HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1041 Tax Administration
SPONSOR(S): Appropriations Committee and Ways & Means Committee, Stevenson
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1382

FINAL HOUSE FLOOR ACTION: 105 **Y's** 10 **N's** **GOVERNOR'S ACTION:** Pending

SUMMARY ANALYSIS

CS/CS/HB 1041 passed the House on March 08, 2022, as CS/CS/SB 1382.

The bill makes the following tax administration changes:

Administrative Updates

- Authorizes the Department of Revenue (Department) to respond to contact initiated by taxpayers to discuss audits and provides the Department with the discretion to assist taxpayers by reopening a closed audit protest or refund denial case in specified circumstances.
- Requires the Department to provide a taxpayer with the ability to hold a conference to discuss audit findings, and extends the tolling period to issue an assessment if a taxpayer provides additional data during one of these conferences.
- Revises the period in which, and conditions under which, the Department may adopt emergency rules; provides clarifying language for existing rulemaking authority.
- Authorizes the Department to include additional daily accrued interests, costs, and fees authorized by law to be included in a garnishment levy; and to deliver notices of levy by electronic means.

Recordkeeping and Administrative Subpoenas

- Creates a rebuttable presumption that failure to provide adequate records when requested by the Department is evidence of willful neglect for purposes of applying or compromising penalties, and prohibits taxpayers from using such records in subsequent tax proceedings.
- Provides that failure of a taxpayer to provide documents requested by a subpoena allows the Department to estimate assessments, and creates a rebuttable presumption that the resulting assessment is correct and that the requested documents would be adverse to the taxpayer's position.
- Updates conditions and methods by which the Department may serve subpoenas on businesses registered with the Department; and extends the tolling of the statute of limitations upon receipt of written objections to a 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.
- Provides for an alcoholic beverage dealer's ability to hold a resale certificate to be suspended if the dealer is found to have substantial noncompliance with statutory recordkeeping requirements under specified circumstances.

Technical Changes

- Removes obsolete language for pollutant tax registration fee repealed in 2017; clarifies conditions for affidavit related to the sales tax exemption for certain nonresident purchasers of boats or aircraft; removes outdated references to "completed contract" method of accounting under an obsolete Treasury Regulation; requires publication of a list of dealers with suspended resale certificates; makes clarifying changes to ensure accurate calculation of Reemployment Tax rates; and requires the Department to participate in the US Treasury Offset Program, consistent with federal law.

The Revenue Estimating Conference estimated that the provisions of the bill will have a recurring zero/positive indeterminate impact on state and local government revenues, beginning in FY 2022-23.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2022.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Exclusion of Records from Chapter 120 Proceedings

Current Situation

Section 72.011(1)(a), F.S., provides that a taxpayer may contest the legality of any assessment or denial of refund of tax, fee, surcharge, permit, interest, or penalty provided for the revenue laws of the state. However, once an action has been initiated under s. 120.56, s. 120.565, s. 120.569, s. 120.57, or s. 120.80(14)(b), F.S., no action relating to the same subject matter may be filed by the taxpayer in circuit court, judicial review shall be exclusively limited to appellate review pursuant to s. 120.68, F.S.; and once an action has been initiated in circuit court, no action may be brought under ch. 120, F.S.

Effect of Proposed Changes

Sections 72.011(1)(c) and 120.80(14)(b), F.S., are amended to prohibit the use of records in civil or administrative litigation if the records were available to the taxpayer, or were supposed to be kept by the taxpayer, and the taxpayer withheld them from the Department of Revenue (Department) after formal demand for records or subpoena unless the taxpayer demonstrates to the court or presiding officer good cause for the taxpayer's failure to previously provide such records to the Department. Good cause may include, but is not limited to, circumstances where a taxpayer was unable to originally provide records under extraordinary circumstances as defined in s. 213.21(10)(d)2. The bill does not prohibit the offering of records where the records were not available 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.

