

1 HB175  
2 147177-1  
3 By Representative McClendon  
4 RFD: Health  
5 First Read: 06-FEB-13

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8 SYNOPSIS: Currently, the dispensing of certain  
9 ophthalmic materials by a licensed ophthalmologist  
10 is not considered a sale subject to state sales  
11 tax.

12 This bill would provide that ophthalmic  
13 materials dispensed by ophthalmologists shall be  
14 considered a sale subject to state sales tax.  
15

16 A BILL  
17 TO BE ENTITLED  
18 AN ACT  
19

20 To amend Section 40-23-1, Code of Alabama 1975,  
21 relating to certain exempt sale of ophthalmic materials; to  
22 provide that certain ophthalmic materials are subject to the  
23 state sales tax.

24 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

25 Section 1. Section 40-23-1 of the Code of Alabama  
26 1975, is amended to read as follows:

27 "§40-23-1.

1           "(a) For the purpose of this division, the following  
2 terms shall have the respective meanings ascribed by this  
3 section:

4           "(1) PERSON or COMPANY. Used interchangeably,  
5 includes any individual, firm, copartnership, association,  
6 corporation, receiver, trustee, or any other group or  
7 combination acting as a unit and the plural as well as the  
8 singular number, unless the intention to give a more limited  
9 meaning is disclosed by the context.

10           "(2) DEPARTMENT. The Department of Revenue of the  
11 State of Alabama.

12           "(3) COMMISSIONER. The Commissioner of Revenue of the  
13 State of Alabama.

14           "(4) TAX YEAR or TAXABLE YEAR. The calendar year.

15           "(5) SALE or SALES. Installment and credit sales and  
16 the exchange of properties as well as the sale thereof for  
17 money, every closed transaction constituting a sale. Provided,  
18 however, a transaction shall not be closed or a sale completed  
19 until the time and place when and where title is transferred  
20 by the seller or seller's agent to the purchaser or  
21 purchaser's agent, and for the purpose of determining transfer  
22 of title, a common carrier or the U. S. Postal Service shall  
23 be deemed to be the agent of the seller, regardless of any  
24 F.O.B. point and regardless of who selects the method of  
25 transportation, and regardless of by whom or the method by  
26 which freight, postage, or other transportation charge is  
27 paid. Provided further that, where billed as a separate item

1 to and paid by the purchaser, the freight, postage, or other  
2 transportation charge paid to a common carrier or the U.S.  
3 Postal Service is not a part of the selling price.

4 "(6) GROSS PROCEEDS OF SALES. The value proceeding  
5 or accruing from the sale of tangible personal property, and  
6 including the proceeds from the sale of any property handled  
7 on consignment by the taxpayer, including merchandise of any  
8 kind and character without any deduction on account of the  
9 cost of the property sold, the cost of the materials used,  
10 labor or service cost, interest paid, any consumer excise  
11 taxes that may be included within the sales price of the  
12 property sold, or any other expenses whatsoever, and without  
13 any deductions on account of losses; provided, that cash  
14 discounts allowed and taken on sales shall not be included,  
15 and "gross proceeds of sales" shall not include the sale price  
16 of property returned by customers when the full sales price  
17 thereof is refunded either in cash or by credit. The term  
18 "gross proceeds of sale" shall also mean and include the  
19 reasonable and fair market value of any tangible personal  
20 property previously purchased at wholesale which is withdrawn  
21 or used from the business or stock and used or consumed in  
22 connection with a business, and shall also mean and include  
23 the reasonable and fair market value of any tangible personal  
24 property previously purchased at wholesale which is withdrawn  
25 from the business or stock and used or consumed by any person  
26 so withdrawing the same, except property which has been  
27 previously withdrawn from business or stock and so used or

1 consumed with respect to which property the tax has been paid  
2 because of previous withdrawal, use, or consumption, except  
3 property which enters into and becomes an ingredient or  
4 component part of tangible personal property or products  
5 manufactured or compounded for sale and not for the personal  
6 and private use or consumption of any person so withdrawing,  
7 using, or consuming the same, and except refinery, residue, or  
8 fuel gas, whether in a liquid or gaseous state, that has been  
9 generated by, or is otherwise a by-product of, a  
10 petroleum-refining process, which gas is then utilized in the  
11 process to generate heat or is otherwise utilized in the  
12 distillation or refining of petroleum products.

