

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB FTC 12-02 General Tax Administration

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

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Finance & Tax Committee	21 Y, 0 N	Wilson	Langston

### SUMMARY ANALYSIS

This bill contains the Department of Revenue's (Department) recommendations for general tax administration improvements. The bill includes numerous statutory changes that will reduce the burden on taxpayers, reduce the Department's costs, increase efficiency in tax administration, and improve enforcement of tax laws.

The bill:

- Clarifies the application of current criminal penalties regarding any person who willfully fails to collect a tax or fee, who makes a false or fraudulent return with willful intent, or who engages in acts that require a certificate of registration and "fails or refuses" to register or willfully fails to register after the Department provides notice.
- Provides that the Department can require individuals and entities seeking to obtain a dealer's certificate of registration to post a cash deposit, bond, or other security if that business will be operated at an identical location of a previous business that would have been required to post such security. This requirement can be waived if absence of tax liability or an arms-length transfer of the business can be demonstrated.
- Clarifies a provision requiring the clerks of the court to transmit all court-related collections electronically by the *10th* of the month immediately following the month in which the funds are collected to conform to a similar law changes made by the Legislature in 2010.
- Provides definitions for "automated sales suppression device" or "zappers" and "phantom-ware", and criminalizes the knowing sale, purchase, installation, transfer, or possession of such software or software devices that can be used to falsify the records of electronic cash registers and other point-of-sale systems.
- Clarifies the definition of "qualified capital expenditure" related to use in single sales factor apportionment.
- Provides the Department can use driver's license images for use in establishing positive identification for tax administration purposes.
- Establishes a requirement for employers to comply with all work records requested during an audit as a prerequisite to earn the lower, unemployment tax contribution rate. The bill further standardizes the interest rate provisions for unemployment tax and makes them the same rate as is applied to other taxes administered by the Department.

The 2012 Revenue Estimating Conference (REC) has reviewed the provisions of this bill. Several provisions are estimated to have positive, but indeterminate state and local revenue impacts. One provision is estimated by the REC to have a -\$0.1 million recurring impact on the Unemployment Compensation Trust Fund beginning in FY 2012-13.

The bill shall take effect on July 1, 2012, except as otherwise provided in the bill.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: pcb02a.FTC

DATE: 2/6/2012

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Section 1. Failure to Collect; Penalties**

###### Present situation

Provisions in s. 212.07(1)(b), F.S., provide that a resale must be in strict compliance with s. 212.18, F.S., and the rules and regulations of the Department. A dealer who makes a sale for resale that is not in strict compliance with 212.18, F.S., shall himself or herself be liable for and pay the tax due. Dealer guidelines for sales for resale are established and supported by rules of the Department. Section 212.07(3), F.S., establishes that any dealer who fails, neglects, or refuses to collect the tax is guilty of a first degree misdemeanor.

###### Proposed change

This bill amends s. 212.07(3), F.S., to clarify that a dealer who willfully fails to collect a tax or fee after receiving notice from the Department is liable for the uncollected tax or fee and subject to criminal penalties that are graduated based on the number of offenses and amount of taxes or fees that go uncollected. This section also provides that the Department may contact the dealer in violation by personal service, registered mail, or both. This section will become effective upon becoming law. This amended section is related to similar changes made in sections 2 & 4.

##### **Section 2. Failure to Collect; Penalties**

###### Present situation

Provisions in s. 212.12, F.S., establish rules regarding a person (dealer) who makes false or fraudulent returns and/or fails to register as a dealer. The Department will contact a person by written notice with a "failure to register" letter followed, if needed, by an intentional failure to collect letter. The provisions cited under s. 775.082, s. 775.083, and s. 775.084, F.S., provide the civil and criminal penalties imposed upon these violators.

###### Proposed change

This bill amends s. 212.12(d), F.S., to provide that a person who makes a false or fraudulent return with willful intent is liable for the uncollected taxes or fees and subject to criminal penalties that are graduated based on the number of offenses and amount of taxes or fees that go uncollected. This amended section is related to similar changes made in sections 1 & 4.

##### **Section 3. Security Requirements for New Registrations**

###### Present situation

Section 212.14(4), F.S., authorizes the Department to require a cash deposit, bond, or other security as a condition to a person obtaining or retaining a dealer's certificate of registration. Despite this requirement, some delinquent sales tax dealers are able to close down their businesses with outstanding tax liabilities and reopen under a new name, allowing the dealers to repeatedly fail to remit sales and use tax for successive businesses. Delinquent dealers can engage in this activity because the current provisions in s. 212.14(4), F.S., do not clearly apply to all of the individuals who were operating, or all who had an ownership interest in, the prior businesses.