Preparation for Audit

Current Situation

The Department has the authority to audit and examine the accounts, books, or records of all persons who are subject to the revenue laws of this state.[1] The Department states that it audits businesses to find out whether state taxes were collected, reported, and paid correctly. Although an audit is an enforcement tool to monitor and evaluate tax compliance, it can also be educational and promote voluntary compliance. During an audit, the Department can help businesses identify and correct bookkeeping problems that could cause additional tax liabilities.[2] Under current law, for communications services tax and sales tax the Department must wait 60 days after sending a notice of intent to audit before initiating the audit.[3]

Effect of Proposed Changes

The bill creates ss. 202.34(4)(f), and 212.13(5)(f), F.S., to clarify that the Department may, at any time, respond to contact initiated by a taxpayer to discuss an audit. Those provisions also provide that the Department may examine, at any time, documentation and other information voluntarily provided by the taxpayer, information it already has in its possession or other publically available information. Such examination does not commence an audit within 60 days of the notice of intent to conduct an audit.

Demand for Records/Subpoena/Tolling

Current Situation

[1] Section 213.34, F.S.
[2] What to Expect from a Florida Tax Audit, available at https://floridarevenue.com/taxes/compliance/Pages/audit.aspx (last visited March 14, 2022).
[3] Sections 202.34(4)(a) and 212.13(5)(a), F.S.

The Department has the authority to issue an administrative subpoena when a taxpayer refuses to provide records after other efforts have failed.[4] When a subpoena is issued, a taxpayer, and/or a recipient of the subpoena, have the right to respond with objections.[5] Service must be made according to the Florida Rules of Civil Procedure, and notice of a third party subpoena has to be provided to the taxpayer within three days of issuance.[6] Production can be due no sooner than within 20 days of service, while objections must be made within 14 days of service. If objections are served, the Department has to enforce the subpoena in circuit court, which can defeat the purpose of the subpoena by running out the one-year statute of limitations to issue an assessment[7].

Effect of Proposed Changes

The bill amends ss. 202.36, 206.14, 211.125, 212.14, and 220.735, 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 create a rebuttable presumption that the resulting proposed final agency action by the Department, as to the requested documents, is correct and that the requested documents would be adverse to the taxpayer's position as to the proposed final agency action. The Department may use estimates for purposes of assessment if a taxpayer fails to provide documents requested by a subpoena. The Department must inform the taxpayer of the reason for the estimate and the information and methodology used to derive the estimate.

The bill amends s. 213.345, F.S., to extend the tolling of the statute of limitations 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 issues by, the department to avoid running out the statute of limitations and allow the taxpayer time to challenge the subpoena or respond to the demand for records.

Pollutant Tax Registration Fee

Current Situation

Under current law, any person producing in, importing into, or causing to be imported into this state taxable pollutants for sale, use, or otherwise and who is not registered or licensed is required to register and become licensed. Such person must register as either a producer or importer of pollutants and is subject to all applicable registration and licensing provisions of ch. 206, F.S. Registrations are to be made prior to the first production or importation of pollutants for businesses created after July 1, 1986. Failure to timely register is a misdemeanor of the first degree. A registration fee of $30 was repealed in 2017.[8]

[4] See ss. 202.36, 206.14, 211.125, 212.14, and 220.735, F.S., for such authority for communications services tax, motor fuel taxes, severance taxes, sales tax and corporate income tax, respectively.
[5] Section 202.36(4)(a), F.S. and Section 212.14(7)(a), F.S.
[6] Florida Rules of Civil Procedure, available at https://www-media.floridabar.org/uploads/2021/11/Civil-Procedure-Rules-Updated-11-15-2021.pdf (last visited March 14, 2022).
[7] Section 213.345, F.S.
[8] Section 206.9931(1), F.S.

Effect of Proposed Change

The bill amends s. 206.9931(1), F.S., to remove obsolete language for the pollutant tax registration fee repealed in 2017.

Affidavit for Non-Resident Purchaser of Boat/Aircraft

Current Situation

Under current law, nonresident purchasers of boats/aircrafts qualify for a sales tax exemption, provided that certain application requirements are met.[9] One of the requirements is that nonresident purchasers of boats/aircrafts must provide the Department an original signed affidavit attesting that he or she read the provisions of s. 212.05, F.S. That statute provides for the exemption and includes the process to document the purchaser's qualification for the exemption. The statutory affidavit requirement does not require that the purchaser understand the exemption or documentation requirements, or that they attest they will comply with the provisions.