13 "In the case of the retail sale of equipment,  
14 accessories, fixtures, and other similar tangible personal  
15 property used in connection with the sale of commercial mobile  
16 services as defined herein, or in connection with satellite  
17 television services, at a price below cost, "gross proceeds of  
18 sale" shall only include the stated sales price thereof and  
19 shall not include any sales commission or rebate received by  
20 the seller as a result of the sale. As used herein, the term  
21 "commercial mobile services" shall have the same meaning as  
22 that term has in 47 U.S.C. Sections 153(n) and 332(d), as in  
23 effect from time to time.

24 "(7) TAXPAYER. Any person liable for taxes  
25 hereunder.

26 "(8) GROSS RECEIPTS. The value proceeding or  
27 accruing from the sale of tangible personal property,

1 including merchandise and commodities of any kind and  
2 character, all receipts actual and accrued, by reason of any  
3 business engaged in, not including, however, interest,  
4 discounts, rentals of real estate or royalties, and without  
5 any deduction on account of the cost of the property sold, the  
6 cost of the materials used, labor or service cost, interest  
7 paid, any consumer excise taxes that may be included in the  
8 sales price of the property sold, or any other expenses  
9 whatsoever and without any deductions on account of losses.  
10 The term "gross receipts" shall also mean and include the  
11 reasonable and fair market value of any tangible personal  
12 property previously purchased at wholesale which is withdrawn  
13 or used from the business or stock and used or consumed in  
14 connection with a business, and shall also mean and include  
15 the reasonable and fair market value of any tangible personal  
16 property previously purchased at wholesale which is withdrawn  
17 from the business or stock and used or consumed by any person  
18 so withdrawing the same, except property which has been  
19 previously withdrawn from business or stock and so used or  
20 consumed and with respect to which property the tax has been  
21 paid because of previous withdrawal, use, or consumption,  
22 except property which enters into and becomes an ingredient or  
23 component part of tangible personal property or products  
24 manufactured or compounded for sale as provided in subdivision  
25 (9) and not for the personal and private use or consumption of  
26 any person so withdrawing, using, or consuming the same, and  
27 except refinery, residue, or fuel gas, whether in a liquid or

1 gaseous state, that has been generated by, or is otherwise a  
2 by-product of, a petroleum-refining process, which gas is then  
3 utilized in the process to generate heat or is otherwise  
4 utilized in the distillation or refining of petroleum  
5 products.

6 "(9) WHOLESALE SALE or SALE AT WHOLESALE. Any one of  
7 the following:

8 "a. A sale of tangible personal property by  
9 wholesalers to licensed retail merchants, jobbers, dealers, or  
10 other wholesalers for resale and does not include a sale by  
11 wholesalers to users or consumers, not for resale.

12 "b. A sale of tangible personal property or  
13 products, including iron ore, and including the furnished  
14 container and label of such property or products, to a  
15 manufacturer or compounder which enter into and become an  
16 ingredient or component part of the tangible personal property  
17 or products which the manufacturer or compounder manufactures  
18 or compounds for sale, whether or not such tangible personal  
19 property or product used in manufacturing or compounding a  
20 finished product is used with the intent that it becomes a  
21 component of the finished product; provided, however, that it  
22 is the intent of this section that no sale of capital  
23 equipment, machinery, tools, or product shall be included in  
24 the term "wholesale sale." The term "capital equipment,  
25 machinery, tools, or product" shall mean property that is  
26 subject to depreciation allowances for Alabama income tax  
27 purposes.

1            "c. A sale of containers intended for one-time use  
2 only, and the labels thereof, when containers are sold without  
3 contents to persons who sell or furnish containers along with  
4 the contents placed therein for sale by persons.

5            "d. A sale of pallets intended for one-time use only  
6 when pallets are sold without contents to persons who sell or  
7 furnish pallets along with the contents placed thereon for  
8 sale by persons.

9            "e. A sale to a manufacturer or compounder, of  
10 crowns, caps, and tops intended for one-time use employed and  
11 used upon the containers in which a manufacturer or compounder  
12 markets his products.

13           "f. A sale of containers to persons engaged in  
14 selling or otherwise supplying or furnishing baby chicks to  
15 growers thereof where containers are used for the delivery of  
16 chicks or a sale of containers for use in the delivery of eggs  
17 by the producer thereof to the distributor or packer of eggs  
18 even though containers used for delivery of baby chicks or  
19 eggs may be recovered for reuse.

20           "g. A sale of bagging and ties used in preparing  
21 cotton for market.

22           "h. A sale to meat packers, manufacturers,  
23 compounders, or processors of meat products of all casings  
24 used in molding or forming wieners and Vienna sausages even  
25 though casings may be recovered for reuse.

