

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.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1024

INTRODUCER: Commerce Committee, Senator Dean, and others

SUBJECT: Reimbursement of Federal Excise Taxes on Fuel

DATE: March 31, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hrdlicka</u>	<u>Cooper</u>	<u>CM</u>	Fav/CS
2.	<u>Treadwell</u>	<u>Maclure</u>	<u>JU</u>	Favorable
3.	_____	_____	<u>FT</u>	_____
4.	_____	_____	<u>GA</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill creates a new section of Florida law to address fuel supply contracts that require reimbursement of federal fuel excise taxes.

This bill allows a party who is required by contract to reimburse another party for federal fuel excise taxes imposed by federal law to exercise an option to make the reimbursement one business day before the tax is to be remitted to the Internal Revenue Service (IRS). The bill specifies that exercising the option does not relieve a party of an obligation to make reimbursement, but alters the timing of that payment.

This bill requires that notice of the exercise of the option be made in writing, and will not be effective for 30 days or the beginning of the other party's next federal excise tax quarter, whichever is later. The reimbursed party may require a security for the amount due and may request funds to be delivered by electronic transfer.

The bill applies to all contracts entered into after July 1, 2009, and all continuing contracts with no fixed expiration in effect on July 1, 2009. The bill does not apply to contracts of fixed expiration entered into prior to July 1, 2009.

The bill creates section 686.701, Florida Statutes.

II. Present Situation:

There are approximately 9,200 retail facilities in Florida that purchase fuel products subject to excise taxes.

Federal Fuel Excise Taxes

The federal excise tax is imposed on the removal, entry, or sale of fuel. Generally, when a distributor or retailer picks up the fuel at a terminal rack, the tax is imposed.¹ This is also known as “tax at the rack.” The tax is imposed solely upon certain entities, such as producers, and not on consuming buyers.²

Federal excise taxes are collected by the Internal Revenue Service (IRS) through the submission of payment with applicable forms, either electronically or on paper. Generally, semimonthly deposits of excise taxes are required. A semimonthly period is the first 15 days of a month (the first semimonthly period) or the 16th through the last day of a month (the second semimonthly period).³

Federal law establishes the federal excise tax upon taxable fuels.⁴ “Taxable fuel” is defined generally as gasoline, diesel fuel, and kerosene.⁵ Under 26 U.S.C. s. 4081, the applicable tax rates to fuel are:

- Gasoline, other than aviation gasoline, 18.3 cents per gallon (after September 30, 2011, 4.3 cents per gallon);
- Aviation gasoline, 19.3 cents per gallon (after March 31, 2009, 4.3 cents per gallon);
- Commercial aviation kerosene, 4.3 cents per gallon;
- All other aviation kerosene, 21.8 cents per gallon (after March 31, 2009, 4.3 cents per gallon); and
- Diesel fuel or kerosene, 24.3 cents per gallon (after September 30, 2011, 4.3 cents per gallon).

The Excise Summary Terminal Activity Reporting System (ExSTARS) is a fuel reporting system developed with the cooperation of the IRS, the U.S. Department of Transportation, states, and the motor fuel industry. It is designed to track the movement of fuel to and from approved terminals by electronically filed monthly returns (Fuel Transaction Reports) reflecting fuel quantity and type as it moves through the distribution chain. The Fuel Transaction Reports are filed by approved terminal operators and bulk carriers who report from an approved terminal with a Terminal Control Number. The Terminal Control Number (TCN)/Terminal Locations

¹ Internal Revenue Service, *Publication 510 Excise Taxes*, Part 1 (2008), available at <http://www.irs.gov/publications/p510/index.html> (last visited Mar. 24, 2009).

² *Gurley v. Rhoden*, 421 U.S. 200, 207-208 (1975).

³ Internal Revenue Service, *Publication 510 Excise Taxes*, Part 3 (2008), available at <http://www.irs.gov/publications/p510/index.html> (last visited Mar. 24, 2009).