###### Proposed change

This bill amends s. 212.14(4), F.S., to define which individuals or entities the Department can require to produce a cash deposit, bond, or other security. Included in this list of individuals and entities are not only those who had an ownership interest or a controlling interests in a business that would otherwise be liable for posting a cash deposit, bond, or other security, but those individuals and entities seeking to obtain a dealer's certificate of registration for a business that will be operated at an identical location of a previous business that would have otherwise been liable for posting a cash deposit, bond, or other

security. These requirements can be waived if absence of tax liability or an arms-length transfer of the business can be demonstrated. The bill further allows the Department to adopt rules necessary to administer this subsection.

#### **Section 4. Failure to Collect; Penalties**

##### Present situation

In s. 212.18(3)(b), F.S., guidelines are provided for persons who want to engage in and conduct business within the state as a dealer. The Department also grants certificates of registration for each place of business. The failure or refusal of any person, firm, co-partnership, or corporation to follow these rules is a first degree misdemeanor and is subject to injunctive proceedings as provided by law.

##### Proposed change

This bill amends s. 212.18(3)(c), F.S., to clarify that any person that engages in acts that require a certificate of registration and “fails or refuses” to register, commits a misdemeanor of the first degree. This bill also adds s. 212.18(3)(c)2., F.S., to provide that a person who willfully fails to register after the Department provides notice, commits a felony of the third degree, punishable as proscribed in law. This section further provides that the Department shall give written notice of the duty to register to the person through registered mail, personal service or both. This section will become effective upon becoming a law. This amended section is related to similar changes made in sections 1 & 2.

#### **Section 5. Electronic Remittance and Distribution of Funds by the Clerk of Courts**

##### Present situation

In 2010, the Legislature passed ch. 2010-162, L.O.F., that changed the remittance date for funds collected by the clerks of the court from the 20th to the 10th day of the month immediately following the month in which the funds are collected. A conforming provision in s. 213.13, F.S., regarding electronic remittance was not updated after the law change.

##### Proposed change

This bill amends s. 213.13(5), F.S., to require the clerks of the court to transmit all court-related collections electronically by the 10th of the month immediately following the month in which the funds are collected. This section is effective upon becoming a law and will apply retroactively to July 1, 2010.

#### **Section 6. Automated Sales Suppression Devices or “Zappers”**

##### Present situation

The Department has identified a practice of retailers using automated sales suppression software programs (“zappers”) and/or “phantom-ware” to falsify the records of electronic cash registers and other point-of-sale systems. In effect, the technologies allow dealers to create a fraudulent, virtual second set of books by which the dealers are able to evade state and federal sales taxes.

##### Proposed change

The bill creates s. 213.295, F.S., defines zappers and phantom-ware, and criminalizes the knowing sale, purchase, installation, transfer, or possession of phantom-ware in this state. This section provides that any person in violation of this section shall be guilty of a felony of the third degree and shall be liable for all taxes, fees, penalties, and interest due to the state; the dealer shall also forfeit to the state all profits associated with the sale or use of the zappers or phantom-ware. Finally, the bill classifies zappers and phantom-ware as contraband articles under s. 932.701-932.706, F.S., the Florida Contraband Act. This section will become effective upon becoming a law.

#### **Section 7. Single Sales Factor Apportionment**

##### Present situation

In 2011, the Legislature passed ch. 2011-76, L.O.F., which provided that corporations making \$250 million of qualified capital expenditures within a two year period may apply to Department of Economic

Opportunity (formerly the Office of Tourism, Trade, & Economic Development) for approval to use single sales factor apportionment for corporate income tax purposes.

Currently, s. 220.153(1), F.S., defines “qualified capital expenditures” as expenditures in this state for purposes substantially related to a business's production or sale of goods or services for funding the acquisition of additional real property (land, buildings, including appurtenances, fixtures and fixed equipment, structures, etc.), including additions, replacements, major repairs, and renovations to real property which materially extend its useful life or materially improve or change its functional use and including furniture and equipment necessary to furnish and operate a new or improved facility.

However, expenditures for passive investment are excluded from this definition. The current language regarding this exclusion also refers to “investment intended for the accumulation of reserves or the realization of profit for distribution to any person holding an ownership interest in the business.” This language is unclear as to its meaning. If read literally it could be interpreted to exclude any investment made for “the realization of profit for distribution to any person holding an ownership interest in the business,” which appears contrary to the purpose of most businesses and of the tax code, which is directed at taxable, for-profit entities.

#### Proposed change

The bill amends 220.153(1), F.S., to remove the unclear and seemingly contradictory language related to the definition of “qualified capital expenditure” related to use in single sales factor apportionment.

### **Section 8. Identity Confirmation; Interagency Agreements**

#### Present situation

Currently, Department staff during an audit does not have a way to verify the identity of a business owner prior to visiting a business. In some cases, Department staff cannot be sure that the person with whom they are working during a field visit is the business owner. Under s. 322.142, F.S., the Department of Highway Safety and Motor Vehicles (DHSMV) maintains a file of the digital images and signatures of driver's license holders. Currently, these DHSMV records can be shared with the Department through an interagency agreement for child support enforcement purposes but not for other uses.

