Ohio Legislative Service Commission

Bill Analysis

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Sub. H.B. 23
131st General Assembly
(As Reported by H. Ways & Means)

Reps. Amstutz, Cera

BILL SUMMARY

- Suspends the transfer of use tax collections from out-of-state "remote" sellers to the Income Tax Reduction Fund (ITRF) until Congress enacts federal "Marketplace Fairness" legislation authorizing states to compel such remote sellers to collect state use taxes.
- Requires the Director of Budget and Management to recommend whether income tax rates should be permanently reduced after the Director certifies a temporary rate reduction by virtue of money accruing in the ITRF.
- Earmarks one-third of the income from certain oil and gas leases on state land for the ITRF.
- Earmarks one-third of that lease income to provide capital improvements funding to subdivisions in which leased parcels are located.

CONTENT AND OPERATION

Overview

The bill makes three changes to the funding and operation of a fund used under continuing law to temporarily reduce income tax rates — the Income Tax Reduction Fund (ITRF). First, the bill effectively prohibits use tax collections from remote sellers — generally online and catalog retailers — from being credited to the ITRF until Congress enacts "Marketplace Fairness" legislation enabling states to compel remote sellers to collect the tax. Second, it authorizes the Director of Budget and Management (OBM) to recommend whether and to what extent income tax rates should be permanently reduced based on revenue credited to the ITRF from its various revenue sources. Third,

the bill creates a new dedicated source of revenue for the ITRF by crediting one-third of income from certain oil and gas leases on state land to the ITRF.

In addition, the bill credits another one-third of that lease income to a new Local Royalty Fund to provide funding for counties, townships, and municipal corporations in which those leased parcels are located, to be used for capital improvements.

Income Tax Reduction Fund

Under continuing law, the ITRF serves as a mechanism to provide one-year reductions in income tax rates upon the Fund's accrual of a certain amount of money. The ITRF currently may receive revenue from two dedicated sources: (1) surplus revenue that is available after the balance in the state's Budget Stabilization Fund equals 5% of annual General Revenue Fund (GRF) expenditures and certain inter-year fund carryovers and reserves are made and (2) use tax collected and remitted by remote sellers (see "**Remote seller use tax collections**," below).

By July 31 of any year, the Director of OBM must certify to the Tax Commissioner if money in the ITRF exceeds 0.35% of the amount of income tax revenue the Director estimates will be collected in the current fiscal year, and the percentage of that excess.[1] The Tax Commissioner then proportionately reduces the rate of the state's income tax for that calendar year by that certified percentage.[2]

Remote seller use tax collections

The bill narrows the scope of who is a "remote seller" for the purpose of earmarking use tax collected by those sellers for the ITRF, effectively ensuring that the state will not collect, and the ITRF will not receive, use taxes collected from anyone qualifying as a remote seller until Congress enacts "Marketplace Fairness" legislation.

Background

Under continuing law, state and local use tax applies to sales of tangible personal property or taxable services made outside Ohio if the property or service is used or stored in Ohio and sales tax was not collected. Use taxes are levied at the same rate as sales taxes. Under U.S. Supreme Court precedent, only sellers that have a "physical presence" with a state may be required to collect sales or use tax from a customer in that

[1] R.C. 131.44.

[2] R.C. 5747.02, not in the bill.

state.[3] Otherwise, a state cannot require a seller to collect and remit use tax. In instances where use tax is not collected by the seller, continuing law requires that the consumer pay use tax directly to the state. Continuing law codifies the physical presence requirement by requiring only sellers with a "substantial nexus" with Ohio to collect and remit use tax from Ohio customers.[4]

Though the state cannot require sellers without substantial nexus with Ohio to collect and remit use tax to the state, Congress could enact pending "Marketplace Fairness" legislation to authorize qualifying states to compel remote sellers to collect use taxes from customers.[5] Under continuing law, all use tax revenue is credited to the GRF, but the portion of collections attributed to remote seller collections are subsequently transferred to the ITRF.[6]

Even though the state cannot require remote sellers to collect and remit use tax, continuing law authorizes remote sellers to register with the state and voluntarily do so (hereafter, "voluntary remitters").[7] Additionally, remote sellers may collect and remit use tax to the state pursuant to an agreement entered unto under the multi-state "Streamlined Sales and Use Tax Agreement" ("SSUTA remitters").

