

REALITY CHECK : SB 584

*An honest look at Senate
Bill 584 passed by the
Missouri General Assembly
and vetoed by Governor
Jeremiah "Jay" Nixon on
June 11, 2014*



The Voice of Missouri Business.



TABLE OF CONTENTS

Executive Summary..... 1

Burden of proof shift to the Missouri Department of Revenue..... 2

St. Louis County Assessor notice to taxpayers..... 3

Marine fuel tax exemptions..... 3

Allowing small businesses to file annual Withholding Tax returns..... 4

Division of corporation income for state tax purposes..... 4

Sales taxes in places of amusement, entertainment and recreation..... 5

Used manufactured homes..... 6

Drugs and devices used to treat terminally ill patients..... 7

Electricity transmission and distribution..... 7

Data processing and storage..... 9

Advertising absorption of sales tax..... 11

Refund claims allowed to original taxpayer..... 11

Notes..... 12

Appendix..... 13

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EXECUTIVE SUMMARY

On June 11, 2014, Governor Jeremiah “Jay” Nixon vetoed CCS HCS Senate Bill 584. The bill contained many issues related to the same subject: clarifying the tax laws for tax administrators and taxpayers in Missouri.

Following the veto of the tax bill, on June 16, 2014, a fiscal note was released for the bill with estimates of fiscal impact to the state and local governments. The fiscal note was based on information furnished by the Office of Administration, the administrative and managerial arm of Missouri State Government under control of the governor. Although all but one of the issues contained in the bill had been filed as individual bills and were the subject of public hearings and committee debate, this was the first time the Office of Administration had offered estimates of impact on many of these items.

This document analyzes the real effect of each piece of this legislation and notes whether or not an impact is anticipated for state and local governments. In most cases, the bill seeks to clarify an exemption that has already been granted by the Missouri General Assembly, but the Missouri Department of Revenue has interpreted the statute very narrowly and not allowed some taxpayers to fully use the exemptions or provisions of law as they now read. The bill provides further clarification by the legislature to prevent such ridiculous acts as the collection of sales taxes from dance instructors providing dance lessons to children, collection of sales taxes on cancer treatment devices and drugs - even to prevent the Department of Revenue from keeping taxpayers’ money when they have overpaid their taxes.

Here is a summary of the fiscal impact determined by AIM/TRIM vs. the Governor/OA estimate:

| ITEM | AIM/TRIM ESTIMATE | GOVERNOR/OA ESTIMATE |
|---|--|---|
| Burden of proof | \$0 | (Significant cost state & local) |
| St. Louis Co. Assessor notices | \$0 | \$0 |
| Marine fuel tax exemptions | \$0 | \$0 |
| Small business Withholding Tax returns | Indeterminable administrative cost savings state only | \$0 |
| Division of corporation income | \$0 | (\$15m) state; \$0 local |
| Amusement, entertainment, recreation tax | (\$17m) state; (\$17m) local | (\$35.8m) state; (\$35.8m) local |
| Used manufactured homes | \$0 | \$0 |
| Drugs and devices for terminally ill | \$0 | \$0 |
| Electricity transmission and distribution | \$29.7m+ savings state; indeterminable local savings | (\$30m) state; (\$30m) local |
| Data processing and storage | Indeterminable savings state and local | (\$152.1m) state; (\$152.1m) local |
| Advertising absorption of sales tax | \$0 | \$0 |
| Refund claims allowed to taxpayers | \$0 | (\$5m) state; (\$5m) local |
| TOTAL | (\$17m) to \$12.7m+ net gain to state; (\$17m) to UNKNOWN gain to local funds | (\$237.9m+) state; (\$222.9m+) local funds |

ISSUE: Burden of proof shift to the Missouri Department of Revenue

SECTION: 136.300

DESCRIPTION: The law change would require the Missouri Department of Revenue (DOR) to prove additional tax liability for all taxpayers if the taxpayer meets certain conditions. Taxpayers must produce evidence of a valid dispute, must maintain adequate records (including support for any claimed exemptions) and provide the DOR reasonable access to those records. But if the DOR claims the taxpayer owes additional taxes, including in a dispute over an exemption, the DOR would be required to prove the additional tax liability, the same as the Internal Revenue Service does with federal tax liability today.