26           "i. A sale of commercial fish feed including  
27 concentrates, supplements, and other feed ingredients when



1 substances are used as ingredients in mixing and preparing  
2 feed for fish raised to be sold on a commercial basis.

3 "j. A sale of tangible personal property to any  
4 person engaging in the business of leasing or renting tangible  
5 personal property to others, if tangible personal property is  
6 purchased for the purpose of leasing or renting it to others  
7 under a transaction subject to the privilege or license tax  
8 levied in Article 4 of Chapter 12 of this title against any  
9 person engaging in the business of leasing or renting tangible  
10 personal property to others.

11 "k. A purchase or withdrawal of parts or materials  
12 from stock by any person licensed under this division where  
13 parts or materials are used in repairing or reconditioning the  
14 tangible personal property of a licensed person, which  
15 tangible personal property is a part of the stock of goods of  
16 a licensed person, offered for sale by him, and not for use or  
17 consumption of a licensed person.

18 "(10) SALE AT RETAIL or RETAIL SALE. All sales of  
19 tangible personal property except those above defined as  
20 wholesale sales. The quantities of goods sold or prices at  
21 which sold are immaterial in determining whether or not a sale  
22 is at retail. Sales of building materials to contractors,  
23 builders, or landowners for resale or use in the form of real  
24 estate are retail sales in whatever quantity sold. Sales of  
25 building materials, fixtures, or other equipment to a  
26 manufacturer or builder of modular buildings for use in  
27 manufacturing, building, or equipping a modular building

1 ultimately becoming a part of real estate situated in the  
2 State of Alabama are retail sales, and the use, sale, or  
3 resale of building shall not be subject to the tax. Sales of  
4 tangible personal property to undertakers and morticians are  
5 retail sales and subject to the tax at the time of purchase,  
6 but are not subject to the tax on resale to the consumer.  
7 Sales of tangible personal property or products to  
8 manufacturers, quarry operators, mine operators, or  
9 compounders, which are used or consumed by them in  
10 manufacturing, mining, quarrying, or compounding and do not  
11 become an ingredient or component part of the tangible  
12 personal property manufactured or compounded as provided in  
13 subdivision (9) are retail sales. The term "sale at retail" or  
14 "retail sale" shall also mean and include the withdrawal, use,  
15 or consumption of any tangible personal property by any one  
16 who purchases same at wholesale, except property which has  
17 been previously withdrawn from the business or stock and so  
18 used or consumed and with respect to which property tax has  
19 been paid because of previous withdrawal, use, or consumption,  
20 except property which enters into and becomes an ingredient or  
21 component part of tangible personal property or products  
22 manufactured or compounded for sale as provided in subdivision  
23 (9) and not for the personal and private use or consumption of  
24 any person so withdrawing, using, or consuming the same; and  
25 wholesale purchaser shall report and pay the taxes thereon. In  
26 the case of the sale of equipment, accessories, fixtures, and  
27 other similar tangible personal property used in connection

1 with the sale of commercial mobile services as defined in  
2 subdivision (6) above, or in connection with satellite  
3 television services, at a price below cost, the term "sale at  
4 retail" and "retail sale" shall include those sales, and those  
5 sales shall not also be taxable as a withdrawal, use, or  
6 consumption of such tangible personal property.

7 "(11) BUSINESS. All activities engaged in, or caused  
8 to be engaged in, with the object of gain, profit, benefit, or  
9 advantage, either direct or indirect, and not excepting  
10 subactivities producing marketable commodities used or  
11 consumed in the main business activity, each of which  
12 subactivities shall be considered business engaged in, taxable  
13 in the class in which it falls.

14 "(12) AUTOMOTIVE VEHICLE. A power shovel, dragline,  
15 crawler, crawler crane, ditcher, or any similar machine which  
16 is self-propelled, in addition to self-propelled machines  
17 which are used primarily as instruments of conveyance.

18 "(13) PREPAID TELEPHONE CALLING CARD. A sale of a  
19 prepaid telephone calling card or a prepaid authorization  
20 number, or both, shall be deemed the sale of tangible personal  
21 property subject to the tax imposed on the sale of tangible  
22 personal property pursuant to this chapter.