"Remote seller"

Current law defines a "remote seller" as any person that the state may not require to collect and remit use tax. The bill qualifies the current definition in three ways. The bill specifies that a person is a remote seller only if all of the following apply:

(1) The person did not have substantial nexus with Ohio before the bill's effective date.

(2) The person is required to collect and remit use tax pursuant to federal "Marketplace Fairness" legislation.

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[3] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (finding that a catalog seller that delivered products to North Dakota customers by an out-of-state common carrier outside the state did not have a physical presence with North Dakota and was not required to collect and remit the state's sales tax).

[4] R.C. 5741.01(I).

[5] See Section 757.50 of H.B. 59 of the 130th General Assembly (expressing the General Assembly's intent to conform Ohio's law upon Congress' enactment of the "Marketplace Fairness Act of 2013" or similar legislation. A successor bill has been introduced in the current 114th Congress, S. 698, entitled the "Marketplace Fairness Act of 2015.")

[6] R.C. 5741.03.

[7] R.C. 5741.17(B), not in the bill.

(3) The seller was not a voluntary remitter before the effective date of that federal legislation.[8]

Effect of change on current law

Effectively, the revised definition of remote seller ensures that the ITRF will not receive use taxes collected from anyone qualifying as a remote seller until Congress enacts "Marketplace Fairness" legislation. (The bill also contains an explicit statement to that effect.[9]) Since Congress has not yet enacted such legislation, the state will collect no use tax revenue remitted by "remote sellers." The state will, however, continue to receive use taxes collected by voluntary and SSUTA remitters, but, as explained below, such revenue will not be credited to the ITRF.

Under continuing law, in January and June of each year, the Director of OBM and the Tax Commissioner jointly calculate use tax collected by remote sellers in a preceding six-month period for purposes of transferring that amount from the GRF to the ITRF. Under current law, remote seller use tax collections are those remitted by remote sellers in excess of (1) remittances by SSUTA remitters, (2) refunds issued to remote sellers, and (3) the amount of use tax remitted during fiscal year (FY) 2013 by voluntary remitters.

The presence of (3) ensures that collections from voluntary remitters in excess of the amount collected in FY 2013 are counted among the "new" remote seller use tax collections credited to the ITRF. Because the bill changes the definition of a remote seller, use tax collections from voluntary remitters are completely excluded from that calculation, even if those collections exceed FY 2013 levels. Thus, the bill's definitional change ensures that no use tax revenue will be credited to the ITRF in the absence of congressional action. Under the bill, the Director is no longer required to make the calculation described above until the first January or June following the date that remote sellers are first required to collect and remit use tax pursuant to authority conferred under federal legislation.[10]

Report on income tax reductions

Within 15 days after the Director of OBM certifies that the ITRF has a substantial enough balance to temporarily reduce income rates, the bill requires the Director to

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[8] R.C. 5741.01.

[9] R.C. 5741.03(C)(3).

[10] R.C. 5741.03 and 5741.032.

issue a report to the Governor, Speaker of the House, and President of the Senate containing both of the following:

(1) Amounts credited to the ITRF in the preceding fiscal year from each of its three dedicated revenue sources (see "**Income Tax Reduction Fund**," above, and "**State land oil and gas lease income**," below).

(2) Recommendations whether and to what extent income tax rates should be proportionately and permanently reduced based on revenue credited to the ITRF from those three sources in the preceding fiscal year.[11]

State land oil and gas lease income

The bill earmarks one-third of the income from signing fees, rentals, and royalty payments with respect to certain oil and gas leases on state land to the ITRF and one-third of such income to a new Local Royalty Fund to provide funding for counties, townships, and municipal corporations in which those leased parcels are located, to be used for capital improvements. The remaining one-third of the income is credited to the funds to which all such revenue is credited under current law, as explained below.

