

Legislative Analysis



CONFORM STATE LAW TO MULTI-STATE STREAMLINED SALES AND USE TAX AGREEMENT

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House Bill 5554 without amendment
House Bill 5556 (Substitute H-2)
Sponsor: Rep. Steve Bieda

House Bill 5555 (Substitute H-1)
Sponsor: Rep. Paul Condino
Committee: Tax Policy

Complete to 1-23-08

A SUMMARY OF HOUSE BILLS 5554-5556 AS REPORTED FROM COMMITTEE

The bills would make a number of changes in the state's sales and use taxes, primarily to make state tax statutes conform to the streamlined sales and use tax agreement. This is the agreement that resulted from a multi-state effort to simplify and modernize sales and use tax collection and administration, with the aim of reducing the burden on sellers of collecting those taxes and increasing compliance with the taxes. This is considered particularly relevant to attempts to collect taxes on "remote" sales, such as sales by catalogue and Internet, and "leveling the playing field" between those sales and sales by "brick and mortar" main street retailers. Michigan is a member of the multi-state agreement.

Among other things, the bills would amend the definition of "sales price" to address consideration received by a seller from a third party (such as a manufacturer), for example to offset price reductions or discounts; provide a definition of "bundled transaction" for the telecommunications industry and delineate how bundled telecommunications services are to be treated; and provide a method of allocating delivery charges when both exempt and taxable property are involved in a shipment. The bills also specify that "certified service providers" are considered sellers for the purpose of providing them protections against tax liability in certain circumstances, and address other relief from tax liability. Other provisions deal with durable medical equipment, hearing aids, and motor vehicle and trailer leases. The bills provide numerous new and revised definitions, notably in the area of telecommunications.

House Bill 5554 would amend the Streamlined Sales and Use Tax Administration Act (MCL 205.825) to address the subject of "certified service providers." House Bill 5555 would amend the General Sales Tax Act (MCL 205.51 et al.). House Bill 5556 would amend the Use Tax Act (MCL 205.92). A detailed description of the bills follows. (Information in this summary is based on a Department of Treasury memorandum.)

House Bills 5555 and 5556 have many common features (since the sales and use taxes are companion taxes with many elements in common). House Bill 5556 has some unique provisions regarding telecommunications services; they will be described later.

Definition of "Sales Price" and "Purchase Price" (Consideration from Third parties)

The bills would add to the definition of "sales price" for sales tax purposes (HB 5555) and "purchase price" for use tax purposes (HB 5556) consideration received by the seller from third parties if all of the following conditions are met:

** The seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale.

** The seller has an obligation to pass the price reduction or discount through to the purchaser.

** The amount of consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser.

** And one of the following:

(1) The purchaser presents a coupon, certificate, or other documentation to the seller to claim a price reduction or discount where the coupon, etc. is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, etc. is presented.

(2) The purchaser identifies himself or herself to the seller as a member of a group or organization entitled to a price reduction or discount. A preferred customer card that is available to any patron does not constitute membership in a group or organization.

(3) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

Exclusion for Employee Discounts.

The terms "sales price" and "purchase price" would not include, beginning January 1, 2000, employee discounts that are reimbursed by a third party on sales of motor vehicles.

Delivery Charges.

If a shipment includes both exempt property and taxable property, the seller would allocate the delivery charge using one of the following methods:

(1) Multiply the delivery price by a fraction, the numerator of which is the total sales prices of the taxable property and the denominator of which is the total sales prices of all property in the shipment.

(2) Multiply the delivery price by a fraction, the numerator of which is the total weight of the taxable property and the denominator of which is the total weight of all property in the shipment.

Rewrite of exemption for sales of automobiles by charitable organizations.

Current statutory language in the General Sales Tax Act says, "a qualified organization could exclude from gross proceeds . . . the sale of an eligible automobile to a qualified recipient." House Bill 5555 would say instead, "the sale of an eligible automobile to a qualified recipient by a qualified organization . . . is exempt."

Durable Medical Equipment.

The bills would provide a definition of "durable medical equipment repair or replacement parts" as "all components or attachments used in conjunction with durable medical equipment." The "parts" term is currently contained within the definition of "durable medical equipment" but is not itself defined. Durable medical equipment is exempt from sales and use taxes (along with prosthetic devices and mobility enhancing equipment).

