

- SUBJECT:** Enforcement of tax laws and related criminal penalties
- COMMITTEE:** Ways and Means — committee substitute recommended
- VOTE:** 10 ayes — Hilderbran, Otto, Christian, Elkins, Gonzalez, Lyne, Martinez Fischer, Murphy, Ritter, Villarreal
- 0 nays
- 1 absent — Woolley
- WITNESSES:** For — (*Registered but did not testify:* Doug DuBois, Texas Petroleum Marketers and Convenience Store Association)
- Against — None
- On — Ann O’Connell, Texas Comptroller of Public Accounts
- BACKGROUND:** Tax Code, sec. 151.7032 criminalizes the failure by retailers and sellers to pay taxes owed to the state. The penalty, depending on the amount of taxes collected and not paid to the comptroller, is a:
- class C misdemeanor (maximum fine of \$500), if the amount is less than \$10,000;
 - state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000), if the amount is between \$10,000 and \$20,000;
 - third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000), if the amount is between \$20,000 and \$100,000; or
 - second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000), if the amount is more than \$100,000.
- DIGEST:** CSHB 255 would make various changes to the Tax Code related to the comptroller’s criminal investigation efforts. These changes would include:
- linking certain tax crimes to existing crimes in the Penal Code;
 - broadening the venue for prosecuting tax crimes;

- expanding certain tax enforcement powers of the comptroller;
- increasing sales-tax reporting requirements for retailers;
- allowing photographic evidence in certain tobacco cases; and
- removing possible double-jeopardy risks in existing law.

Linking tax crimes and the Penal Code. The bill would make the failure to pay already collected sales taxes prosecutable under existing money-laundering statutes in the Penal Code. Tax Code felonies would be prosecutable under the organized-crime statutes in the Penal Code. Penal Code statutes on conspiracy, certain defenses, and organized crime would apply to tax offenses and their prosecution.

The bill would amend the penalties for the existing crime of failure to pay taxes that had already been collected. The penalty would depend on the amount of taxes collected and not paid to the comptroller:

- class C misdemeanor (maximum fine of \$500), if the amount was less than \$50;
- class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000), if the amount was between \$50 and \$500;
- class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000), if the amount was between \$50 and \$1,500;
- state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000), if the amount was between \$1,500 and \$10,000;
- third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000), if the amount was between \$20,000 and \$100,000;
- second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000), if the amount was between \$100,000 and \$200,000; and
- first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to \$10,000), if the amount was \$200,000 or more.

Under CSHB 255 if the tax collected and not paid was part of an ongoing scheme or continuous course of conduct, prosecutors would be able to aggregate the amounts for purposes of determining the degree of the offense.

CSHB 255 would amend the Code of Criminal Procedure to direct a court to make findings of civil tax fraud if the evidence during a criminal trial showed that the defendant's failure to pay a tax or file a required form stemmed from fraud or intent to evade the tax.

Venue for tax cases. CSHB 255 would broaden the venue for prosecution of conspiracy, organized criminal activity, and money laundering. If the prosecution was based on a criminal offense that also would be classified as a felony under the Tax Code, then the offense could be prosecuted in any county where the venue was proper under the Tax Code.

Alcohol and tobacco reporting rules. CSHB 255 would require retailers and sellers to keep records in the form of all sales receipts, invoices, or other records showing sales and use tax received or collected on each sale, rental, lease, or other service transaction.

The bill also would create a new crime of failure to produce certain records after using a resale certificate. A person would commit an offense if the person intentionally failed to submit to the comptroller records that documented a taxpayer's taxable sales of alcohol and tobacco that were received tax free from another seller using the exemption for resale. Dependent on the amount of tax avoided through use of the resale exemption, an offense would be a:

- class C misdemeanor (maximum fine of \$500), if the tax avoided was less than \$20;
- class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000), if the tax avoided was between \$20 and \$200;
- class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000), if the tax avoided was between \$200 and \$750;
- third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000), if the tax avoided was between \$750 and \$20,000; or
- second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000), if the tax avoided was \$20,000 or more.

It would be an affirmative defense to prosecution if the items purchased tax free under the resale exemption had not yet been resold when the comptroller requested pertinent records. If the avoided taxes were part of an ongoing scheme or continuous course of conduct, prosecutors would be

able to aggregate the amounts for purposes of determining the degree of the offense.

Tax enforcement powers. CSHB 255 would allow the comptroller or the attorney general to use confidential tax information or records to enforce any Texas or federal crime in addition to those under the Tax Code.

The bill would grant investigators employed by the comptroller the authority to investigate any criminal tax offense or any criminal offense under any other law if the offense related to a tax, fee, penalty, or charge administered, collected, or enforced by the comptroller. An investigator commissioned by the comptroller as a peace officer would have the powers of a peace officer within Texas.

CSHB 255 would amend the Government Code to allow the comptroller to receive federal property or federal money from a federal equitable sharing program.

The bill would allow the comptroller to retain, not just sell, forfeited property from cigarette, cigar, and tobacco tax enforcement efforts for official use by the comptroller's criminal investigation division.

Evidence in cigarette, cigar, and tobacco tax prosecutions. The bill would allow the comptroller to use photographs of cigarettes, cigars, and tobacco in related cases to be used as evidence instead of the actual tobacco product.

Double jeopardy. CSHB 255 would amend the Tax Code to remove certain instances of possible double jeopardy concerning motor fuels tax penalties, cigarette, cigar, and tobacco forfeiture, and penalties on delinquent taxes or tax reports.

Effective date. The bill would take effect on September 1, 2011, and would apply only to an offense committed on or after that date. The provision related to broadened venues for tax cases would apply to cases in which the indictment or information was presented to the court on or after the bill's effective date.