⁴ 26 U.S.C. s. 4081.

⁵ 26 U.S.C. s. 4083.

Directory contains terminal control numbers and locations for IRS approved terminals. The Fuel Transaction Reports are compared to the information entered on Quarterly Federal Excise Tax returns.⁶

Florida Fuel Taxes

Section 213.05, F.S., authorizes the Florida Department of Revenue (DOR) to collect taxes pursuant to ch. 206, F.S., for motor and other fuel taxes. The DOR is not authorized or directed to collect federal excise taxes on motor or other fuels.

Chapter 206, F.S., directs how state and local taxes will be imposed and collected for fuel in Florida. Sales of motor fuel, diesel fuel, and aviation fuel are taxed under this chapter. On January 1, 2009, the overall Florida tax rates on motor fuel and diesel fuel increased by \$0.008. Florida law requires annual adjustments to the state fuel tax rates and the State Comprehensive Enhanced Transportation System (SCETS) tax rate, based on the National Consumer Price Index. The applicable taxes for 2009 are:⁷

- Motor fuel state tax increased from 15.6 cents per gallon to 16.1 cents per gallon;
- Diesel fuel state tax increased from 15.6 cents per gallon to 16.1 cents per gallon;
- Diesel fuel SCETS and local option tax rates increased from 13.4 cents per gallon to 13.7 cents per gallon statewide;
- Aviation fuel state tax remained at 6.9 cents per gallon;
- Terminal suppliers must collect a state fuel tax of \$0.161 at the loading rack and a minimal local option tax of \$0.106 on each gallon of gasoline sold to licensed wholesalers; and
- Wholesales must remit to DOR the local option tax on gasoline sold to retail dealers or end-users above the minimum \$0.106 collected by terminal suppliers.

In FY 2007-08, according to statistics from DOR, there were a total of 10,079,132,913.61 taxable gallons of fuel in Florida.⁸ Of that total, 8,440,146,629.33 gallons were motor fuel, and 1,638,986,284.28 gallons were diesel fuel.

Florida law allows, after obtaining written consent of the executive director of the department, for the Florida excise tax on motor fuels to be reimbursed from the wholesaler to the supplier no later than the last business day before the taxes are due to be remitted to DOR. Consent by the department is conditioned upon a wholesaler having a license currently in good standing and is subject to a bond required pursuant to s. 206.05(1), F.S.⁹

⁶ Internal Revenue Service, *Excise Summary Terminal Activity Reporting System (ExSTARS)*, available at <http://www.irs.gov/businesses/small/article/0,,id=177193,00.html> (last visited Mar. 24, 2009); Internal Revenue Service, *Motor Fuel Excise Tax EDI Guide*, available at <http://www.irs.gov/pub/irs-pdf/p3536.pdf> (last visited Mar. 24, 2009).

⁷ Florida Department of Revenue, *Fuel Taxes Adjusted Beginning January 1, 2009*, TIP 08B05-0 (Nov. 28, 2008), available at <https://taxlaw.state.fl.us/wordfiles/MSF%20TIP%2008B05-01.pdf> (last visited Mar. 24, 2009).

⁸ Florida Department of Revenue, *Fuel Tax Statistics for FY 08*, available at http://dor.myflorida.com/dor/taxes/fuel_tax.html (last visited Mar. 24, 2009).

⁹ Section 206.43(5), F.S.

Fuel Supply Contracts

The typical fuel supply contract details the quantities of fuel involved, the pricing mechanism, payment of taxes, the relevant fuel performance guarantees, and the contract's duration. Generally, the contract terms require payment of the state and federal tax when fuel is picked up at the rack or three to five days from that date.

III. Effect of Proposed Changes:

Section 1 creates s. 686.701, F.S., relating to fuel supply contracts that require reimbursement of federal excise taxes. This section allows a party who is required by a fuel supply contract to reimburse another party for federal fuel excise taxes imposed by 26 U.S.C. s. 4081 to exercise an option to make the reimbursement one business day before the day on which the tax is due to the Internal Revenue Service. The exercise of the option does not relieve a party of an obligation to make reimbursement but alters the timing of that payment permanently.

