematurely commenced the audit, the taxpayer must object in writing to the Department before the issuance of an assessment or else the objection is waived. If the Department agrees that the audit was prematurely commenced, or a judge, a hearing officer, or an administrative law judge so determines, the tolling period provided for in s. 213.345, F.S., is considered lifted for the number of days equal to the difference between the date of premature commencement of audit and the 61st day after the date of the Department's notice of intent to audit.

The bill provides that the Department may adopt rules to administer s. 212.13, F.S.

### **Informal Compromises and Reopening of Final Assessments**

*Present Situation:* Florida's tax laws require taxpayers to maintain and provide records related to tax compliance and to provide those records during audit. While there are no specific statutory penalties imposed solely for failure to keep and provide records, delinquency penalties may be imposed up to 50 percent of any tax due. Under s. 213.21(3)(a), F.S., the Department is required to compromise 25 percent of the delinquency penalty if the Department determines that compliance errors were due to reasonable cause and not willful negligence, willful neglect, or fraud. The Department has discretion to compromise the remaining 25 percent for the same reason. Without records, the Department is forced to estimate any potential liability, and a determination regarding reasonable cause and penalty compromise is nearly impossible.

Section 213.21, F.S., does not currently provide the Department with the authority to reopen a final assessment for purposes of adjusting or compromising the liability, other than to resolve the outstanding liability for collectability.

*Proposed Changes:* **Section 15** amends s. 213.21(3)(a), F.S., to provide that a taxpayer's liability for penalties under any of the chapters specified in s. 72.011(1), F.S., greater than 25 percent of the tax must be settled or compromised if the Department determines that the noncompliance is not due to willful negligence, willful neglect, or fraud. The bill creates a rebuttable presumption that a taxpayer's noncompliance is due to willful negligence, willful neglect, or fraud when adequate records as requested by the Department are not provided to the Department before the issuance of an assessment. In addition, a taxpayer's liability for penalties up to and including 25 percent of the tax may be settled or compromised if the Department determines that reasonable cause exists and the penalties greater than 25 percent of the tax were compromised because the noncompliance is not due to willful negligence, willful neglect, or fraud.

Section 15 also creates s. 213.21(11), F.S., to provide that following the expiration of time for a taxpayer to challenge an assessment as provided in s. 72.011, F.S., the Department may consider a request to settle or compromise any tax, interest, penalty, or other liability under s. 213.21, F.S., if the taxpayer demonstrates that the failure to initiate a timely challenge was due to a qualified event that directly impacted compliance with that section. For purposes of s. 213.21(11), F.S., a qualified event is limited to the occurrence of events during an audit or the expired protest period which were beyond the control of the taxpayer, including the death or life-threatening injury or illness of the taxpayer or an immediate family member of the taxpayer; the death or life-threatening injury or illness of the responsible party that controlled, managed, or directed the affected business entity; acts of war or terrorism; natural disasters; fire; or other



catastrophic loss. The Department may not consider a request received more than 180 days after the expiration of time allowed under s. 72.011, F.S.

The bill creates s. 213.21(12), F.S., to provide that any decision by the Department regarding a taxpayer's request to compromise or settle a liability under this s. 213.21, F.S., is not a final order subject to review under ch. 120, F.S.

### **Garnishment**

*Present Situation:* The Department has the authority to issue a levy upon credits, other personal property, or debts belonging to a delinquent taxpayer. Currently, s. 213.67, F.S., allows the Department to levy for any taxes, penalties, and interest. However, this section does not provide the Department with the authority to levy for fees (e.g., administrative collection processing fee (ACP fee), warrant filing fees, or any other fee or cost that might be enacted into the Florida Statutes), additional daily accrued interest, or the authority to issue notices to levy (garnishments) by electronic means. As a result, the Department typically continues with collection efforts for these additional fees after the initial levy is complete.

*Proposed Changes:* **Section 18** amends s. 213.67, F.S., to authorize the Department to include all taxes, penalties, interest, costs, and fees authorized by law to be included in a garnishment or levy, which has the effect of avoiding multiple collection efforts for additional amounts. The bill also allows the Department to deliver its notices of levy by electronic means, as requested by many financial institutions.

