

1 HB514  
2 135766-2  
3 By Representatives McClendon and Love  
4 RFD: Ways and Means Education  
5 First Read: 14-MAR-12

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

12 This bill would provide that the dispensing  
13 or transferring of such products by a licensed  
14 ophthalmologist or a licensed optometrist is  
15 subject to the state sales tax.

16  
17 A BILL  
18 TO BE ENTITLED  
19 AN ACT

20  
21 To amend Section 40-23-1, Code of Alabama 1975,  
22 relating to transactions that are considered to be or not be a  
23 sale; to provide that the dispensing or transferring of  
24 ophthalmic materials by either a licensed ophthalmologist or a  
25 licensed optometrist is a sale subject to the state sales tax.  
26 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

3           "§40-23-1.

4           "(a) For the purpose of this division, the following  
5 terms shall have the respective meanings ascribed by this  
6 section:

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

13           "(2) DEPARTMENT. The Department of Revenue of the  
14 State of Alabama.

15           "(3) COMMISSIONER. The Commissioner of Revenue of  
16 the State of Alabama.

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

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

1 transportation, and regardless of by whom or the method by  
2 which freight, postage, or other transportation charge is  
3 paid. Provided further that, where billed as a separate item  
4 to and paid by the purchaser, the freight, postage, or other  
5 transportation charge paid to a common carrier or the U.S.  
6 Postal Service is not a part of the selling price.

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

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

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

1           "(7) TAXPAYER. Any person liable for taxes  
2 hereunder.

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

1 manufactured or compounded for sale as provided in subdivision  
2 (9) and not for the personal and private use or consumption of  
3 any person so withdrawing, using, or consuming the same, and  
4 except refinery, residue, or fuel gas, whether in a liquid or  
5 gaseous state, that has been generated by, or is otherwise a  
6 by-product of, a petroleum-refining process, which gas is then  
7 utilized in the process to generate heat or is otherwise  
8 utilized in the distillation or refining of petroleum  
9 products.

10 "(9) WHOLESALE SALE or SALE AT WHOLESALE. Any one of  
11 the following:

12 "a. A sale of tangible personal property by  
13 wholesalers to licensed retail merchants, jobbers, dealers, or  
14 other wholesalers for resale and does not include a sale by  
15 wholesalers to users or consumers, not for resale.

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

1 the term "wholesale sale." The term "capital equipment,  
2 machinery, tools, or product" shall mean property that is  
3 subject to depreciation allowances for Alabama income tax  
4 purposes.

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

9 "d. A sale of pallets intended for one-time use only  
10 when pallets are sold without contents to persons who sell or  
11 furnish pallets along with the contents placed thereon for  
12 sale by persons.

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

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

24 "g. A sale of bagging and ties used in preparing  
25 cotton for market.

26 "h. A sale to meat packers, manufacturers,  
27 compounders, or processors of meat products of all casings



1 used in molding or forming wieners and Vienna sausages even  
2 though casings may be recovered for reuse.

3 "i. A sale of commercial fish feed including  
4 concentrates, supplements, and other feed ingredients when  
5 substances are used as ingredients in mixing and preparing  
6 feed for fish raised to be sold on a commercial basis.

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

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

22 "(10) SALE AT RETAIL or RETAIL SALE. All sales of  
23 tangible personal property except those above defined as  
24 wholesale sales. The quantities of goods sold or prices at  
25 which sold are immaterial in determining whether or not a sale  
26 is at retail. Sales of building materials to contractors,  
27 builders, or landowners for resale or use in the form of real

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

1 any person so withdrawing, using, or consuming the same; and  
2 wholesale purchaser shall report and pay the taxes thereon. In  
3 the case of the sale of equipment, accessories, fixtures, and  
4 other similar tangible personal property used in connection  
5 with the sale of commercial mobile services as defined in  
6 subdivision (6) above, or in connection with satellite  
7 television services, at a price below cost, the term "sale at  
8 retail" and "retail sale" shall include those sales, and those  
9 sales shall not also be taxable as a withdrawal, use, or  
10 consumption of such tangible personal property.

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

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

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

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

20           "(c) The sale of lumber by a lumber manufacturer to  
21 a trucker for resale is a sale at wholesale as sales are  
22 defined herein where the trucker is either a licensed dealer  
23 in lumber or, if a resident of Alabama, has registered with  
24 the Department of Revenue, and has received therefrom a  
25 certificate of registration or, if a nonresident of this state  
26 purchasing lumber for resale outside the State of Alabama, has  
27 furnished to the lumber manufacturer his name, address and the

1 vehicle license number of the truck in which the lumber is to  
2 be transported, which name, address, and vehicle license  
3 number shall be shown on the sales invoice rendered by the  
4 lumber manufacturer. The certificate provided for herein shall  
5 be valid for the calendar year of its issuance and may be  
6 renewed from year to year on application to the Department of  
7 Revenue on or before January 31 of each succeeding year;  
8 provided, that if not renewed the certificate shall become  
9 invalid for the purpose of this division on February 1.

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

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

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

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

1 be deemed or considered to constitute a transaction subject to  
2 sales and use tax."

3 Section 2. This act shall become effective on the  
4 first day of the third month following its passage and  
5 approval by the Governor, or its otherwise becoming law.