AIM/TRIM's ESTIMATE OF IMPACT: There should be no cost to state or local governments.

AIM/TRIM's METHODOLOGY: The burden of proof has already shifted to the Missouri Department of Revenue (DOR) in nearly all tax cases involving all individual taxpayers. The burden of proof is also on the DOR for business taxpayers with less than \$7 million in net worth and less than 500 employees. There has been no revenue loss associated with this shift in the burden of proof since it was implemented in 1999.

We believe the government should be able to prove all cases where they claim a taxpayer owes additional taxes and do not believe this law change will result in any loss to state or local funds. We believe this change will cause the DOR to more adequately prepare their case when claiming additional liability and this additional review may reduce the number of disputes between the DOR and taxpayers. This would result in cost savings for both the state and taxpayers through reduction in legal fees and expenses.

OA ESTIMATE OF IMPACT: "The impact on state revenues is unknown, but will be significantly negative, and there will be a significant negative impact on local revenues."²

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: The laws that govern a taxpayer's eligibility for tax exemptions are not changed by this legislation and are still in effect. These laws would still require a taxpayer to provide evidence of qualification for any tax exemption they claim, along with documentation that is required to claim the exemption. Taxpayers must keep adequate records and provide the DOR reasonable access to those records under the provisions of the new law. As in existing law, taxpayers must provide initial evidence of exemption. This change requires the DOR to prove a taxpayer is not eligible for an exemption after the taxpayer has provided evidence they are eligible for the exemption. We believe the DOR should bear that reasonable burden.

ISSUE: St. Louis County Assessor notice to taxpayers

SECTION: 137.133

DESCRIPTION: This section would require correspondence from the St. Louis County Assessor to taxpayers requesting voluntary disclosure of information to clearly indicate disclosure of the information is voluntary.

AIM/TRIM's ESTIMATE OF IMPACT: No cost to state or local government.

AIM/TRIM's METHODOLOGY: This simply requires a statement and there should be no cost to add the statement and better inform taxpayers of the voluntary nature of the requested information.

OA ESTIMATE OF IMPACT: N/A

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: N/A

ISSUE: Marine fuel tax exemptions

SECTIONS: 142.815, 144.030.

DESCRIPTION: Motor fuel delivered to a marina that sells fuel exclusively for marine use would be exempted from motor fuel tax. Such use is currently exempt from tax, but refund must be claimed by end user under current law. A sales tax exemption for motor fuel used in watercraft is also included. Under current law, sales taxes are deducted from refunds claimed for motor fuel taxes paid on fuel for watercraft.

AIM/TRIM's ESTIMATE OF IMPACT: \$0

AIM/TRIM's METHODOLOGY: We assume the Office of Administration is aware of the Department of Revenue's current practice regarding the treatment of marine fuel tax refunds and agree with their assessment of zero impact.

OA ESTIMATE OF IMPACT: \$0¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: N/A

ISSUE: Allowing small businesses to file annual Withholding Tax returns

SECTION: 143.221

DESCRIPTION: This change would allow 3,500 smaller employers with less than \$100 in withholding tax per quarter to file withholding taxes on an annual basis, rather than four times per year. This will save them time and effort in preparing 10,500 extra returns per year and resulting in cost savings for the Missouri Department of Revenue that currently must process those returns.

AIM/TRIM's ESTIMATE OF IMPACT: No cost – should result in cost savings to the Missouri Department of Revenue.

AIM/TRIM's METHODOLOGY: We agree there is no cost to the state, and argue there should be some savings to the Missouri Department of Revenue because of the elimination of 10,500 returns and payments that will no longer need to be processed by the DOR personnel. Even if those returns and payments are made electronically, there should be some cost savings to the state.