23 "(b) The use within this state of tangible personal  
24 property by the manufacturer thereof, as building materials in  
25 the performance of a construction contract, shall, for the  
26 purposes of this division, be considered as a retail sale  
27 thereof by manufacturer, who shall also be construed as the

1 ultimate consumer of materials or property, and who shall be  
2 required to report transaction and pay the sales tax thereon,  
3 based upon the reasonable and fair market price thereof at the  
4 time and place where same are used or consumed by him or it.  
5 Where the contractor is the manufacturer or compounder of  
6 ready-mix concrete or asphalt plant mix used in the  
7 performance of a contract, whether the ready-mix concrete or  
8 asphalt plant mix is manufactured or compounded at the job  
9 site or at a fixed or permanent plant location, the tax  
10 applies only to the cost of the ingredients that become a  
11 component part of the ready-mix concrete or the asphalt plant  
12 mix. The provisions of this subsection shall not apply to any  
13 tangible personal property which is specifically exempted from  
14 the tax levied in this division.

15 "(c) The sale of lumber by a lumber manufacturer to  
16 a trucker for resale is a sale at wholesale as sales are  
17 defined herein where the trucker is either a licensed dealer  
18 in lumber or, if a resident of Alabama, has registered with  
19 the Department of Revenue, and has received therefrom a  
20 certificate of registration or, if a nonresident of this state  
21 purchasing lumber for resale outside the State of Alabama, has  
22 furnished to the lumber manufacturer his name, address and the  
23 vehicle license number of the truck in which the lumber is to  
24 be transported, which name, address, and vehicle license  
25 number shall be shown on the sales invoice rendered by the  
26 lumber manufacturer. The certificate provided for herein shall  
27 be valid for the calendar year of its issuance and may be

1 renewed from year to year on application to the Department of  
2 Revenue on or before January 31 of each succeeding year;  
3 provided, that if not renewed the certificate shall become  
4 invalid for the purpose of this division on February 1.

5 "(d) The dispensing or transferring of ophthalmic  
6 materials, including lenses, frames, eyeglasses, contact  
7 lenses, and other therapeutic optic devices, to a patient by a  
8 licensed ophthalmologist, as a part of his or her professional  
9 service, shall ~~not~~, for purposes of this division, ~~be deemed~~  
10 ~~or considered to~~ constitute a sale, subject to the state sales  
11 tax. The licensed ophthalmologist or licensed optometrist  
12 ~~shall be considered the ultimate consumer of the ophthalmic~~  
13 ~~materials and shall have no responsibility or duty pursuant to~~  
14 ~~this division for the collection of~~ collect the state sales  
15 tax. ~~The sale of the ophthalmic materials to a licensed~~  
16 ~~ophthalmologist by a supplier thereof shall be considered a~~  
17 ~~retail sale subject to the state sales tax, and the supplier~~  
18 ~~shall be responsible for collecting sales tax from the~~  
19 ~~licensed ophthalmologist.~~ In no event shall the providing of  
20 professional services in connection with the dispensing or  
21 transferring of ophthalmic materials, including dispensing  
22 fees or fitting fees, by a licensed ophthalmologist or  
23 licensed optometrist be considered a sale subject to the state  
24 sales tax. When the ophthalmic materials are purchased by a  
25 consumer covered by a third party benefit plan, including  
26 Medicare, the sales tax shall be applicable to the amount that  
27 the ophthalmologist, optometrist, or optician is reimbursed by

1     the third party benefit plan plus the amount that the consumer  
2     pays to the ophthalmologist, optometrist, or optician at the  
3     time of the sale. All transfers of ophthalmic materials by  
4     opticians or optometrists shall be considered retail sales  
5     subject to the state sales tax. The term supplier shall  
6     include but not be limited to optical laboratories, ophthalmic  
7     material wholesalers, or anyone selling ophthalmic materials  
8     to ophthalmologists.

9             "(e) Notwithstanding the above, the withdrawal, use,  
10     or consumption of a manufactured product by the manufacturer  
11     thereof in quality control testing performed by employees or  
12     independent contractors of the taxpayer, for purposes of this  
13     division, shall not be deemed or considered to constitute a  
14     transaction subject to sales tax, nor shall a gift by the  
15     manufacturer of a manufactured product, withdrawn from the  
16     manufacturer's inventory, to an entity listed in 26 U.S.C.  
17     Sections 170(b) or (c), be considered a transaction subject to  
18     sales tax.

19             "(f) Notwithstanding the foregoing, a gift by a  
20     retailer of a product or products where the aggregate retail  
21     value of any single gift is equal to or less than ten thousand  
22     dollars (\$10,000), withdrawn from the retailer's inventory, to  
23     an entity listed in 26 U.S.C. Sections 170(b) or (c) shall not  
24     be deemed or considered to constitute a transaction subject to  
25     sales and use tax."

1                   Section 2. This act shall become effective  
2       immediately following its passage and approval by the  
3       Governor, or its otherwise becoming law.