#### Proposed change

The bill amends s. 322.142, F.S., to allow the Department to use driver's license images for use in establishing positive identification for tax administration purposes.

### **Section 9. Standard Rate for Non-Compliance with Audit Record Requests; Unemployment Tax**

#### Present situation

Florida law provides a standard unemployment tax rate, and allows many employers to earn a lower rate if they meet certain compliance conditions set forth in s. 443.131(3)(h), F.S. However, under the current requirements to meet the compliance standards, it does not explicitly state that the taxpayer must comply with records requests to qualify for the reduced tax rate pursuant to s. 443.171(5), F.S.

#### Proposed change

This bill amends s. 443.131, F.S., to require an employer to comply with records requests as a prerequisite for that employer to earn the lower, unemployment tax contribution rate. In order to receive the lower contribution rate, the employer must produce all work records requested during an audit by the Department of Economic Opportunity or the state agency providing tax collection services pursuant to s. 443.171(5), F.S. This section will become effective upon becoming a law.

## **Section 10. Floating Interest Rate; Unemployment Tax**

### Present situation

Section 443.141(1)(a), F.S., states that unemployment compensation tax contributions or reimbursements that are unpaid on the due date bear an interest rate of 1 percent per month (an effective rate of 12 percent annually). Other payment deficiencies on taxes that the Department administers have an interest rate of prime plus 4 percent but not to exceed an effective rate of 1 percent per month, adjusted twice per year.

### Proposed change

This bill amends s. 443.141(1)(a), F.S., to adjust the interest rate applied to contributions or reimbursements unpaid on the date due. The current interest rate of 1 percent will carry on through December 31, 2012, and beginning January 1, 2013, the interest rate shall be calculated in accordance with s. 213.235, F.S., except that the rate of interest shall never be greater than 1 percent per month. This bill would reduce the interest rate provisions for unemployment tax and make them the same rate as is applied to other taxes administered by the Department. This section will become effective January 1, 2013.

## **Section 11. Effective Date**

This act shall take effect July 1, 2012, except as expressly provided within the bill.

## **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 212.07(3), F.S., clarifying when a dealer is liable for failing to collect a tax or fee and imposing criminal penalties for such failure.

**Section 2:** Amends s. 212.12, F.S., providing a tax liability and restating the criminal penalties for dealers who willfully make false or fraudulent tax returns.

**Section 3:** Amends s. 212.14(4), F.S., defining which individuals or entities the Department can require to produce a cash deposit, bond, or other security as a condition to a person obtaining a dealer's certificate of registration.

**Section 4:** Amends s. 212.18(3)(c), F.S., and adds s. 212.18(3)(c)2., F.S., imposing criminal penalties on a person for willfully failing to register as a dealer after the Department provides notice by personal service, mail, or both of that person's duty to register as a dealer.

**Section 5:** Amends s. 213.13(5), F.S., changing the date by which the clerks of the court shall transmit all court-related collections.

**Section 6:** Creates s. 213.295, F.S., defining sales suppression software (or "zappers") and phantomware and imposing criminal liability for willfully and knowingly selling, purchasing, installing, transferring, or possessing such sales suppression software or phantomware.

**Section 7:** Amends 220.153(1), F.S., removing unclear language in the definition of "qualified capital investment expenditures" related to use in single sales factor apportionment.

**Section 8:** Amends s. 322.142, F.S., allowing the Department to use identifying information in DHSMV's licensee file for use in establishing positive identification for tax administration purposes.

**Section 9:** Amends s. 443.131, F.S., requiring the employer to produce all work records requested by the Department as a prerequisite for that employer earning a lower, preferential unemployment contribution rate.

**Section 10:** Amends s. 443.141(1)(a), F.S., adjusting the interest rate applied to contributions or reimbursements unpaid on the date due and capping that interest rate at 1 percent per month.

**Section 11:** This act shall take effect July 1, 2012, except as expressly provided within the bill.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See FISCAL COMMENTS.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See FISCAL COMMENTS.

2. Expenditures:

None.

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

This bill will reduce taxpayer expenses. These savings will be generated by reducing the interest rate applied to taxpayer unemployment tax contributions or reimbursements that go unpaid on the date they are due and makes it uniform to the interest rate that applied to other taxes administered by the Department.

### D. FISCAL COMMENTS:

The 2012 Revenue Estimating Conference (REC) has reviewed the provisions of this bill. Several provisions are estimated to have positive, but indeterminate state and local revenue impacts. One provision is estimated by the REC to have a -\$0.1 million recurring impact on the Unemployment Compensation Trust Fund beginning in FY 2012-13.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Section 3. The Department may adopt rules necessary to administer s. 212.14(4), F.S., related to requiring a cash deposit, bond, or other security as a condition to a person obtaining or retaining a dealer's certificate of registration.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**