OA ESTIMATE OF IMPACT: \$0¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: N/A

ISSUE: Division of corporation income for state tax purposes

SECTION: 143.451

DESCRIPTION: In the 2013 legislative session, HB 128 was passed and signed into law allowing an additional method for determining the amount of income that is subject to Missouri income tax when a corporation derives income from business in Missouri and other states. Six bills were passed this legislative session with identical language that clarified the 2013 additional method was available to all corporations.

AIM/TRIM's ESTIMATE OF IMPACT: \$0

AIM/TRIM's METHODOLOGY: The law change in 2013 already applies to **ALL** Missouri corporations. The change in these six bills is intended to clarify the intent of the 2013 law change – specifically, that this new method of calculation indeed applies to all types of corporations: those that derive their income from the sale of tangible personal property, and those that derive their income from other sources.

Although neither the statute nor the regulation issued by the Missouri Department of Revenue (DOR) prevent taxpayers that derive their income from sources other than the sale of tangible personal property from using this new method of calculation, the DOR has recently issued letters to such taxpayers denying them the use of this new calculation method. These new bills are necessary to provide guidance to the DOR of the legislature's intent. As such, there is no revenue loss from the enactment of this language as it simply clarifies the original intent of HB 128. More detail is available in the NOTES.³

OA ESTIMATE OF IMPACT: \$15m state cost, no local cost.¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: As stated above, this new language clarifies previous changes made to the law and clarifies the application of the law to all taxpayers as contained in the DOR's regulation interpreting the original law change. There should be no revenue loss associated with this proposal.

ISSUE: Sales taxes in places of amusement, entertainment and recreation

SECTIONS: 144.010, 144.018, 144.020

DESCRIPTION: The definitions are revised to more clearly define the legislative intent to apply sales tax to admission fees and charges to view events and performances and to ensure sales taxes are applied properly for admission to amusement parks, carnivals, festivals, etc. The new definition excludes sales taxes on admissions to gyms, instructional fees paid to dance instructors and personal trainers, and other transactions upon which tax may or may not be collected and/or due under current law.

AIM/TRIM's ESTIMATE OF IMPACT: Approximately \$17m state cost, \$17m local cost.

AIM/TRIM's METHODOLOGY: Contrary to OA's assertion to the contrary², taxable sales reported now in the categories of producers, orchestras and entertainers would continue to be fully taxable, as would taxable sales from commercial sports (specifically included), riverboats with no gambling, and camps and trilinger parks (these are taxed under a completely different section of law that was not amended by the bill nor affected by the new language). Therefore, there would be no impact from these items as they remain fully taxable.

We agree taxable sales from SIC 791 representing sales taxes on dance halls, studios and schools would no longer be taxable under the bill. Also, a portion of the taxable sales currently derived from double taxation in bowling and billiard establishments (SIC 793) would be corrected and would be exempted. Because our intent is to provide the most reasonable estimate possible, we will assume the entire amount shown for bowling and billiard establishments would be exempted by the proposal.

We also agree a portion of the "Miscellaneous Amusement and Recreation" category (SIC 799) would no longer be taxable as this category contains the targeted activities (gyms, and other recreational activities); however, this category also contains amusement parks, theme parks, and similar establishments that would continue to be specifically taxable under the bill. According to data published by the U.S. Department of Commerce, Bureau of Economic Analysis, personal consumption expenditures for membership clubs, health clubs and gym memberships were roughly equal to personal consumption expenditures for amusement parks and related recreational services. Because there are no reliable data for determining an appropriate amount of the miscellaneous category that would remain taxable and given the fact that expenditures are roughly equal for those that would remain taxable and those that would be exempted, we will assume 50% of the taxable sales in the "Miscellaneous Amusement and Recreation" category (SIC 799) would be exempted by the proposal.

