



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #763

Oil Company Assessment -- Other Provisions (DOT -- Transportation Finance and DOR -- Tax Administration)

Bill Agency

[LFB 2007-09 Budget Summary: Page 489, #3 and Page 528, #3]

CURRENT LAW

The Department of Revenue (DOR) currently administers the state's motor vehicle fuel tax and petroleum inspection fee collections process.

GOVERNOR

Provide \$200,500 SEG in 2007-08 and \$187,300 SEG in 2008-09 and 3.0 SEG positions annually from the transportation fund to assist in enforcing the oil company assessment on motor vehicle fuel suppliers' gross receipts from fuel sales in Wisconsin.

Require DOR to administer the oil company assessment and authorize the Department to take any action, conduct any proceeding, and impose interest and penalties. Specify that the assessments imposed for each calendar quarter would be due and payable on the last day of the month next succeeding the calendar quarter for which the assessments would be imposed, as provided by the Department by rule. Specify that the current statutory authorities of DOR and the statutory rights and privileges of the taxpayers relative to the assessment, administration, and enforcement of the state income and franchise taxes, as they apply to those taxes, would also apply to the oil company assessment.

Prohibit any supplier who is subject to the oil company assessment from taking any action to increase or influence the selling price of motor vehicle fuel in order to recover the amount of the assessment. Specify that any supplier who takes such action would be subject to a

penalty equal to either the amount of the gain the supplier received from any increase in the selling price that is implemented in order to recover the assessment amount or imprisonment of not more than six months, or both. Specify that, at the DOR Secretary's request, the Attorney General may represent this state, or assist a district attorney, in prosecuting any case arising from the administration and enforcement of the oil company assessment.

Provide DOR the authority to promulgate emergency rules to implement the oil company assessment. DOR would not be required to provide evidence that promulgating these emergency rules is necessary for the preservation of the public peace, health, safety, or welfare and would not be required to provide a finding of emergency to promulgate the rules.

Allow DOR to audit any supplier who would be subject to the oil company assessment to determine whether the supplier has taken any action to increase or influence the selling price of motor vehicle fuel in order to recover the amount of the assessment. Require the Department to annually submit a report to the Governor and the Legislature that contains information on any audits conducted in relation to this authority in the previous year. This audit authority would be in addition to any other audits the Department conducts relative to the oil company assessment.

DISCUSSION POINTS

Modifications to the Bill Requested by the Administration

1. Based on the provisions in the bill, the oil company assessment would likely first apply to motor vehicle fuel sales on January 1, 2008. However, the Department of Administration (DOA) indicates that it was intended that the assessment would first apply to fuel sales on October 1, 2007. The estimated revenues to be generated from the oil company assessment were based on an October 1, 2007, initial applicability. Subsequent to the bill being introduced, DOA submitted an errata under which the oil company assessment would first apply to motor vehicle fuel sales on October 1, 2007.

2. DOA indicates that it was intended that gross receipts would exclude any motor vehicle fuel receipts associated with federal and state excise taxes. However, because the bill does not include a definition of gross receipts, additional clarification of the makeup of gross receipts may be needed. The DOA errata to the bill requests that gross receipts be defined as follows:

"Gross receipts would mean and include all consideration received from the first sale in the state of motor vehicle fuel received by a supplier for sale in the this state, for sale for export to this state, or for export to this state, but do not include state or federal excise taxes collected from the purchaser".

3. DOA's proposed definition of gross receipts would exclude the federal and state motor vehicle fuel excise taxes from the fuel price used to calculate a supplier's gross receipts to which the oil company assessment would be applied. However, under current law, the state also imposes a two cent per gallon petroleum inspection fee, which is referred to under the statutes as a

fee rather than an excise tax. While DOR could interpret DOA's proposed definition in their administrative rules to also exclude the petroleum inspection fee from the gross receipts calculation, specifying that the fee is excluded would better clarify the definition.

4. The bill would specify that any supplier who takes an action to increase or influence the selling price of motor vehicle fuel in order to recover the amount of the assessment would be subject to a penalty or imprisonment of not more than six months, or both. However, the bill does not specify the person or entity that would be subject to the penalty or imprisonment. The DOA errata requests that the person responsible for an action to recover the cost of the oil company assessment would be subject to the possible six-month prison term. DOA also requests that a person be defined as follows:

"An officer, employee, or other responsible person of a corporation or other form of business association or a member, employee, or other responsible person of a partnership, limited liability company, or sole proprietorship who, as such officer, employee, member, or other responsible person, is under a duty to establish the selling price of motor vehicle fuel".

Oil Company Assessment Administration

5. Under current law, in order to protect the revenues to this state from the motor vehicle fuel tax, DOR has the authority to require any licensed supplier who is liable for the tax to place security with the Department in the form of a surety bond. The security can be in an amount determined by the Department and may be increased or decreased as the Department deems necessary. However, the amount cannot exceed three times the licensed supplier's average monthly liability for the taxes. If any applicant or licensed supplier fails or refuses to place security with the Department, DOR may refuse to issue or may revoke their supplier license.

6. The surety bond requirements relative to the motor vehicle fuel tax are in place to provide the state with some up-front security deposit in the event a supplier fails to pay the motor vehicle fuel taxes owed to the state. The bill would not extend a security deposit requirement to the proposed oil company assessment. Given that the proposed oil company assessment would generate an estimated \$158.5 million during its first full year of implementation, it may be desirable to extend the current surety bond requirements for the motor vehicle fuel tax to the proposed oil company assessment in order to provide the state some protection relative to these revenues (modified to refer to the average quarterly liability).