Under current law, with three exceptions, all income received by state agencies from an oil or gas lease entered into on or after September 30, 2011, on land owned by the agency is credited to a special fund and used to pay capital costs, including equipment and renovations and repairs of facilities, of those contributing state agencies. However, if the land is owned by the Division of Forestry, Division of Wildlife, or Division of Parks and Recreation in the Department of Natural Resources, that revenue is credited, respectively, to one of the following funds: (1) the Forestry Mineral Royalties Fund, (2) the Wildlife Habitat Fund, or (3) the Parks Mineral Royalties Fund.[12]

Money in the Forestry Mineral Royalties Fund and the Parks Mineral Royalties Fund must be used by the applicable Division to acquire land and to pay capital costs for facilities owned by the state and administered by that Division.[13] Under law unchanged by the bill, money in the Wildlife Habitat Fund is used to acquire and develop land for the preservation, propagation, and protection of wild animals.[14]

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[11] R.C. 131.44(B)(3).

[12] R.C. 1509.73(G)(1) and (2).

[13] R.C. 1503.012 and 1541.26, not in the bill.

[14] R.C. 1531.33, not in the bill.

Income Tax Reduction Fund earmark

The portion of lease revenue that the bill earmarks for the ITRF is credited initially to the GRF, and then the Director of OBM, twice annually, is required to transfer six-months' worth of that revenue from the GRF to the ITRF.[15]

Local Royalty Fund earmark

The bill requires the Director of OBM to distribute the portion of lease revenue credited to the new Local Royalty Fund – one-third of such revenue – to counties, townships, and municipal corporations in which leased parcels of state land are located. Of this one-third share, 85% is divided and allotted to each county in proportion to the income generated by leased parcels in that county. One-half of each county's allotment is further allocated and ultimately paid to the county and each constituent township and municipal corporation in proportion to each subdivision's population relative to the aggregate population of the county and each of its constituent subdivisions. The other one-half of the county's allotment is allocated and paid to those subdivisions in proportion to the number of road miles maintained by each subdivision relative to the aggregate road miles maintained by the county and each of its constituent subdivisions.[16]

The bill requires the other 15% of the Local Royalty Fund share to be paid directly to townships and municipal corporations in which leased parcels are located. Each such township or municipal corporation receives only the portion of that amount attributable to the proportionate income generated from the lease of a parcel in that subdivision.[17]

The Director of Budget and Management is required to make both types of payments according to a schedule prescribed by the Director.[18] The bill requires a county, township, or municipal corporation to use those payments exclusively to pay the costs of capital improvements.[19] Capital improvements are defined to be projects involving the construction, improvement, maintenance, or planning of roads and bridges, waste water treatment system, water supply systems, solid waste disposal facilities, and storm water and sanitary sewer facilities, and specifically include the

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[15] R.C. 1509.73(G)(3) and (J).

[16] R.C. 1509.79(B) and (C)(2) and (3)(a).

[17] R.C. 1509.79(C)(3)(b).

[18] R.C. 1509.79(C)(4).

[19] R.C. 1509.79(D).

acquisition or maintenance of service vehicles used for purposes of public safety, highway construction and maintenance, or maintaining public parks.[20]

Current status of oil and gas leases on state land

Though the bill reserves one-third of such income for the ITRF and one-third for the Local Royalty Fund, because members of the Oil and Gas Leasing Commission have not been appointed as of the date of this analysis, state agencies may not currently enter into such leases. Thus, lease income will not flow into the ITRF or the Local Royalty Fund until the Governor appoints members to that Commission and leases are made (see **COMMENT**).

COMMENT

Under continuing law, state agencies are required to follow certain procedures to lease oil or gas interests on state land on and after September 30, 2011 — the effective date of H.B. 133 of the 129th General Assembly. As part of those procedures, a state agency may enter into such a lease only if the agency consults with the Oil and Gas Leasing Commission or, after that Commission adopts rules establishing additional procedures and requirements, only if the Commission approves the nomination of that property for a lease.[21]

As of the date of this analysis, members of the Oil and Gas Leasing Commission have not been appointed. Because the Commission does not yet exist, state agencies are unable to obtain the agencies' required consultation with the Commission that is a prerequisite to entering into a new oil or gas lease.

HISTORY

ACTION	DATE
Introduced	01-28-15
Reported, H. Ways & Means	05-13-15

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[20] R.C. 1509.79(A)(3).

[21] R.C. 1509.73.