NOTE: In areas with an extremely high percentage of receipts from tourist attractions, such as Branson, the impact of this proposal would be negligible because all ticket sales and admissions to

attractions would continue to be taxable for state and local sales tax purposes and subject to local tourism taxes. This exemption would only apply to gyms, dance lessons and other activities that generate an extremely low percentage of taxable sales in such areas under current law.

Using the figures² provided by OA as a starting point, we can provide a more realistic estimate of sales tax loss as follows:

| SIC | INDUSTRY | TAXABLE SALES 2012 |
|-----|--|----------------------|
| 791 | DANCE HALLS, STUDIOS, AND SCHOOLS | \$ 4,974,184 |
| 793 | BOWLING BILLIARD ESTABLISHMENTS | \$ 72,077,232 |
| 799 | MISC. AMUSEMENT & RECREATION (50% exempt) | \$324,232,849 |
| | TOTAL TAXABLE SALES | \$401,284,265 |
| | LOSS TO STATE FUNDS (at 4.225%) | \$ 16,954,260 |
| | LOSS TO LOCAL FUNDS (OA estimates local loss is approx. equal to state loss – verified through receipts in FY 13) | \$ 16,954,260 |

OA ESTIMATE OF IMPACT: \$35.8m state cost, \$35.8m local cost.¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: OA’s estimate that more than 2/3 of current sales tax transactions in many categories would be exempted by the new language, including categories that are specifically covered by other statutes and others that are not included in this exemption, is simply not supported by any evidence.

ISSUE: Used manufactured homes

SECTION: 144.044

DESCRIPTION: The bill codifies the current practice of exempting the sale of used manufactured homes from sales and use taxes.

AIM/TRIM’s ESTIMATE OF IMPACT: No cost.

AIM/TRIM’s METHODOLOGY: We agree with the assessment by the Office of Administration there is no impact from this provision.

OA ESTIMATE OF IMPACT: \$0¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: We agree with OA’s assessment on this issue.

ISSUE: Drugs and devices used to treat terminally ill patients

SECTION: 144.052

DESCRIPTION: The bill would exempt from sales and use taxes drugs, devices and biological products used for the treatment of terminal illnesses.

AIM/TRIM's ESTIMATE OF IMPACT: No cost.

AIM/TRIM's METHODOLOGY: We agree with the assessment by the Office of Administration there is very little or no impact from this provision. The value in passing this law change is to prevent the Missouri Department of Revenue from pursuing taxation of these products in the future.

OA ESTIMATE OF IMPACT: \$0¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: We agree with OA's assessment on this issue.

ISSUE: Electricity transmission and distribution

SECTION: 144.058.1

DESCRIPTION: The bill would clarify items used to transmit and distribute electricity to customers are exempt from state sales and use taxes only. Local sales and use taxes would continue to apply. Generation of electricity, while included in the language of this section, is already exempted from applicable state and local sales and use taxes.

AIM/TRIM's ESTIMATE OF IMPACT: \$29.7m **SAVINGS** to state (refunds that could be avoided if bill becomes law); indeterminable **SAVINGS** to some local governments that incorrectly collected use taxes (refunds that could be avoided if bill becomes law).

AIM/TRIM's METHODOLOGY: The exemption applies **only** to sections of law that levy state sales and use taxes; therefore local sales and use taxes would continue to apply. **There is no cost to local government.** The only impact to local governments could result if the governor's veto is allowed to stand and refund claims are filed, as those refund claims would include local use taxes paid, resulting in a potential loss of local use tax funds. If the governor's veto is overridden and the bill becomes law, there would be no local revenue loss. See Appendix (page 13) for further discussion of this issue.

Our calculations are based on actual Department of Revenue sales and use taxable sales data for 2013.

