

Department of Finance and Administration

Legislative Impact Statement

Bill: HB1491

Bill Subtitle: TO REQUIRE THE DEPARTMENT OF FINANCE AND ADMINISTRATION TO ADOPT RULES BEFORE ASSESSING OR COLLECTING CERTAIN TAXES.

Basic Change :

Sponsors:

Reps. Cavanaugh, Barker, Richmond, Milligan, Wardlaw, Eubanks, Ray, Beaty Jr., G. Hodges, Hollowell, Cozart, M. Berry, Fortner, J. Moore, Lundstrum, J. Mayberry, Gonzales, Schulz, and Lynch

Sens. B. Johnson, J. Dotson, J. Boyd, and Gilmore

HB1491 amends the Arkansas Tax Procedure Act, § 26-18-101, *et seq* to prohibit the Department of Finance and Administration (DFA) from assessing or collecting a tax on an item or service that DFA has not previously assessed or collected on the item or service unless there has been a change in the statutory law that requires the assessment and collection of the tax on the item or service. If DFA determines that it has failed to assess or collect a tax on an item or service that, based on the DFA's interpretation, is authorized by law, DFA shall promulgate by rule to clarify the application of the tax to the item or service. DFA shall not assess or collect a tax on an item or service that is subject to a rule promulgated under the requirements of HB1491 unless the rule has been approved under § 10-3-309.

Revenue Impact :

Revenue impact is unknown.

Taxpayer Impact :

It is unclear what effect HB1491 would have upon a taxpayer's obligations to collect, remit, or pay a tax levied by the Arkansas General Assembly. DFA could not assess a taxpayer under audit or have tax collected on sales of items or services that have not previously been collected or assessed unless a statutory law change occurs requiring assessment or collection of the tax or DFA promulgates a rule under the Administrative Procedures Act. New types of goods and services may not be subject to taxation in Arkansas until the Legislative Council or Joint Budget Committee have approved DFA rules governing the taxation of those new goods and services.

Resources Required :

DFA would require additional staff to ensure compliance amongst the 100 auditors it employs across the State to continually review all audits conducted. DFA would require additional staff of one Assistant Administrator, one Managing Attorney, one Attorney Specialist, one Senior Auditor, and five Fiscal Support Analysts to ensure legal uniformity, and draft and promulgate additional rules, at an additional approximate salary cost of \$460,000.

The Arkansas Integrated Revenue System (AIRS) system will need to be programmed to accommodate this change. Requirements gathering, development, testing, and training will cost an estimated \$40,000. Yearly maintenance is estimated to cost \$12,000.

Department of Finance and Administration

Legislative Impact Statement

Bill: HB1491

Bill Subtitle: TO REQUIRE THE DEPARTMENT OF FINANCE AND ADMINISTRATION TO ADOPT RULES BEFORE ASSESSING OR COLLECTING CERTAIN TAXES.

Time Required :

Unknown at this time.

Procedural Changes :

Department employees will need to be educated as well as the tax community.

Other Comments :

HB1491 may be interpreted by individuals to prevent DFA from any non-filer assessment or audits of taxpayers since the items or services technically may not be considered to have been previously taxed by DFA if individual taxpayers fail to report them as required by law even if other taxpayers report and pay tax for the same items or services.

DFA is often unaware of a taxpayer's noncompliance with the tax law until such time as an audit is performed uncovering the taxpayer's interpretation of the law which might be different from the audit staff. Final determinations may be made during the protest process or in court regarding the correct application of the tax being assessed. HB1491 could unintentionally incentivize taxpayers to not voluntarily report tax on items or services which are taxable under the law if no rule exists since HB1491 may create an additional defense against any potential audit findings even though the General Assembly has previously levied a tax.

HB1491 may be intended to only address the assessment and collection of gross receipts tax (sales tax) and other excise taxes but does not clearly specify and therefore may include income taxes or other taxes as written. Businesses create hundreds of new products and services each year. Requiring DFA to create rules concerning the taxation of each product or service classification would require additional staff members to identify, classify and propose rules that would have to be legislatively approved before sales of those goods and services could be taxed. This would result in sales of new goods and services being sold without collection of the tax until rules were implemented. Businesses would have to separate their sales between goods and services that are currently taxable from those that are not and monitor DFA constantly to look for changes in the status from non-taxable to taxable once rules were in place.

Legal Analysis :

Transactions involving goods or services are subject to tax based on the Arkansas Code that existed at the time of the transaction. For example, all sales of tangible personal property and certain enumerated services are subject to sales tax unless otherwise exempt. DFA administers the laws passed by the General Assembly and has no authority to make the sale of an item or service taxable through promulgation of a rule.

It is unclear if HB1491 is intended to exempt from tax all purchases of new tangible personal property. The bill states that DFA may not "assess or collect a tax on an item . . . that the department has not previously assessed or collected on the item[.]" A new item, by its very nature, has not been sold before and therefore would not be subject to assessment or collection. It appears likely that HB1491 is

Department of Finance and Administration

Legislative Impact Statement

Bill: HB1491

Bill Subtitle: TO REQUIRE THE DEPARTMENT OF FINANCE AND ADMINISTRATION TO ADOPT RULES BEFORE ASSESSING OR COLLECTING CERTAIN TAXES.

not meant to exempt from sales tax all purchases of new tangible personal property.

Instead, HB1491 possibly attempts to prevent DFA from assessing or collecting tax on the sale of an item or service unless DFA has in other scenarios assessed or collected taxes on transactions involving the same type of item or service. DFA will have difficulty complying with that requirement because information is not available or accessible to determine compliance with the law. There is not a searchable database of all transactions involving a particular item or service on which DFA has assessed tax. Further, DFA is typically unaware of the contents of transactions upon which it collects tax. Taxpayers with sales tax permits remit taxes to DFA but do not provide itemized lists of items or services they sold.

It is unclear if HB1491 provides a defense to the assessment of tax on a transaction. It seems that a taxpayer could sue DFA to protest an assessment based on the allegation that DFA has not previously assessed or collected tax on a type of item or service. To disprove that allegation, DFA would need to release the information of other taxpayers that have previously been assessed for transactions involving the same type of item or service. Disclosing confidential information regarding other taxpayers is prohibited under Arkansas law and would violate the privacy of the other taxpayer. In addition, disclosing confidential taxpayer information subjects the DFA employee defending the assessment to potential criminal liability or termination under § 26-18-303.

HB1491 may encourage individuals to conceal transactions involving items or services that might be taxable because taxpayers will believe that if they can emerge from one audit without a transaction being assessed as taxable, then similar transactions in the future will be tax free until DFA promulgates a rule clarifying the taxability of that type of transaction.