7. Under the bill, DOR would be provided \$200,500 SEG in 2007-08 and \$187,300 SEG in 2008-09 and three audit positions to audit the compliance of oil companies relative to the oil company assessment, including whether a company is passing through the tax. The bill would provide \$124,800 in salary, \$55,300 in fringe benefits, \$13,200 in overtime funding, and \$7,200 in supplies and services in 2007-08 to fund the positions for a full year. However, because it takes some time to get positions filled, first year positions are typically not budgeted for a full year. DOA's budget instructions to agencies for the 2007-09 biennium indicate that new positions are to

be budgeted for only nine months in the first year. Therefore, funding for these positions could be reduced by \$48,300 SEG in salary, fringe benefit, and overtime funding to reflect that the positions would only be filled for nine months in 2007-08.

8. During the Joint Finance Committee's agency briefings on the Governor's 2007-09 budget recommendations, the DOR Secretary indicated that he was confident that the Department could develop an audit model that would ensure compliance with the anti-pass-through provision. DOR indicates that each auditor position has the ability to perform six to eight audits per year. They note that while there are over 150 registered suppliers subject to the oil company assessment, over 90% of the revenue from the oil company assessment would come from the largest 15 suppliers. Therefore, the Department indicates that, over a four-year audit cycle, these audit positions could select, audit, and review the 15 largest suppliers, as well as several smaller suppliers, to ensure compliance.

9. The DOR Secretary also indicated that he would provide additional information on how the Department would administer and enforce the oil company assessment. Subsequently, DOR has provided the following information related to the administration of the proposed oil company assessment, including the enforcement of the anti-pass-through provision:

- DOR will consult industry experts to learn more about industry practices. Department staff expect economists with industry knowledge to have information and practical suggestions about industry accounting and pricing practices.
- The Department will use auditors who audit the largest multi-state and multi-national corporations to review the books and records of the oil companies. These auditors are Certified Public Accountants who have significant training and experience in taxation, financial accounting, and auditing and are experienced in auditing complex corporate structures and inter-company transactions.
- The Department will obtain and maintain historical market data for gasoline and diesel prices at the terminal level in Wisconsin and surrounding states. A disproportionate increase in the price at a Wisconsin terminal versus out-of-state terminals will be a red flag in Department audits.
- DOR staff will work with industry experts and oil companies to develop the forms, schedules, and records necessary to audit this tax. Staff will ask for more data and company records as they gain more experience.
- During an examination, Department auditors would measure the profit margin earned on the company's Wisconsin sales by measuring Wisconsin sales and the costs associated with those sales. Department auditors would do comparisons from year-to-year and across the industry. Deviations may be red flags or at least require further analysis and questioning.

- DOR's large corporate auditors have experience with analyzing market prices (including the effect of intangibles, such as trademarks and tradenames, accounts receivable, inventory, capital assets, real estate, etc.) and using outside sources to confirm financial data.

ALTERNATIVES TO BILL

A. Statutory Provisions

1. Approve the Governor's recommendations as submitted in the bill.
2. Modify the Governor's recommendations relative to the oil company assessment to do one or more of the following:
 - a. Specify that the oil company assessment would first apply to motor vehicle fuel sales on October 1, 2007;
 - b. Define gross receipts to mean and include all consideration received from the first sale in the state of motor vehicle fuel received by a supplier for sale in the this state, for sale for export to this state, or for export to this state, but do not include state or federal excise taxes, or the petroleum inspection fees, collected from the purchaser;
 - c. Specify that the person responsible for an action to recover the cost of the oil company assessment would be subject to the possible six-month prison term and define person to mean an officer, employee, or other responsible person of a corporation or other form of business association or a member, employee, or other responsible person of a partnership, limited liability company, or sole proprietorship who, as such officer, employee, member, or other responsible person, is under a duty to establish the selling price of motor vehicle fuel; and/or
 - d. Extend the current law surety bond requirements for the motor vehicle fuel tax to the proposed oil company assessment, modified to refer to the average quarterly liability.
3. Delete provision.

B. Audit Positions

1. Approve the Governor's recommendation to provide \$200,500 SEG in 2007-08 and \$187,300 SEG in 2008-09 and 3.0 SEG positions annually from the transportation fund to assist in enforcing the oil company assessment on motor vehicle fuel suppliers' gross receipts from fuel sales in Wisconsin.

ALT B1	Change to Bill		Change to Base	
	Funding	Positions	Funding	Positions
SEG	\$0	0.00	\$387,800	3.00

2. Modify the Governor's recommendation by reducing funding in 2007-08 for the 3.0 SEG auditor positions by \$48,300 SEG in salary, fringe benefit, and overtime funding to reflect that the position would only be filled for nine months in 2007-08. Funding for the positions would be \$152,200 SEG in 2007-08 and \$187,300 SEG in 2008-09.

ALT B2	Change to Bill		Change to Base	
	Funding	Positions	Funding	Positions
SEG	- \$48,300	0.00	\$339,500	3.00

3. Delete provision.

ALT B3	Change to Bill		Change to Base	
	Funding	Positions	Funding	Positions
SEG	- \$387,800	- 3.00	\$0	0.00

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