The transactions for which the current exemption would be clarified would not include purchases of any items that are used to **generate** electricity – only the materials, equipment and supplies used to **transmit and distribute** the electricity to customers. The Department of Revenue provides data that is specific to companies making these types of sales as those sales are reported on Sales Tax returns and Vendor's Use tax returns. Other purchases are made by electric companies from vendors outside the state that are not registered for collection of tax in Missouri, in which case the electric company pays the tax on a Consumer's Use Tax return. All of these transactions are accounted for in our calculation.

Utilities are entitled to exemption for these purchases under current law, given the Missouri Supreme Court’s interpretation of existing exemptions, enactment of new statutes since those interpretations, and the fact that the act of generating electricity service is not complete and finished until the electricity arrives at the customer’s location.

The need for the clarification provided in this bill was apparent following discussions between utility company representatives and the Missouri Department of Revenue. This clarification would save state and local governments money by preventing utilities from pursuing refund claims for three years (or more, if under audit) of taxes paid in error on purchases that would be exempted by the proposal. The proposed language would clearly indicate the legislature’s intent to exempt only state taxes on items used to transmit and distribute electricity to customers and eliminate the need to pursue refunds for previous state sales taxes and state and local use taxes paid in error.

Also, it should be noted that any tax savings would be savings for the customers of regulated utilities or for the members of electric coops as tax costs are reflected in utility rates and/or reduce profits distributed to members of electric coops. Municipal utilities are already exempt on these transactions.

Although only qualifying items representing a portion of these sales are transactions that would be clarified as exempt under this proposal, we used the entire amount of sales and use taxable sales reported by Electric Distribution Equipment companies, Electrical Industrial Apparatus companies, and Electric Lighting and Wiring Equipment companies; added 30% of the Miscellaneous Equipment and Supplies for this category (the vast majority of this is probably communication equipment and supplies as that category is the vast majority of itemized sales in the sector); and added ALL of the Consumer’s Use Tax taxable purchases reported by Electric Utility companies and Combination Utility Services companies (realizing that only a portion of this Use Tax will represent transactions that are involved in this exemption clarification). **The resulting impact is a total of \$9.9 million in state tax per year, calculated as follows:**

| TYPE | SIC | DESCRIPTION | 2013 TS |
|----------------------------|-----|-------------------------------------|----------------------|
| Sales & Use | 361 | ELECTRIC DISTRIBUTING EQUIPMENT | \$44,987,754 |
| Sales & Use | 362 | ELECTRICAL INDUSTRIAL APPARATUS | \$37,916,969 |
| Sales & Use | 364 | ELECTRIC LIGHTING AND WIRING EQUIPM | \$31,888,813 |
| Sales & Use | 369 | 30% of MISC EQUIPMENT AND SUPPLIES | \$33,288,986 |
| Use | 491 | ELECTRIC SERVICES | \$69,214,482 |
| Use | 493 | COMBINATION UTILITY SERVICES | \$16,700,022 |
| TOTAL TAXABLE SALES | | | \$233,997,025 |
| TSR (4.225%) | | | \$9,886,374 |

It should be noted this is an extremely liberal calculation. We know some of the taxable purchases reported as Consumer’s Use tax transactions are not related to transmission and distribution activities, but they are included here because they may not be separated. Also, Consumer’s Use tax reported by utility companies include transactions that are not related to transmission and distribution activities, but are also included because they are not able to be separated from the target transactions.

The State of Missouri stands to lose in excess of \$29.7 million (\$9.9 million per year X 3 years or more of refunds) if the governor’s veto is allowed to stand and refunds are sought against the state. In addition,

local governments that have received local use taxes from these transactions will also lose revenue if the governor's veto is allowed to stand because the refunds will include local use tax, although the amount is indeterminable from available data.

OA ESTIMATE OF IMPACT: \$30m state cost, \$30m local cost.¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: OA's calculation is a completely inaccurate way to identify transactions involved in this clarifying exemption.

First, the use of "Input-Output Use Tables" fails to account for the enormous amount of such input that is already exempted from sales and use taxes. All inputs used to generate electricity are currently exempted from state sales and use taxes under existing law.

