86R1184 CJC-F

By:  West S.B. No. 119

A BILL TO BE ENTITLED

AN ACT

relating to actions by a retailer that constitute engaging in business in this state for purposes of the use tax and to the allocation of certain revenue derived from that tax.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1.  Section 151.107(a), Tax Code, is amended to read as follows:

(a)  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, distribution center, sales or sample room or place, warehouse, storage place, or any other physical location where business is conducted;

(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 or delivering or the taking of orders for a taxable item;

(3)  derives receipts from the sale, lease, or rental 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 franchisee or licensee operating 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 person who maintains a location in this state from which business is conducted and if:

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

(B)  the facilities or employees of the person with the location in this state are used to:

(i)  advertise, promote, or facilitate sales by the retailer to consumers; or

(ii)  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 person that:

(A)  maintains a distribution center, warehouse, or similar location in this state; and

(B)  delivers property sold by the retailer to consumers; [~~or~~]

(9)  in the previous calendar year or the current calendar year:

(A)  has total receipts of more than $100,000 from taxable items delivered in this state, including taxable items delivered electronically to purchasers in this state; or

(B)  has at least 200 sales of taxable items delivered in this state, including taxable items delivered electronically to purchasers in this state; or

(10)  otherwise does business in this state.

SECTION 2.  Section 151.801, Tax Code, is amended by amending Subsection (a) and adding Subsection (c-3) to read as follows:

(a)  Except for the amounts allocated under Subsections (b), (c), [~~and~~] (c-2), and (c-3), all proceeds from the collection of the taxes imposed by this chapter shall be deposited to the credit of the general revenue fund.

(c-3)  Except to the extent Subsection (b), (c), or (c-2) requires a different allocation, the comptroller shall deposit to the credit of the property tax relief fund established under Section 403.109, Government Code, the amount of the proceeds from the tax imposed under Section 151.101 and received by the comptroller that is attributable to the collection of that tax by retailers considered to be engaged in business in this state solely on the basis of Section 151.107(a)(9). The comptroller may require a retailer described by this subsection to report to the comptroller as necessary to make the allocation under this subsection.

SECTION 3.  (a) The state may bring an action for declaratory judgment in a district court in Travis County under Chapter 37, Civil Practice and Remedies Code, to determine the constitutionality and other validity under the state or federal constitution of all or any part of Section 151.107(a)(9), Tax Code, as amended by this Act. This subsection applies without regard to whether the state has initiated an audit of, or other tax collection procedure against, any taxpayer involving Section 151.107(a)(9), Tax Code, as amended by this Act. This subsection does not authorize an award of attorney's fees against this state, and Section 37.009, Civil Practice and Remedies Code, does not apply to an action filed under this subsection.

(b)  An appeal of a declaratory judgment or order, however characterized, of a district court, including an appeal of the judgment of an appellate court, holding or otherwise determining that all or any part of Section 151.107(a)(9), Tax Code, as amended by this Act, is constitutional or unconstitutional, or otherwise valid or invalid, under the state or federal constitution is an accelerated appeal.

(c)  If the judgment or order is interlocutory, an interlocutory appeal may be taken from the judgment or order and is an accelerated appeal.

(d)  A district court in Travis County may grant or deny a temporary or otherwise interlocutory injunction or a permanent injunction on the grounds of the constitutionality or unconstitutionality, or other validity or invalidity, under the state or federal constitution of all or any part of Section 151.107(a)(9), Tax Code, as amended by this Act.

(e)  There is a direct appeal to the Texas Supreme Court from an order, however characterized, of a trial court granting or denying a temporary or otherwise interlocutory injunction or a permanent injunction on the grounds of the constitutionality or unconstitutionality, or other validity or invalidity, under the state or federal constitution of all or any part of Section 151.107(a)(9), Tax Code, as amended by this Act.

(f)  The direct appeal is an accelerated appeal.

(g)  This section exercises the authority granted by Section 3-b, Article V, Texas Constitution.

(h)  The filing of a direct appeal under this section will automatically stay any temporary or otherwise interlocutory injunction or permanent injunction granted in accordance with this section pending final determination by the Texas Supreme Court.

(i)  An appeal under this section, including an interlocutory, accelerated, or direct appeal, is governed, as applicable, by the Texas Rules of Appellate Procedure, including Rules 25.1(d)(6), 26.1(b), 28.1, 28.3, 32.1(g), 37.3(a)(1), 38.6(a) and (b), 40.1, and 49.4.

SECTION 4.  While a declaratory judgment action under Section 3(a) of this Act or an appeal of a declaratory judgment or order, however characterized, in an action under Section 3(a) of this Act is pending, the state may not apply Section 151.107(a)(9), Tax Code, as amended by this Act, to any person unless:

(1)  the person consents to the application of Section 151.107(a)(9), Tax Code, as amended by this Act, to the person; or

(2)  another court order or judgment has determined that Section 151.107(a)(9), Tax Code, as amended by this Act, is valid and constitutional as applied to the particular person.

SECTION 5.  The change in law made by this Act does not affect tax liability accruing before the effective date of this Act. That liability continues in effect as if this Act had not been enacted, and the former law is continued in effect for the collection of taxes due and for civil and criminal enforcement of the liability for those taxes.

SECTION 6.  This Act takes effect September 1, 2019.