### **Rulemaking Proceedings and Litigation**

*Present Situation:* Current law provides certain requirements pursuant to a taxpayer contesting an assessment or denial of refund by filing a petition under the applicable provisions of ch. 120, F.S.<sup>5</sup>

Current law provides for a stay of litigation challenging an agency statement as an unadopted rule upon the publication of a notice of rulemaking under s. 120.54(3), F.S., addressing the agency statement.<sup>6</sup> These provisions do not apply to emergency rulemaking and are not consistent with the procedures of Cabinet agencies.

*Proposed Changes:* **Section 2** amends s. 120.80(14)(b), F.S., to prohibit the use of records pertaining to an assessment or refund claim as evidence in any proceeding brought pursuant to Ch. 120, F.S., as authorized by s. 72.011(1), F.S., if the records were withheld from the Department after a formal demand for records or subpoena. The proposal does not prohibit the offering of records where the records were not available to the taxpayer at the time of the demand or subpoena, unless the records were required to be kept by the taxpayer and the taxpayer failed to keep the records.

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<sup>5</sup> Section 120.80(14)(b), F.S.

<sup>6</sup> Sections 120.56(4) and 120.595, F.S.

Section 2 also creates s. 120.80(19), F.S., which provides that under s. 120.56(4), F.S., challenging a statement of an agency headed by the Governor and Cabinet, upon notification to the administrative law judge provided before the final hearing that the agency has published a notice of rule development under s. 120.54(2), F.S., regarding the statement and for which a notice of adoption of an emergency rule under s. 120.54(4), F.S., was also published, such notice automatically operates as a stay of proceedings pending adoption of the statement as a rule or while the emergency rule remains in effect. Other provisions of law allow the challenge of the emergency rule on an expedited basis.

### **Rulemaking Authority and Emergency Rules**

*Present Situation:* The Department has received at least one final order from the Division of Administrative Hearings (DOAH) holding that the Department may not rely on a general grant of rulemaking authority to adopt a rule implementing other specific revenue laws. The First District Court of Appeal has ruled inconsistently on this issue. It appears that a grant of rulemaking authority and a specific law to be implemented has been confused by some courts to require a grant of specific rulemaking authority. Most revenue laws, especially those predating the administrative procedures act, do not contain specific rulemaking authority for each provision.

Current law provides emergency rulemaking authority for revenue laws effective less than 60 days after the end of the session in which the change enacted under s. 213.06(2), F.S. This provision is extremely helpful but fails to include many revenue laws, which typically have an October 1 effective date or changes with an “upon becoming law” effective date when the bill is not transferred to the Governor from the Legislature for a number of weeks or months, delaying the Department’s ability to begin rulemaking.

*Proposed Changes:* **Section 14** amends s. 213.06(2), F.S., to provide that the Executive Director of the Department may adopt emergency rules when the effective date of a legislative change occurs sooner than 120 days after the close of the legislative session in which enacted or after the governor approves or fails to veto the legislative change, whichever is later, and the change affects a tax rate or a collection or reporting procedure which affects a substantial number of dealers or persons subject to the tax change or procedure.

Emergency rules adopted under s. 213.06(2), F.S., are exempt from s. 120.54(4)(c), F.S., remain in effect for 6 months or until replaced by rules adopted under the nonemergency rulemaking procedures of the Administrative Procedure Act, and may be renewed during the pendency of procedures to adopt permanent rules addressing the subject of the emergency rules.

The bill also creates subsection 213.06(3), F.S., which provides that the grants of rulemaking authority in ss. 213.06(1) and (2), F.S., are sufficient to allow the Department to adopt rules implementing all revenue laws administered by the Department. Each revenue law administered by the Department is an enabling statute authorizing the Department to implement it, regardless of whether the enabling statute contains its own grant of rulemaking authority.

## **Pandemic Benefit Charges Clarification**

*Present Situation:* Employers file quarterly reports listing their employees and the wages paid to those employees. A tax rate is issued to each employer every year and the tax due is determined by multiplying that tax rate by the amount of taxable wages reported by the employer. Reemployment tax is only imposed on the first \$7,000 of wages. A new employer is assigned a tax rate of 2.7 percent. This tax rate is in effect for 8 chargeable quarters (approximately 2 ½ years), at which time the employer is eligible for an earned rate which can vary from the statutory minimum (1 percent) to the statutory maximum (5.4 percent) of taxable wages. One of the factors used in calculating the earned rate is the amount of reemployment assistance benefits paid to the employer's ex-employees.