Second, the Office of Administration failed to subtract purchases by municipal utilities that do not pay sales and use taxes under current law for purchases made in generating, transmitting or distributing electricity to their customers. Only investor-owned utilities and coops would be affected by this exemption.

Third, the Office of Administration applied the Input-Output percentage against a broad category of taxable sales made by not just electricity service companies, but also water companies, gas production and distribution companies, sanitary services companies, irrigation systems and steam supply companies.

Most importantly, use of less accurate Input-Output tables from the BEA is not necessary because taxable sales reports are available that give us much more accurate data from which to identify transactions that are involved in this exemption clarification. Our calculations are based on actual Department of Revenue sales tax data for 2013.

ISSUE: Data processing and storage

SECTION: 144.058.2

DESCRIPTION: The bill would clarify the current sales and use tax exemption for purchases of items used or consumed in data processing and data storage in facilities or parts of facilities that are used primarily for data processing and storage activities.

AIM/TRIM's ESTIMATE OF IMPACT: No cost to state or local funds. This proposal could result in savings to state and local funds if refunds are prevented by clarifying the sales tax exemption on a prospective basis rather than allowing refunds (see methodology for explanation). If the veto of this legislation is allowed to stand, state and local governments may experience revenue loss due to refund claims for overpaid sales and use taxes.

AIM/TRIM's METHODOLOGY: These purchases are already exempt from state sales and use taxes, local use taxes and, in some cases, local sales taxes under current law. In fact, three Missouri Supreme Court cases⁴ have already ruled that "data processing" is "manufacturing" for purposes of obtaining sales tax exemption under the sales tax law. Because data processing is "manufacturing," machinery, equipment, materials and utilities used for data processing (including data storage which involves copying,

processing, storing and recovering electronic copies of data) are already exempt under current law in sections 144.030 and 144.054, RSMo.

Data processing functions, whether performed by data processing companies or by other companies, are already entitled to the exemption under section 144.054. This exemption applies to purchases made in support of the activity being performed, and is not limited to any particular type of business performing the activity.

Although these exemptions are not currently claimed by most businesses that are entitled to them, we predict that will change in the near future if the governor's veto is allowed to stand. On the other hand, if the legislation becomes law, taxpayers and tax collectors will have clear guidance going forward regarding the exemptions, state and local governments will be able to plan for the exemptions, and Missouri and local government officials may begin to reap the benefits of advertising their locations as "data center friendly" to attract large data center projects and the associated increased jobs and spending accompanying such projects.

If the governor's veto is sustained, taxpayers may find it beneficial to apply for refunds of taxes paid and pursue refunds of state and local sales and use taxes paid in previous years. Rather than offer fantasy estimates of the amount of transactions involved, as the OA has done, we will simply state what the OA will not: there is no reliable information with which to determine the number or size of transactions upon which tax may have been erroneously collected and remitted. However, we do expect refund claims to be filed if this legislative change is not enacted, at which time the state and local governments may anticipate revenue loss from not enacting this proposal.

OA ESTIMATE OF IMPACT: \$152.1m state cost, \$152.1m local cost. ¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: The ridiculous "calculation" offered by the Office of Administration offers no evidence based in fact for its estimate of impact. In fact, OA states "data processing may be between 2 and 9.3 percent of total consumption"² which is an extremely large range and, without any qualification or justification whatsoever, OA chooses to use a midpoint of this imaginary range to arrive at its estimate of state cost, then duplicates this erroneous calculation for an estimate of local cost. As such, OA estimates more than 5% of ALL sales taxes collected today will be exempted by this proposal. OA's estimate of impact would require \$3.6 billion in such purchases per year! This is simply a fantastic number with no basis in fact or reality. To put this in perspective, OA's estimate would require exemption of more than 3 times the total amount of taxable sales reported by "radio, television, music and computer stores", more than 15 times the total taxable sales reported by all "office and computing machine" companies, and more than 20 times the total taxable sales reported by all "computer and data processing services" companies in 2013.

