

AMENDED IN SENATE JUNE 27, 2011

AMENDED IN ASSEMBLY MAY 27, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 153

Introduced by Assembly Member Skinner
(Coauthors: Assembly Members Allen and Huffman)
(Coauthor: Senator Leno)

January 18, 2011

An act to amend Section 6203 of the Revenue and Taxation Code, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

AB 153, as amended, Skinner. State Board of Equalization: administration: retailer engaged in business in this state.

The Sales and Use Tax Law imposes a tax on retailers measured by the gross receipts from the sale of tangible personal property sold at retail in this state, or on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer for storage, use, or other consumption in this state, measured by sales price. That law defines a “retailer engaged in business in this state” to include retailers that engage in specified activities in this state and requires every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state to register with the State Board of Equalization and to collect the tax from the purchaser and remit it to the board.

This bill would include in the definition of a retailer engaged in business in this state any retailer entering into agreements under which a person or persons in this state, for a commission or other consideration,

directly or indirectly refer potential purchasers, whether by an Internet-based link or an Internet Web site, or otherwise, to the retailer, provided the total cumulative sales price from all sales by the retailer to purchasers in this state that are referred pursuant to these agreements is in excess of ~~\$500,000 within the preceding 12 months, except as specified~~ *\$10,000, within the preceding 12 months, and provided further that the retailer has cumulative sales of tangible personal property to purchasers in this state of over \$500,000, within the preceding 12 months, except as specified.* This bill would further provide that a retailer entering specified agreements to purchase advertising is not a retailer engaged in business in this state *and would define a retailer to include an entity affiliated with a retailer under federal income tax law, as specified.* This bill would further provide that these provisions would not apply if the retailer can demonstrate that the referrals would not satisfy specified United States constitutional requirements, as provided.

This bill would provide that the provisions of this bill are severable.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 6203 of the Revenue and Taxation Code
- 2 is amended to read:
- 3 6203. (a) Except as provided by Sections 6292 and 6293, every
- 4 retailer engaged in business in this state and making sales of
- 5 tangible personal property for storage, use, or other consumption
- 6 in this state, not exempted under Chapter 3.5 (commencing with
- 7 Section 6271) or Chapter 4 (commencing with Section 6351),
- 8 shall, at the time of making the sales or, if the storage, use, or other
- 9 consumption of the tangible personal property is not then taxable
- 10 hereunder, at the time the storage, use, or other consumption
- 11 becomes taxable, collect the tax from the purchaser and give to
- 12 the purchaser a receipt therefor in the manner and form prescribed
- 13 by the board.
- 14 (b) As respects leases constituting sales of tangible personal
- 15 property, the tax shall be collected from the lessee at the time
- 16 amounts are paid by the lessee under the lease.
- 17 (c) “Retailer engaged in business in this state” as used in this
- 18 section and Section 6202 means and includes any of the following:

1 (1) Any retailer maintaining, occupying, or using, permanently
2 or temporarily, directly or indirectly, or through a subsidiary, or
3 agent, by whatever name called, an office, place of distribution,
4 sales or sample room or place, warehouse or storage place, or other
5 place of business.

6 (2) Any retailer having any representative, agent, salesperson,
7 canvasser, independent contractor, or solicitor operating in this
8 state under the authority of the retailer or its subsidiary for the
9 purpose of selling, delivering, installing, assembling, or the taking
10 of orders for any tangible personal property.

11 (3) As respects a lease, any retailer deriving rentals from a lease
12 of tangible personal property situated in this state.

13 (4) (A) Any retailer soliciting orders for tangible personal
14 property by mail if the solicitations are substantial and recurring
15 and if the retailer benefits from any banking, financing, debt
16 collection, telecommunication, or marketing activities occurring
17 in this state or benefits from the location in this state of authorized
18 installation, servicing, or repair facilities.

19 (B) This paragraph shall become operative upon the enactment
20 of any congressional act that authorizes states to compel the
21 collection of state sales and use taxes by out-of-state retailers.

22 ~~(5) (A) Any retailer entering into an agreement or agreements~~
23 ~~under which a person or persons in this state, for a commission or~~
24 ~~other consideration, directly or indirectly refer potential purchasers~~
25 ~~of tangible personal property to the retailer, whether by an~~
26 ~~Internet-based link or an Internet Web site, or otherwise, provided~~
27 ~~that the total cumulative sales price from all of the retailer's sales,~~
28 ~~within the preceding 12 months, of tangible personal property to~~
29 ~~purchasers in this state that are referred pursuant to all of those~~
30 ~~agreements with a person or persons in this state, is in excess of~~
31 ~~five hundred thousand dollars (\$500,000).~~

32 ~~(B) This paragraph shall not apply if the retailer can demonstrate~~
33 ~~that the person in this state with whom the retailer has an agreement~~
34 ~~did not engage in referrals in the state on behalf of the retailer that~~
35 ~~would satisfy the requirements of the commerce clause of the~~
36 ~~United States Constitution.~~

37 ~~(C) An agreement under which a retailer purchases~~
38 ~~advertisements from a person or persons in this state, to be~~
39 ~~delivered on television, radio, in print, on the Internet, or by any~~
40 ~~other medium, is not an agreement described in subparagraph (A).~~

1 unless the advertisement revenue paid to the person or persons in
2 this state consists of commissions or other consideration that is
3 based upon sales of tangible personal property.