Effect of Proposed Change

The bill removes the requirement that nonresident purchasers attest to having read statutory provisions and replaces it with the requirement that nonresident purchasers complete an affidavit that affirms that the nonresident purchaser qualifies for the exemption from sales tax pursuant to s. 212.05(1)(a)2., F.S., and attests that the nonresident purchaser will provide the documentation necessary to substantiate its qualification for the exemption.

Liquor, Beer, and Wine Retailer's Failure to Collect Tax/Failure to Produce Records

Current 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.

Pursuant to s. 561.55, F.S., each manufacturer, distributor, broker, sales agent, importer, and exporter must keep a complete and accurate record and make reports showing the amount of:

- Beverages manufactured or sold within the state and to whom sold;
- Beverages imported from beyond the limits of the state and to whom sold;
- Beverages exported beyond the limits of the state, to whom sold, the place where sold, and the address of the person to whom sold.

Section 561.29, F.S., provides the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation (Division) the authority to revoke or suspend the license of any person holding a license under the Beverage Law under specified circumstances.

Effect of Proposed Change

The bill creates s. 212.13(2)(b), F.S., to require the Department to suspend a dealer's privilege to hold a resale certificate and purchase products tax exempt for resale under specified circumstances. If, during the course of an audit, the Department makes a formal demand for records and a dealer fails to comply with the demand, the Department may issue a written request for such records to the dealer, allowing the dealer an additional 20 days to provide the requested records or show reasonable cause why the records cannot be produced. If the dealer fails to produce the requested records or show reasonable cause as to why the records cannot be produced, the Department may issue a notice of intent to suspend the dealer's resale certificate. The dealer has 20 days to file a petition with the

[9] Section 212.05, F.S.

Department challenging the proposed action pursuant to s. 120.569, F.S. If the dealer fails to timely file a petition or the Department prevails in a proceeding challenging the notice, the Department shall suspend the resale certificate.

The bill specifies that if a dealer's resale certificate is suspended during the dealer's first sales and use tax audit before the Department, the dealer's failure to comply is also deemed sufficient cause under s. 561.29(1)(a), F.S., for the Division to suspend the dealer's license. The Department must promptly notify the dealer of such failure and notify the Division for appropriate action. The Division must lift the suspension of the license, and the Department must lift the suspension of the license of the resale certificate if the dealer either provides the necessary records to conduct the audit before the Department issues an estimated assessment; posts a bond with the Department in the amount of an estimated assessment to ensure payment of the assessment; or fully pays any tax, penalties, and interest owed.

The bill provides that if a dealer's resale certificate is suspended and the audit is not the dealer's first sales and use tax audit before the Department, such failure is sufficient cause under s. 561.29(1)(a) for the Division to revoke the dealer's license and the Department shall promptly notify the Division and the dealer of such failure for appropriate action by the Division.

The bill defines the following terms:

- “Dealer" means a dealer, as defined in s. 212.06(2), who is licensed under chapter 561.
- "Division" means the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation.
- "Transferor" means an entity or person, licensed under chapter 561, who sells and delivers alcoholic beverages to a dealer for purposes of resale.

The bill requires the Department to notify the Division when a dealer's resale certificate has been suspended and to publish a list of dealers whose resale certificates have been suspended. The bill requires the Division to include notice of the suspension in its license verification database, or provide a link to the Department's published list from the Division's license verification page.

The bill limits the time period for a transferor to accept orders from or deliver alcohol beverages to a dealer to no more than 7 days, inclusive of any Saturday, Sunday, or legal holiday, after the date the Department publishes the list identifying that the dealer's resale certificate has been suspended.

The bill provides that a transferor who sells alcoholic beverages to a dealer whose resale certificate has been suspended is not responsible for any tax, penalty, or interest due if the alcoholic beverages are delivered no more than 7 days, inclusive of any Saturday, Sunday, or legal holiday, after the date the Department publishes the list identifying that the dealer's resale certificates has been suspended.

Emergency Rule/ Rule Making Authority

Current Situation

Under current law, the executive director of the Department may adopt emergency rules pursuant to s. 120.54, F.S., on behalf of the department when the effective date of a legislative change occurs sooner than 60 days after the close of a legislative session in which enacted 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.[10]

Effect of Proposed Change

[10] Section 213.06(2), F.S.

