



Senate Fiscal Agency
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Senate Bill 153 (as enacted)
House Bill 5267 (as enacted)
Sponsor: Senator Winnie Brinks (S.B. 153)
Representative Bryan Posthumus (H.B. 5267)
Senate Committee: Finance
House Committee: Tax Policy

PUBLIC ACT 109 of 2021
PUBLIC ACT 108 of 2021

Date Completed: 4-13-22

RATIONALE

The State of Michigan levies 6.0% taxes on tangible personal property sold (sales tax) or used, stored, or consumed (use tax) in Michigan. Formerly, tampons, sanitary napkins, and similar feminine hygiene products were subject to these taxes. However, since women use these products for most of their adult lives, some contended that menstrual products are medically necessary and that the lack of exemptions for those products discriminates against women, particularly those who have lower incomes. Accordingly, it was suggested that tax exemptions be established for feminine hygiene products.

CONTENT

Senate Bill 153 and House Bill 5267 amended the Use Tax Act and General Sales Tax Act, respectively, to exempt from taxation under those Acts the sale of feminine hygiene products.

"Feminine hygiene products" means tampons, panty liners, menstrual cups, sanitary napkins, and other similar tangible personal property designed for feminine hygiene in connection with the human menstrual cycle.

The Acts generally exempt from taxation certain transactions with respect to sale of data center equipment; however, both require an amount equal to the revenue lost to the State School Aid Fund as a result of those exemptions to be deposited into the School Aid Fund. Under the bills, this also applies to the bills' exemptions.

The bills took effect on February 3, 2022.

MCL 205.94 & 205.111 (S.B. 153)
205.54a & 205.75 (H.B. 5267)

BACKGROUND

Within the United States, there has been significant discussion about eliminating taxes on feminine hygiene products. Before the enactment of Public Acts 108 and 109, an effort was made to challenge the collection of sales and use tax in Michigan on equal protection grounds. In 2020, a group of plaintiffs who were purchasers of menstrual products in Michigan sought to bring a class action alleging that the State of Michigan's administration and enforcement of the sales and use

tax on menstrual products were unconstitutional in that they constituted disparate treatment of women and constituted sex-based discrimination.¹

In *Beggs*, the Michigan Court of Claims held that the application of sales and use tax to those products did not violate State or Federal guarantees of equal protection. Because the plaintiffs' claims implicated questions of sex-based discrimination, the Court analyzed whether intermediate scrutiny applied to the claims.² The Court held that it did not. In determining whether to apply intermediate scrutiny, the Court first looked at whether the statutes at issue are facially neutral. The Court noted that the General Sales Tax Act and the Use Tax Act are facially neutral because they impose tax on "tangible personal property", a broad term that is defined without respect to sex. The Court next looked at whether the laws have a disparate impact on a protected class. The Court noted that a statute having a disparate impact on a protected class does not, in and of itself, make the statute unconstitutional; only purposeful discrimination does. While the absence of an exemption disparately affected women, the Court noted that the plaintiffs did not demonstrate any legislative intent to discriminate. Moreover, because the power to tax or exempt items from taxation lies with the Legislature, the Court stated that plaintiffs' claims that the Department of Treasury administered and enforced the law with discriminatory intent could not succeed. In short, because the pertinent statutes did not provide sales or use tax exemptions for menstrual products, the Department could not grant one.

After determining that intermediate scrutiny did not apply, the Court applied the rational-basis test.³ Accordingly, the Court held that the raising of revenue is a legitimate State interest, and that statutes that impose a tax on a broad category of goods while offering a limited number of exemptions (and declining to do so for any product that could be exempted for a given policy reason) are consistent with that interest.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Feminine hygiene products are essential for the health and well-being of women from adolescence through adulthood. Despite their necessity, these products were subject to taxation while many other necessary medical products are not. Although the amount of the tax was not a substantial amount of money on a per-product basis, the lifetime costs were substantial, particularly for those with lower incomes. Also, the sales and use tax that was paid on these products was paid predominantly by women and girls (or by those purchasing these products for women or girls). Ultimately, this was unequitable.

The General Sales Tax Act and the Use Tax Act exempt a variety of necessities from taxation; it is not unreasonable that feminine hygiene products are exempt, as well. Between 2016 and 2020, a number of states, including Florida, Connecticut, Illinois, Nevada, New York, Ohio, Utah, and Washington, have eliminated sales or use taxes on menstrual products. According to Period., a nonprofit organization, 27 states (including Michigan) have established, or already had, tax

¹ *Beggs v. Michigan*, opinion and order of the Michigan Court of Claims, case no. 20-000149-MT (2021).

² In order to determine the constitutionality of a statute that is alleged to violate State or Federal guarantees of equal protection against a protected class (e.g., race, sex, religion, etc.), a court will apply a given level of judicial scrutiny (i.e., intermediate scrutiny or strict scrutiny) to the statute depending on the protected class involved. In any event, a challenged statute is presumed constitutional, and the plaintiff bears the burden of rebutting this presumption. To survive intermediate scrutiny, the challenged law must further an important government interest and it must do so by means that are substantially related to that interest.

³ If a heightened level of scrutiny is unwarranted, the statute is analyzed under 'rational-basis' review. To pass rational-basis review, the statute must further a legitimate governmental interest, and the statute must be rationally related to achieving that result.

exemptions for feminine hygiene products, and other state legislatures have introduced similar measures. Moreover, beginning with the 2019 tax year, the Federal government recognizes the medical necessity of these products and has designated menstrual care products as qualified health expenses for the purposes of health savings accounts (HSAs), flexible spending arrangements (FSAs), and other Federal medical savings programs.⁴ A tax exemption for menstrual products gives parity to women and girls in Michigan as compared with other states, puts millions of dollars back into the pockets of women and families who purchase these products, and ends a discriminatory practice.

Opposing Argument

The elimination of taxes on these medically necessary products is worthy policy, but primarily benefits women only. Instead of granting a limited, sex-specific tax exemption only for menstrual products, the Michigan Legislature should have enacted a broader exemption for all medically necessary items. Moreover, the creation of limited exemptions further serves to erode the tax base of the sales tax, which will create more funding issues for State and local governments.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bills will reduce revenue to the State General Fund and constitutional revenue sharing by approximately \$6.3 million per year. Most of any impact from exempting the sale of feminine hygiene products likely will fall under a sales tax exemption, such as the one provided in House Bill 5267. While sales and use tax exemptions normally reduce both General Fund and School Aid Fund revenue, the bills require the General Fund to reimburse the School Aid Fund for any revenue loss. House Bill 5267 does not require the General Fund to reimburse any reduction in constitutional revenue sharing to local units.

Because both bills were enacted, General Fund will be reduced by approximately \$5.7 million per year, while constitutional revenue sharing to local units will be reduced by approximately \$600,000.

Fiscal Analyst: David Zin

⁴ "Health Savings Accounts and Other Tax-Favored Health Plans", Internal Revenue Service Publication 969. The Federal government offers a variety of tax favored programs to allow taxpayers to use (generally) before-tax income for health and medical costs for themselves and their dependents. These include the HSA and the FSA.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.