In the 2021 Legislative Session, the rate calculation was amended by ch. 2021-2, L.O.F., to exclude benefit charges from the benefits paid during the period beginning April 1, 2020, and ending December 31, 2020, for rates effective through December 31, 2025. The amendment also included a provision that repealed this exclusion if the balance of the Unemployment Trust Fund exceeds \$4,071,519,600 on June 30 of any year, which could be interpreted to result in the inclusion of all benefit charges that were previously excluded, thereby substantially increasing tax rates.

*Proposed Changes:* **Section 21** amends s. 443.131, F.S., to clarify that the rate calculation “shall exclude any benefit that is excluded by the multipliers under subparagraph (b)2. and subparagraph 1. for rates effective January 1, 2021, through December 31, 2025, notwithstanding the repeal of subparagraph 5. as provided in ch. 2021-2, L.O.F.” Therefore, for the calculation of rates through 2025, Department will exclude benefit charges from the second through fourth quarters of 2020, even if the balance of the Unemployment Compensation Trust Fund exceeds \$4,071,519,600.

## **Federally Required Offset Program**

*Present Situation:* Federal law (42 U.S.C. s. 503, which incorporates 26 U.S.C. s. 6402) requires states to participate in the Treasury Offset Program (TOP) in order to receive grants for the administration of the reemployment assistance program. TOP requires states to send a list of delinquent employers to Treasury, which intercepts any federal income tax refund and sends it to the states to offset the employers' reemployment tax debt. Chapter 443, F.S., does not specifically give the Department the authority to participate in the intercept program nor does ch. 443, F.S., provide the legal authority to adopt any needed rules regarding the intercept program.

*Proposed Changes:* **Section 22** requires the Department to comply with the requirements of the Treasury Offset Program as it pertains to the recovery of unemployment compensation debts as required by the United States Department of Labor pursuant to 26 U.S.C. s. 6402. The Department is also given the authority to adopt rules to implement this provision.

## **State Fire Marshal Tax Percentages**

*Present Situation:* The Department works with the Office of Insurance Regulation (“Office”) to periodically update the rates for various lines of fire coverage. Some taxpayers pay rates based

on their own experience and avoid the published rate. The updating of these rates has not happened regularly. Out-of-date rates may cause taxpayers using the published rates to pay rates inconsistent with the intent of the law.

*Proposed Changes:* **Section 23** strikes language providing that when it is impractical, due to the nature of the business practices within the insurance industry, to determine the percentage of fire insurance contained within a line of insurance written by an insurer on risks located or resident in Florida, the Department may establish by rule such percentages for the industry and may also amend the percentages as the insurance industry changes its practices concerning the portion of fire insurance within a line of insurance.

Section 23 also establishes that annually before the due date of the first installment, the Department of Financial Services (“DFS”), with the assistance of the Office, shall make available in an electronic format or otherwise the percentage of fire insurance contained in lines of insurance for the industry for that taxable year. The percentages determined by the Office are exempt from ch. 120, F.S.

In the alternative, the bill provides that insurers may choose to use their own previous 5 years of loss experience or rate filings that have been approved by the Office instead of using the percentages provided by DFS. However, if an insurer chooses not to use the percentages provided by DFS, it must use the same alternative method for all lines of business, continue using the method for a minimum of 3 consecutive tax years, and attach documentation of the calculation and determination to the tax return.

### **Affidavit for Non-Resident Purchasers of Boats and Aircrafts**

*Current Situation:* Nonresident purchasers of boats and aircraft are required to sign an affidavit attesting that they have read the provisions of s. 212.05, F.S., in its entirety, in order to claim an exemption from sales tax. Section 212.05, F.S., is lengthy and includes many provisions that are not applicable to the purchaser of a boat or aircraft.

*Proposed Changes:* **Section 9** amends s. 212.05(1)(a)2.d., F.S., by removing the requirement that a purchaser attests to having read statutory provisions and replacing that language with the requirement that the nonresident purchaser complete an affidavit that affirms that the nonresident purchaser qualifies for exemption from sales tax pursuant to s. 212.05(1)(a)2., F.S., and attesting that the nonresident purchaser will provide the documentation required to substantiate the exemption claimed under s. 212.05(1)(a)2., F.S.