The bill amends s. 213.06(2), F.S., to provide that emergency rulemaking is available if a legislative change occurs less than 120 days after the close of the legislative session in which enacted, or after the Governor approves or fails to veto the measure, whichever is later. This provision only applies when the change affects a tax rate, collection, or reporting procedure which affects a substantial number of dealers or persons subject to the tax change or procedure.

The revision also provides that emergency rules adopted under revised s. 212.06(2), F.S., are:

- Exempt from s. 120.54(4)(c), F.S. (i.e., 90 day expiration period; restricted renewal); and
- Shall 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 for no more than three additional six-month periods during the pendency of procedures to adopt permanent rules addressing the subject of the emergency rules.

Compromise of Penalties

Current Situation

Taxpayers are required to keep suitable books and records related to the revenue laws of the state.[11] Taxpayers must maintain those books and records until the expiration of the period for which an assessment could be made on transactions in the books and records.[12] The Department may inspect such books and records[13] at reasonable times and places.[14] While there are no specific statutory penalties solely for failure to keep and provide records, penalties may be imposed up to 50% of any tax due based on the delinquent nature of those taxes. The Department is required to compromise 25% 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% for the same reason.

Effect of Proposed Change

The bill amends s. 213.21(3)(a), F.S., to create a rebuttable presumption that a taxpayer's failure to provide adequate records as requested by the Department before the issuance of an assessment is evidence of willful negligence, willful neglect, or fraud. The presumption may be rebutted by showing reasonable cause why adequate records were not provided or were unavailable to the taxpayer.

Qualified Event Impacting Timely Challenge

Current Situation

The Department does not have the authority to reopen a final assessment or refund denial following the expiration of all taxpayer appeal rights under the law for purposes of adjusting or compromising the liability of a taxpayer.

Effect of Proposed Change

The bill creates ss. 213.21(11) and (12), F.S., to allow the Department to reopen a final assessment or refund denial for purposes of settling or compromising a liability or approving a denied refund request if the failure to initiate a timely challenge was the result of specified qualifying events which were beyond the control of the taxpayer. The bill requires that a request to reopen an assessment or refund denial for a qualifying event occur no later than 180 days from the date the assessment became final and also clarifies that any decision by the Department regarding a taxpayer's request to compromise or settle a liability under section is not a final order subject to review under ch. 120, F.S.

[11] Section 213.35, F.S.
[12] Id.
[13] Section 213.34, F.S.
[14] Section 213.025

Notice Prior to Issuing an Assessment and Extension of Tolling Provisions

Current Situation

Under current law, an audit must be completed within one year to avoid any loss of the audit period. This creates a disincentive to issue revised notices of audit changes and therefore provide multiple 30-day periods to request audit conferences. As a result, the Department's revisions are frequently provided in a Notice of Proposed Audit Assessment to avoid running of the limitations period. This in turn forces the taxpayer into the protest process if they believe there should be other changes.

Effect of Proposed Change

The bill provides a statutory requirement for the Department to provide a taxpayer with a conference within 30 days of a notice explaining the audit findings and additional conferences upon written request of the taxpayer. The bill provides the taxpayer with additional response time and the ability to provide additional information, and it extends the tolling period so taxpayers and the Department can ensure the audit is accurate based on the data available. The bill clarifies that tolling is terminated and the statute of limitations begins to run when the Department fails to issue a "proposed assessment" instead of a "final assessment" within the one-year audit period or any extension of that period. The bill also provides that an audit will be considered commenced upon the issuance of a notice of audit findings that is based on an estimate due to taxpayer noncompliance instead of the current practice of issuing a motive of proposed assessment. This allows the taxpayer to have the option of having a field conference prior to the issuance of a notice of proposed assessment.

Automatic Refund of Overpayments Revealed by Audit

Current Situation

Section 213.34(3), F.S., provides that the Department may correct by credit or refund any overpayment of tax, penalty, or interest revealed by an audit. However, taxpayers must file an application in order to request a refund.

Effect of Proposed Change

The bill creates s. 213.34(5), F.S., to eliminate the requirement for taxpayers to submit a refund application to obtain a refund discovered as the result of a compliance audit.

Garnishment Notice

Current Situation

Section 213.67, F.S., provides the statutory framework for the Department's garnishment authority. This includes the authority to issue a levy upon credits, other personal property, or debts belonging to a delinquent taxpayer for any taxes, penalties, and interest owed. Under current law, the levy does not include additional daily interest accrued after the date of the levy, or the authority to issue notice to levy notices by electronic means.