Hearing Aid Prescriptions.

Prosthetic devices are exempt from tax if "dispensed pursuant to a prescription." The bills would specify that "for a hearing aid, prescription includes an order, instruction, or direction of a hearing aid dealer or salesperson licensed under Article 13 of the Occupational Code." Currently the acts require prescriptions to be issued by "a licensed physician or other health professional," using definitions from the Insurance Code.

Blanket Exemption Certificates.

The acts allow a blanket exemption to cover exempt transactions (rather than a separate exemption certificate for each transaction); the exemptions last for up to four years. The bills would instead allow such blanket exemptions to continue indefinitely if there is a recurring business relationship between seller and purchaser. A recurring business relationship would exist when a period of not more than 12 months elapses between sales transactions.

Motor Vehicle and Trailer Leases.

The bills would amend the definition of "lease or rental" in the sales and use tax acts to include vehicle and trailer leases when the amount of consideration may be increased or decreased based on the amount realized upon the sale of the vehicle or trailer under the federal Internal Revenue Code. Reportedly, these transactions were inadvertently

excluded from the definition when the acts were amended in 2004 for streamline sales tax agreement purposes.

Definition of Manufacturer/Contractor.

House Bill 5556 would rewrite the provision that applies the use tax to manufacturers who affix their products to real estate; this would address what tax officials say was a 2004 drafting error that left the provision unclear.

Meals Eligible to be Purchased with Food Stamps (Clarification).

Currently, the sales and use tax acts both exempt meals "eligible to be purchased under the federal food stamp program." The bills instead would provide an exemption to meals "sold by a person exempt from the tax . . . that are eligible to be purchased under the federal food stamp program." This is said to avoid any reading of the acts that would exempt meals "eligible to be purchased" with food stamps even though the purchaser was paying cash and not eligible for food stamps. (Some fast food meals, for example, can be purchased under the food stamp program, according to the Department of Treasury.)

Direct Mail.

The bills would eliminate provisions that require a separate exemption form for direct mail exemptions; instead a standard exemption form would be used.

Exemptions from the Act.

Section 12 of the sales tax statute and Section 14b of the use tax statute specify what a seller must do when a purchaser claims an exemption: collect identifying information from the purchaser and the reason for the claiming the exemption, as well as maintain proper records of exempt transactions. A seller who complies is not liable for the tax if a purchaser improperly claims an exemption; the purchaser is.

Under the bills, a seller who obtains a fully completed exemption form or captures the relevant data elements within 120 days after the date of sale would not be liable for the tax. Further, if the seller has not obtained an exemption form or all relevant data elements, the seller could either prove that the transaction was not subject to tax by other means or obtain a fully completed exemption form from the purchaser by the later of (1) 120 days after a request by the Department of Treasury; (2) the date an assessment becomes final; (3) the denial of a claim for refund; (4) in the instance of a credit audit, the issuance of an audit determination letter or informal conference decision and order of determination; or (5) the date of a final order of the Court of Claims or the Michigan Tax Tribunal with respect to an assessment, order, or decision of the department.

The department also could allow a seller additional time to comply to substantiate the exemption.

Drop Shipments.

A sale that is part of a drop shipment is exempt if the taxpayer complies with certain requirements. The deliverer of the shipment must currently possess "a resale or exemption certificate or other written evidence of exemption authorized by another state." The bills would add "or any other acceptable information evidencing qualification for a resale exemption." This would expand the documentation a drop-shipper could use to claim an exemption, according to the Department of Treasury.

Certified Service Providers.

House Bill 5554 would amend the Streamlined Sales and Use Tax Administration Act to address the liability of a "certified service provider." This term describes an entity that is an agent of a seller that collects and remits sales tax under a contract with the seller. The bill would specify that a certified service provider or a seller using a certified automated system is relieved from liability if it relied on the Department of Treasury's determination that the software program submitted for certification accurately reflected the taxability of the product categories included in the software program. The relief from liability would not apply if the certified service provider or seller using an automated system has incorrectly classified an item or transaction into a product category of the system.