The reimbursing party must provide notice in writing to the reimbursed party of the intent to exercise the option provided by the new section. This notice shall state the effective date of the exercise of the option, but the effective date cannot be earlier than either 30 days after the notice or the beginning of the reimbursed party's next federal excise tax quarter, whichever is later. The reimbursed party may require security for the amount due in proportion to the amount the taxes represent compared to the security demanded on the contract as a whole and may request funds to be delivered by electronic transfer.

The bill applies to all contracts entered into or renewed after July 1, 2009, and all continuing contracts with no fixed expiration in effect on July 1, 2009. However, the bill does not apply to contracts of fixed expiration entered into prior to July 1, 2009.

Section 2 provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill may have the effect of rewriting certain fuel supply contracts by changing the terms under which federal excise taxes are reimbursed. Therefore, the bill could be

challenged as an unconstitutional impairment of an obligation of contract under article I, section 10 of the Florida Constitution. This provision provides, in relevant part, that “[n]o . . . law impairing the obligation of contracts shall be passed.” Courts are empowered to strike down laws that retroactively burden or alter contractual relations. Similarly, article I, section 10 of the United States Constitution also precludes laws impairing the obligation of contracts.

In *Pomponio v. Claridge of Pompano*, the Florida Supreme Court recognized that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid applications used by the United States Supreme Court.¹⁰ The court set forth several factors in balancing whether the state law has in fact operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court concluded that if there is minimal alteration of contractual obligations the inquiry can end at the first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the state legislation.¹¹ The factors to be considered are:

- Whether the law was enacted to deal with a broad, generalized economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive.¹²

The court in *United States Fidelity & Guaranty Co. v. Department of Insurance* reiterated the application of the method used in *Pomponio*.¹³ The court concluded that the method required a balancing of a person’s interest not to have his contracts impaired with the state’s interest in exercising its legitimate police power.¹⁴

The bill may change the terms of reimbursement of federal fuel excise taxes in certain fuel supply contracts. Although the bill does not apply to contracts with fixed expiration dates which were entered into prior to July 1, 2009, contracts with no fixed expiration date in effect on July 1, 2009, may be subject to a party exercising the option to make delayed reimbursement of federal excise taxes under the terms of the bill.

If challenged by a party to a fuel supply contract, the court’s determination of whether the law would unconstitutionally impair an existing contract would likely turn on its evaluation of whether changing the terms of reimbursement would be only a “minimal alteration” of the contract. Arguably, such a change to the terms of an existing fuel supply contract would not rise to the level of a “severe impairment” that would warrant further scrutiny because the reimbursed party would receive reimbursement of the tax,

¹⁰ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979).

¹¹ *Id.* at 779.

¹² *Id.*

¹³ *United States Fidelity & Guaranty Co. v. Department of Insurance*, 453 So. 2d 1355 (Fla. 1984).

¹⁴ *Id.*

just at a different time. Even if a court were to determine that a change in reimbursement terms constituted a “service impairment” of contractual rights, the law would likely survive further constitutional scrutiny because fuel excise taxes are already subject to state and federal regulation.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Parties to private fuel supply contracts will be affected differently depending on whether they are the reimbursing or the reimbursed party. Parties exercising the option will be able to retain their funds for a longer period of time prior to reimbursement. This would allow Florida retailers to keep this money longer. Parties subject to the option who are to be reimbursed will be required to wait to receive the funds until the day before the taxes are due to the Internal Revenue Service.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Commerce on March 17, 2008:

The committee substitute:

- Relocates the proposed statute from the sales tax chapter (ch. 212, F.S.) to ch. 686, F.S., which deals with sales, distribution, and franchise relationships; and
- Deletes a reference in the bill to a federal law that has been repealed.

B. Amendments:

None.