Effect of Proposed Change

The bill amends s. 213.67, F.S., to authorize the Department to include all additional daily accrued interests, costs, and fees authorized by law to be included in garnishment levy. The bill allows the Department to deliver its notices of levy by electronic means.

Corporate Income Tax Methods of Accounting

Current Situation

Section 220.42, F.S., generally provides that taxpayers must use the same method of accounting for Florida corporate income taxes as they do for federal corporate income taxes. The only statutory exception is found in subsection (3), and relates to a taxpayer using a specific type of accounting under a Treasury Regulation that is now obsolete.

Section 220.42(3), F.S. refers to the "completed contract" method of accounting under Treasury Regulation 1.451-3(b)(1) and (2). That Treasury Regulation allowed certain taxpayers to report income and expenses related to a contract based on the year in which the contract was either completed [(b)(1)] or based on the percentage of the contract which was completed in that year [(b)(2)]. Section 220.42(3), F.S., provides that a taxpayer who used the completed contract method under Treasury Regulation 1.451-3(b)(1) for federal purposes has the option to use the percentage complete contract method under Treasury Regulation 1.451-3(b)(2) if requested in the taxpayer's first filing year. Those specific federal regulations have not been in effect since 1989, so no taxpayer is able to make such election under current Florida law, and has not been able to do so for more than 30 years.

Effect of Proposed Change

The bill amends s. 220.42, F.S., to remove outdated references to the "completed contract" method of accounting found in former Treasury Regulation 1.451-3(b). Taxpayers will continue to use the same federal and Florida methods of accounting for corporate income tax purposes.

Pandemic Benefit Charges Clarification

Current Situation

In the 2021 Legislative Session, to mitigate significant increases in reemployment tax rates for Florida businesses, the Legislature amended ch. 443, F.S., to remove benefit charges incurred during certain months heavily impacted by the pandemic from the 2020 rate calculation.[15] The legislation provided that if the balance of the Unemployment Compensation Trust Fund (UCTF) on June 30 of any year exceeds $4,071,519,600, certain rate adjustments for the years 2023-2025 contained in ch. 2021-2, L.O.F., are repealed. The rate adjustments, in part, exclude any benefit charges from the 2nd, 3rd, and 4th quarters of 2020. If the UCTF reaches the statutory threshold much earlier than currently

[15] Chapter 2021-2, L.O.F.

forecasted, it is possible that a strict reading of the statute would result in the unintended inclusion of all benefit charges from the 2nd, 3rd, and 4th quarters of 2020 in an employer's rate calculations.

Effect of Proposed Change

The bill amends s. 443.131, F.S., to clarify the 2020 benefit charges excluded from the 2021 and 2022 rate calculation are permanently excluded from future calculations regardless of trust fund balance.

Federally Required Offset Authority

Current 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 (unemployment) assistance program. In federal fiscal year 2020-21, TOP recovered more than $4.5 billion in federal and state delinquent debts.[16] TOP requires states to send a list of employers with reemployment tax delinquencies to the Department of Treasury, which may intercept any federal income tax refund and send it to the states to offset the employer's reemployment tax liability. Chapter 443, F.S., does not specifically give the Department the authority to participate in the TOP, nor does it provide authority for the Department to adopt any necessary rules regarding the program.

Effect of Proposed Change

The bill specifically requires the Department to comply with the requirements of the federal TOP program relating to the recovery of reemployment compensation debts which will allow the state to continue to receive grants for the administration of the state reemployment assistance program. The bill provides the Department with the authority to adopt rules to implement this provision.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The Revenue Estimating Conference estimated that the provisions of the bill will have a recurring zero/positive indeterminate impact on state government revenues.

2. Expenditures:

   The Department anticipates that it will incur less than $25,000 in expenditures and operational impacts.[17]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The Revenue Estimating Conference estimated that the provisions of the bill will have a recurring zero/positive indeterminate impact on local government revenues.

2. Expenditures:

[16] Treasury Offset Program, available at https://www.fiscal.treasury.gov/TOP/ (last visited March 14, 2022).
[17] Department of Revenue Agency Legislative Bill Analysis, HB 1041, dated January 18, 2022.

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.