Under House Bill 5554 and House Bill 5555, a certified service provider would be considered a seller under Section 12 of the sales tax statute, which provides relief from liability for sales tax under certain circumstances.

Liability Relief for Purchasers.

Under House Bill 5556, beginning January 1, 2009, a consumer would be relieved from liability, including liability for tax, penalty, and interest, for having failed to pay the correct amount of tax when (1) the consumer's seller or seller's certified service provider relied on erroneous data contained in the taxability matrix; and (2) when the consumer relied on erroneous data in the taxability matrix published by the Department of Treasury. This protection is already provided sellers and certified service providers under Section 19 of the Streamlined Sales and Use Tax Administration Act. House Bill 5556 would extend the protection to purchasers or consumers for use tax purposes.

Bundled Transactions Involving Telecommunications Services.

Under House Bill 5556, all of the following apply in the case of a bundled transaction that includes telecommunications service, ancillary service, Internet access, or audio or video programming:

(1) If the purchase price is attributable to products that are taxable and products that are nontaxable, the portion of the price attributable to nontaxable products may be subject to tax unless the provider can identify by reasonable and verifiable standards that portion

from its books and records that are kept in the regular course of business for other purposes, including nontax purposes.

(2) If the purchase price is attributable to products that are subject to tax at different tax rates, the total purchase price may be treated as attributable to the products subject to tax at the highest tax rate unless the provider can identify by reasonable and verifiable standards the portion of the purchase price attributable to the products subject to tax at the lower rate from its books and records that are kept in the regular course of business for other purposes.

(3) These provisions apply unless otherwise provided by federal law.

Bundled Transactions (for Telecommunications).

House Bill 5556 provides a definition of "bundled transaction." This term would refer to the purchase of two or more *distinct and identifiable products*, except real property and services to real property, where the products are sold for *a single non-itemized price*. A bundled transaction does not include the sale of any products in which the sales price varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction.

The term "*distinct and identifiable products*" does not include (1) packaging and instruction guides; (2) a product provided free of charge with the required purchase of another product; and (3) items included in the sales price. The term "*single non-itemized price*" does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the purchaser in paper or electronic form, including an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.

The following would not be considered bundled transactions:

* The purchase of tangible personal property and a service if the property is essential to the use of the service and is provided exclusively in connection with the service and the true object of the transaction is the service.

* The purchase of services if one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service.

* A transaction that includes taxable and nontaxable products and the purchase price of the taxable products is de minimus. (De minimus in this context is defined to mean the seller's purchase price or sales price is 10 percent or less of the total purchase price or sales price.)

* The retail sale of exempt tangible personal property and taxable tangible personal property if all of the following are satisfied:

(1) The transaction includes food and food ingredients, prescription or over-the-counter drugs, durable medical equipment, mobility enhancing equipment, medical supplies, or prosthetic devices.

(2) The seller's purchase price or sales price of the taxable tangible personal property is 50 percent or less of the total purchase price or sales price of the bundled tangible personal property. A seller may not use a combination of the purchase price and sales price of the tangible personal property when making the 50 percent determination for a transaction.

Other Telecommunications Definitions.

House Bill 5556 would revise numerous definitions related to the telecommunications industry and then rewrite various provisions in the Use Tax Act using those definitions. (The Department of Treasury says the changes will have no impact on tax treatment.) The bill provides an extensive new definition of "telecommunications service" and definitions of "interstate," "intrastate," and "international." Other terms defined in the bill include: "ancillary services," "coin-operated telephone service," "conference bridging service," "detailed telecommunications billing service," "directory assistance," "fixed wireless service," "paging service," "pay telephone service," "prepaid calling service," "private communications service," "telecommunications nonrecurring charges," "value-added nonvoice data service," "vertical service," "voice mail service," "800 service," and "900 service."

Repealers.

Two identical sections of each act would be repealed. One section in each act is an obsolete record-keeping provision that specifically says it is not to apply if Michigan becomes a member of the streamlined sales and use tax agreement (as it has). The other section deals with a provision that has been eliminated from the multi-state agreement; it addresses exemptions for electronically delivered computer software that is concurrently available for use in more than one taxing jurisdiction ("multiple points of use").

FISCAL IMPACT:

Department of Treasury officials have said the intent of the bill is to be revenue neutral.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.