OA ignores the fact that the Missouri Supreme Court has already ruled⁴ that data processing is to be treated the same as manufacturing and purchases made to accomplish that processing are already exempt from state and local sales and use taxes, particularly when tangible personal property is produced by the data processing function. Some data centers and data processing departments of other types of companies are already claiming this sales tax exemption today based on this Supreme Court interpretation and the DOR's current regulations⁵ but OA made no adjustment to their inflated calculation for any taxpayers that are claiming the exemption today under current law.

ISSUE: Advertising absorption of sales tax

SECTION: 144.080

DESCRIPTION: The bill would allow a retailer to advertise that sales tax will be absorbed or included in the price if it is separately stated on an invoice or receipt. Current law prohibits such activity.

AIM/TRIM's ESTIMATE OF IMPACT: No cost.

AIM/TRIM's METHODOLOGY: We agree there is no impact from this provision.

OA ESTIMATE OF IMPACT: \$0¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: We agree with OA's assessment on this issue.

ISSUE: Refund claims allowed to original taxpayer

SECTION: 144.190

DESCRIPTION: The bill would clarify the law to ensure taxpayers should receive refunds when they have overpaid paid the tax to the Department of Revenue and would not allow the DOR to offset refunds for "delinquencies" that are still subject to appeal by the taxpayer.

AIM/TRIM's ESTIMATE OF IMPACT: No cost to state or local governments.

AIM/TRIM's METHODOLOGY: In very limited situations, the DOR is denying refunds based on a very strained interpretation of the existing statute that was put in place to prevent abusive behavior by unscrupulous retailers. The law was never intended to block refunds to taxpayers that overpaid taxes to the Department of Revenue, but to stop repeated refunds to retailers that intentionally over-collected sales taxes from customers, sought refunds, and did not refund the money to customers. This change would clarify that taxpayers that have overpaid the tax are entitled to refunds, as the law has been interpreted until a very recent change in interpretation by the Department of Revenue.

The bill also clarifies that a refund may only be used to offset a delinquency if the taxpayer has had the opportunity to appeal the validity of that delinquency. This ensures the taxpayer is not denied due process. Again, this was a recent change in policy by the Department of Revenue and this law is meant to provide clarification to the DOR.

OA ESTIMATE OF IMPACT: \$5m state, \$5m local.¹

AIM/TRIM COMMENT ON OA ESTIMATE OF IMPACT: OA states because DOR claims the provisions have impacted *less* than \$5m in refund claims over the last several years, they estimate the proposal will reduce state revenues by *more* than \$5m annually and reduce local government revenues by the same amount. This is illogical. Regardless, refunding overpaid taxes to the taxpayer to which they rightfully belong is not a "loss" to state and local governments. There is no revenue loss from this proposal.

NOTES:

