

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 1798
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Finance
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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Companies incorporated in states other than Texas that benefit from electronic sales to consumers in Texas, such as Amazon.com and other e-retailers, are not collecting and remitting sales tax to the State of Texas for those purchases. The comptroller of public accounts estimates that Texas loses approximately \$600 million per year in uncollected online sales tax.

The United States Supreme Court has held that state sales tax may only be collected from out-of-state companies whose sales operations have a nexus, or connection, to the state which is entitled to tax those operations. What constitutes the requisite nexus has become increasingly confusing because of legal language that has become essentially irrelevant in an age of routine Internet transactions. The result has been to create a significant competitive advantage for out-of-state e-retailers over Texas-based brick-and-mortar retailers and Texas-based e-retailer competitors.

Out-of-state companies attempt to circumvent and escape nexus through the use of two strategies. The out-of-state company uses an in-state company to solicit on its behalf. This practice is known as "affiliate marketing," wherein in-state companies post links on their websites to out-of-state e-retailers, or the company utilizes "entity isolation," taking functions that would traditionally be performed by separate divisions within the same corporation and tuning them in to separate business and legal entities. The company accordingly creates the legal fiction of separation in order to attempt to escape taxation.

C.S.S.B. 1798 amends current law relating to retailers engaged in business in this state for purposes of sales and use taxes.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 151.008(b), Tax Code, to redefine "seller" and "retailer."

SECTION 2. Amends Section 151.107, Tax Code, by amending Subsection (a) and adding Subsections (a-1) and (d), as follows:

(a) Provides that for the purpose of this subchapter and in relation to the use tax, a retailer is engaged in business in this state if the retailer:

(1) maintains, occupies, or uses in this state permanently, temporarily, directly, or indirectly or through a subsidiary or agent by whatever name, an office, place of distribution, sales or sample room or place, warehouse, storage place, or any other location where business is conducted, rather than any other place of business;

(2) has a representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, fulfilling, or delivering or the taking of orders for a taxable item;

(3) derives receipts or receives compensation from the sale, use, lease, or rental of tangible personal property situated in this state, rather than derives rentals from a lease of tangible personal property situated in this state;

(4) engages in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items;

(5) solicits orders for taxable items by mail or through other media and under federal law is subject to or permitted to be made subject to the jurisdiction of this state for purposes of collecting the taxes imposed by this chapter;

(6) has a franchise or licensee operated under its trade name if the franchisee or licensee is required to collect the tax under this section;

(7) holds a substantial ownership interest in, or is owned in whole or substantial part by, a business entity that maintains a location in this state at which business is conducted and if:

(A) the retailer sells the same or a substantially similar line of products as the business entity with the location in this state and sells those products under a business name that is the same or substantially similar to the business name of the business entity with the location in this state; or

(B) the Texas facilities, Texas employees, or other representatives of the business entity with the location in this state that are used to advertise, promote, or facilitate sales by the retailer to consumers, or perform any other activity on behalf of the retailer that is intended to establish or maintain a marketplace for the retailer in this state, including receiving or exchanging returned merchandise;

(8) holds a substantial ownership interest in, or is owned in whole or substantial part by, a business entity that:

(A) maintains in this state a distribution house, sales house, warehouse, or similar location at which business is conducted; and

(B) delivers property sold by the retailer or an affiliate of the retailer to consumers; or

(9) otherwise does business in this state.

(a-1) Provides that, for the purpose of this subchapter and in relation to the use tax, there is a rebuttable presumption that a retailer that is part of an affiliated group is engaged in business in this state if another member entity of the affiliated group is a retailer engaged in business in this state. Authorizes the presumption to be rebutted by evidence that, during the preceding 12-month period, the other member entity that is a retailer engaged in business in this state did not engage in any activity described by this section on behalf of the retailer to which the presumption applies.

(b) Defines, in this section, "affiliated group," "ownership," and "substantial."

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: January 1, 2012.