SUPPORTERS
SAY:

Linking tax crimes and the Penal Code. Not all crimes are listed in the Penal Code, but the Tax Code lists several crimes related to taxes. Often the Penal Code and the Tax Code take different approaches to crimes and

procedures even though the crimes often are similar or related. CSHB 255 would increase judicial efficiency by allowing certain crimes under the Tax Code to be prosecuted under existing parts of the Penal Code, and by allowing certain existing crimes in the Penal Code be prosecuted under the Tax Code.

CSHB 255 would add tax felonies to the list of crimes that could be prosecuted under the existing organized crime sections of the Penal Code. The bill would amend the Tax Code to explicitly allow the crimes of conspiracy and engaging in organized crime to be prosecuted under the Tax Code. The bill would add the failure to pay sales taxes to the existing statutes on money laundering in the Penal Code.

Making the connections explicit would save prosecutors and courts a great deal of paper and procedural work. These changes are necessary in case certain elements of a crime in the Penal or Tax Codes require an element from the other code as a predicate to prosecution.

CSHB 255 would enhance the penalty ladder for failure to pay taxes collected to match the penalty ladder for theft. This change would be appropriate because not paying taxes that have already been collected on behalf of the state is theft from the state. Existing law is clear that collected taxes are held in trust for the state and must be remitted during the appropriate reporting period.

CSHB 255 bill would increase judicial efficiency by directing a court to make findings of civil tax fraud if the evidence during a criminal trial showed that the defendant's failure to pay a tax or file a required form stemmed from fraud or intent to evade the tax. This would save prosecutors and courts the trouble of holding a second trial on the same facts in order to find a civil penalty. Since one court had already heard and weighed evidence under a criminal proceeding, CSHB 255 would extend those findings to cover applicable civil tax fraud findings as well.

Venue. Under current law, crimes in the Tax Code and crimes in the Penal Code have different statutes that determine where prosecuting the crimes would be appropriate. Most tax crimes can be prosecuted in Travis County, but most crimes in the Penal Code must be prosecuted in the county where they allegedly took place. CSHB 255 would streamline these venue rules to allow prosecution where most appropriate for judicial and prosecutorial efficiency.

For example, if a criminal conspiracy was formed along I-35 to cheat on motor fuel taxes, some of the applicable crimes in the Penal Code would have to be prosecuted in the counties along I-35. Under current law the motor-fuels tax issues could be prosecuted in Travis County. CSHB 255 would allow the prosecution of both the criminal and tax issues to take place in Travis County, saving considerable judicial effort.

Alcohol and tobacco reporting rules. In 2007, the 80th Legislature enacted HB 11 by Cook, which increased the reporting requirements for wholesalers and distributors of alcohol and tobacco products. Under the law they must report to the comptroller the amount of goods sold to retailers. This allows the comptroller and other enforcement agencies to know how much the retailers are selling to the public and how much they should be reporting in applicable taxes.

CSHB 255 would specify the kind of records that retailers are required to keep regarding alcohol and tobacco sales. It also would create a new crime of failure to produce records of sales of alcohol and tobacco. The bill would make it an offense for a retailer to purchase alcohol or tobacco from a distributor or wholesaler and not pay taxes on the purchase under the exemption for resale and then not produce pertinent records of the sale of those goods to the public. Essentially, the retailer in violation promised the state that it would collect the taxes upon ultimate sale to the consumer and then failed to do so. CSHB 255 would be a critical step in allowing prosecutors to keep retailers honest about the taxes they must collect and pay.

Tax enforcement powers. CSHB 255 would make it easier for state and federal agencies to cooperate on joint tax enforcement efforts.

CSHB 255 would allow the comptroller or the attorney general to use confidential tax information to enforce any Texas or federal criminal law in addition to their existing powers to enforce Texas tax laws.

CSHB 255 would allow the comptroller's tax enforcement efforts to become more self sustaining. The bill would allow the comptroller to retain forfeited property from tobacco tax enforcement. The comptroller already can receive forfeited funds that stemmed from a joint enforcement effort with the federal government. In addition, the bill would allow the comptroller to receive certain forfeited property from joint state and federal efforts.

The bill would clarify issues surrounding the jurisdiction of the comptroller's peace officers. Their jurisdiction would be limited to Texas and to crimes under the Tax Code and Penal Code where the particular details of a violation dealt with a tax administered by the comptroller.

Evidence in cigarette, cigar, and tobacco tax prosecutions. CSHB 255 would allow prosecutors to use photographs of tobacco products instead of the items themselves during a prosecution where items were an element of the underlying crime. Public policy dictates that merchandise be returned to rightful owners by courts as soon as possible, so that it can be sold while still fresh and marketable. This policy would encourage merchants to cooperate with authorities because it would minimize disruption to their business activities.

If defense attorneys objected to the use of photographs instead of the underlying evidence itself, they still would be able to argue that the evidence be given less weight.

**OPPONENTS
SAY:**

The creation of new crimes and the enhancement of penalties for existing ones would be disproportionate to the seriousness of the crimes. For example, the range for a class C misdemeanor (maximum fine of \$500) for failure to pay taxes would be collapsed from up to \$10,000 to up to \$50. These are simple property crimes and new felonies should not be created for them. Existing law provides tax collectors and prosecutors ample remedies to enforce tax laws, such as the seizure of business assets or the revocation of business licenses.

NOTES:

The committee substitute removed a provision in the original version of the bill that would have allowed the comptroller to commission any criminal investigators as peace officers.

The companion bill, SB 934 by Williams, passed the Senate by 31-0 on March 31 and was referred to the House Ways and Means Committee on April 11.