1. "2014 Tax Exemptions Grid UPDATE," published by State of Missouri, Office of Administration, Division of Budget & Planning,
<http://content.oa.mo.gov/sites/default/files/Summary%20of%20fiscal%20impact%20-%20FY%202015.pdf>
2. "Tax Break Legislation, Summary of Fiscal Impact," published by State of Missouri, Office of Administration, Division of Budget & Planning,
<http://content.oa.mo.gov/sites/default/files/Summary%20of%20fiscal%20impact%20-%20FY%202015.pdf>
3. Following passage of HB 128, the Missouri Department of Revenue issued a regulation interpreting the new law, "12 CSR 10-2.052 New Apportionment Method". This regulation was effective March 30, 2014, and is still in effect. The statute and the regulation apply to all corporations: those that derive their income from the sale of tangible personal property and those that derive their income from other sources. In fact, the regulation describes an "eligible corporation" as any corporation that is "eligible to compute an interstate division of income under section 143.451.2, RSMo." Section 143.451.2 says a corporation shall use the apportionment formula if they are, "A corporation described in subdivision (1) of subsection 1 of section 143.441." That section of law clearly does not exclude corporations that derive their income from sources other than the sale of tangible personal property:
"143.441. 1. The term "corporation" means every corporation, association, joint stock company and joint stock association organized, authorized or existing under the laws of this state and includes:
(1) Every corporation, association, joint stock company, and joint stock association organized, authorized, or existing under the laws of this state, and every corporation, association, joint stock company, and joint stock association, licensed to do business in this state, or doing business in this state, and not organized, authorized, or existing under the laws of this state, or by any receiver in charge of the property of any such corporation, association, joint stock company or joint stock association;"
4. See: *DST Systems, Inc. v. Director of Revenue*, 43 S.W.3d 799, 800 (Mo. banc 2001); *International Business Machines Corporation v. Director of Revenue*, 958 S.W.2d554 (Mo. 1997); *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204 (Mo. 1990).
5. See Code of State Regulations, "12 CSR 10-111.010, *Manufacturing Machinery and Equipment Exemptions, as Defined in Section 144.030, RSMo.*"

APPENDIX:

ELECTRICITY TRANSMISSION & DISTRIBUTION EXEMPTION LIMITED TO STATE SALES & USE TAXES

Some have erroneously claimed subsection 8 of section 32.087, RSMo, would require the state sales and use tax exemption in SB 584 for electricity transmission and distribution transactions to also apply to local sales taxes. The argument is based on a presumption that section 32.087 requires all state sales tax exemptions apply to local sales taxes also.

There are several problems with this analysis and reasons the language in subsection 1 of section 144.058 in SB 584 exempts transmission and distribution transactions only from state sales and use taxes:

1. The plain language of subsection 1 of section 144.058 in SB 584 exempts the purchase of goods used for the transmission and distribution of electricity ONLY from the state sales taxes (sections 144.010 to 144.525) and state use taxes (sections 144.600 to 144.761). In subsection 2 of that same section, language is used that clarifies data center purchases are exempt from both state AND local sales and use taxes by including additional words that specifically refer to the "local sales tax law as defined in section 32.085." Those words are not present in subsection 1 and were, in fact, removed from a previous version of the bill when lawmakers prepared the final version of the bill. The Missouri Supreme Court has always paid attention to the legislature's inclusion AND exclusion of language;
2. The language in section 32.087.8 was passed in 1991, House Bill 29, by the 86th General Assembly. The language states that it is the intent of "this general assembly" that all state sales tax exemptions should also apply to the local sales tax law. The general assembly that passed Senate Bill 584 in 2014 is the 97th General Assembly. The 86th General Assembly cannot express the intent of a general assembly that follows 23 years later.

This principle was reiterated by the Missouri Supreme Court in the recent case of *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (2012) as they referenced *Mountain Grove Bank v. Douglas Cnty.*, 47 S.W. 944, 947 (Mo. 1898): "...Moreover, no set of judges ought to have the right to tie the hands of their successors on constitutional questions, **any more than one general assembly should those of its successors on legislative matters.**" (emphasis added).

A similar decision by the Missouri Supreme Court in 1901 in *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S.W. 1093 (1901), also reinforces this principle. In that decision the Court said, "**Let it be freely admitted that one General Assembly can not tie the hands of its successor...**" (emphasis added); and,

3. Generally, a later enacted statute will override a previously enacted statute if the two are found to be in conflict. Because section 144.058 will be enacted in 2014, 23 years after section 32.087, section 144.058 should prevail if there is deemed to be a conflict between the two statutes. This principle has been reinforced by multiple attorney general opinions over the years.

Clearly, the exemption in subsection 1 of section 144.058 as contained in the Truly Agreed and Finally Passed version of CCS HCS SB 584 applies only to state sales and use taxes. Assigning a loss to local governments is simply inappropriate and contrary to the plain words and meaning of the legislation.