### **Building Materials**

*Present Situation:* The Florida Enterprise Zone Act (ss. 290.001-290.016, F.S.) was repealed December 31, 2015, by s. 11, Ch. 2005-287, L.O.F. Accordingly, s. 212.08(5)(g), F.S. (*Building materials used in the rehabilitation of real property located in an enterprise zone.*), has been rendered obsolete.

*Proposed Changes:* **Section 10** strikes s. 212.08(5)(g), F.S., and references to s. 212.08(5)(g), F.S., within s. 212.08, F.S.

### Methods of Accounting

*Present Situation:* Section 220.42(3), F.S., provides a taxpayer with an election to report any portion of its income for long-term contracts for Florida purposes on the percentage of completion method of accounting if the taxpayer reports any portion of its income for long-term contracts on the completed contract method of accounting for federal purposes. The completed contract method of accounting is obsolete and has not been available since 1989. Section 220.42(3), F.S., also references Treasury Regulation 1.451-3, which has been repurposed by the Internal Revenue Service.

*Proposed Changes:* **Section 19** strikes s. 220.42(3), F.S., and a reference to that subsection within s. 220.42(1), F.S.

### Pollutants Tax Registration Fees

*Present Situation:* An entity must pay a \$30 registration fee when requesting a pollutants tax license.<sup>7</sup> However, these registration fees were eliminated by ch. 2017-36, L.O.F.

*Proposed Change:* **Section 15** amends s. 206.9931, F.S., to remove obsolete language related to pollutants tax registration fees.

### Cross References and Deletions

**Section 24** replaces a reference to s. 212.08(5)(p), F.S., within s. 220.183(1)(c), F.S., with s. 212.08(5)(o), F.S., to conform with amendments made by s. 10 of the bill.

**Section 25** replaces a reference to s. 212.08(5)(j), F.S., within s. 288.0001(2)(c), F.S., with s. 212.08(5)(i), F.S., to conform with amendments made by s. 10 of the bill.

**Section 26** strikes a reference to s. 212.08(5)(h), F.S., within s. 290.0056(9)(a), F.S., to conform with amendments made by s. 10 of the bill.

**Section 27** strikes language referring to the sales tax exemption for building materials used in the rehabilitation of real property in enterprise zones and also replaces a reference to s. 212.08(5)(h), F.S., within s. 290.007, F.S., with s. 212.08(5)(g), F.S., to conform with amendments made by s. 10 of the bill.

**Section 28** replaces a reference to s. 290.007(8), F.S., within s. 377.809(4)(a), F.S., with s. 290.007(7), F.S., to conform with amendments made by s. 27 of the bill.

**Section 29** replaces a reference to s. 212.08(5)(p), F.S., within s. 624.5105(1)(c), F.S., with s. 212.08(5)(o), F.S., to conform with amendments made by s. 10 of the bill.

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<sup>7</sup> Section 206.9931, F.S.

**Section 30** replaces a reference to s. 212.08(5)(j), F.S., within s. 1011.94(1), F.S., with s. 212.08(5)(i), F.S., to conform with amendments made by s. 10 of the bill.

Except as otherwise provided in this act, this act shall take effect July 1, 2022.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

The Revenue Estimating Committee has analyzed the bill, determining the bill as a whole, excepting section 23, to have a positive indeterminate impact. Section 23, regarding the State Fire Marshall, was determined to have a negative impact.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of Revenue has analyzed the bill and expects implementation to cost less than \$25,000.<sup>8</sup>

#### **VI. Technical Deficiencies:**

None.

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<sup>8</sup> Department of Revenue, *2022 Agency Legislative Bill Analysis, SB 1382*, available at <http://abar.laspbs.state.fl.us/ABAR/Attachment.aspx?ID=33394> (last visited January 28, 2022).

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends sections 72.011, 120.80, 201.02, 202.34, 202.36, 206.14, 206.9931, 211.125, 212.05, 212.08, 212.13, 212.14, 213.051, 213.06, 213.21, 213.34, 213.345, 213.67, 220.42, 220.735, 443.131, 443.171, 624.515, 220.183, 288.0001, 290.0056, 290.007, 377.809, 624.5105, and 1011.94 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

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

None.

**B. Amendments:**

None.