4 (D) Notwithstanding subparagraph (C), an agreement under
5 which a retailer engages a person in this state to place an
6 advertisement on an Internet Web site operated by that person, or
7 operated by another person in this state, is not an agreement
8 described in subparagraph (A), unless the person entering the
9 agreement with the retailer also directly or indirectly solicits
10 potential customers in this state through use of flyers, newsletters,
11 telephone calls, electronic mail, blogs, microblogs, social
12 networking sites, or other means of direct or indirect solicitation
13 specifically targeted at potential customers in this state.

14 (5) (A) Any retailer entering into an agreement or agreements
15 under which a person or persons in this state, for a commission
16 or other consideration, directly or indirectly refer potential
17 purchasers of tangible personal property to the retailer, whether
18 by an Internet-based link or an Internet Web site, or otherwise,
19 provided that both of the following conditions are met:

20 (i) The total cumulative sales price from all of the retailer's
21 sales, within the preceding 12 months, of tangible personal
22 property to purchasers in this state that are referred pursuant to
23 all of those agreements with a person or persons in this state, is
24 in excess of ten thousand dollars (\$10,000).

25 (ii) The retailer, within the preceding 12 months, has total
26 cumulative sales of tangible personal property to purchasers in
27 this state in excess of five hundred thousand dollars (\$500,000).

28 (B) An agreement under which a retailer purchases
29 advertisements from a person or persons in this state, to be
30 delivered on television, radio, in print, on the Internet, or by any
31 other medium, is not an agreement described in subparagraph
32 (A), unless the advertisement revenue paid to the person or persons
33 in this state consists of commissions or other consideration that
34 is based upon sales of tangible personal property.

35 (C) Notwithstanding subparagraph (B), an agreement under
36 which a retailer engages a person in this state to place an
37 advertisement on an Internet Web site operated by that person, or
38 operated by another person in this state, is not an agreement
39 described in subparagraph (A), unless the person entering the
40 agreement with the retailer also directly or indirectly solicits

1 *potential customers in this state through the use of flyers,*
2 *newsletters, telephone calls, e-mail, blogs, microblogs, social*
3 *networking sites, or other means of direct or indirect solicitation*
4 *specifically targeted at potential customers in this state.*

5 *(D) For purposes of this paragraph, “retailer” includes an*
6 *entity affiliated with a retailer within the meaning of Section 1504*
7 *of the Internal Revenue Code.*

8 *(E) This paragraph shall not apply if the retailer can*
9 *demonstrate that the person in this state with whom the retailer*
10 *has an agreement did not engage in referrals in the state on behalf*
11 *of the retailer that would satisfy the requirements of the commerce*
12 *clause of the United States Constitution.*

13 (6) Notwithstanding Section 7262, a retailer specified in
14 paragraph (4) above, and not specified in paragraph (1), (2), or (3)
15 above, is a “retailer engaged in business in this state” for the
16 purposes of this part and Part 1.5 (commencing with Section 7200)
17 only.

18 (d) (1) For purposes of this section, “engaged in business in
19 this state” does not include the taking of orders from customers in
20 this state through a computer telecommunications network located
21 in this state which is not directly or indirectly owned by the retailer
22 when the orders result from the electronic display of products on
23 that same network. The exclusion provided by this subdivision
24 shall apply only to a computer telecommunications network that
25 consists substantially of online communications services other
26 than the displaying and taking of orders for products.

27 (2) This subdivision shall become inoperative upon the operative
28 date of provisions of a congressional act that authorize states to
29 compel the collection of state sales and use taxes by out-of-state
30 retailers.

31 (e) Except as provided in this subdivision, a retailer is not a
32 “retailer engaged in business in this state” under paragraph (2) of
33 subdivision (c) if that retailer’s sole physical presence in this state
34 is to engage in convention and trade show activities as described
35 in Section 513(d)(3)(A) of the Internal Revenue Code, and if the
36 retailer, including any of his or her representatives, agents,
37 salespersons, canvassers, independent contractors, or solicitors,
38 does not engage in those convention and trade show activities for
39 more than 15 days, in whole or in part, in this state during any
40 12-month period and did not derive more than one hundred

1 thousand dollars (\$100,000) of net income from those activities
2 in this state during the prior calendar year. Notwithstanding the
3 preceding sentence, a retailer engaging in convention and trade
4 show activities, as described in Section 513(d)(3)(A) of the Internal
5 Revenue Code, is a “retailer engaged in business in this state,” and
6 is liable for collection of the applicable use tax, with respect to
7 any sale of tangible personal property occurring at the convention
8 and trade show activities and with respect to any sale of tangible
9 personal property made pursuant to an order taken at or during
10 those convention and trade show activities.

11 (f) Any limitations created by this section upon the definition
12 of “retailer engaged in business in this state” shall only apply for
13 purposes of tax liability under this code. Nothing in this section is
14 intended to affect or limit, in any way, civil liability or jurisdiction
15 under Section 410.10 of the Code of Civil Procedure.

16 *SEC. 2. The provisions of this act are severable. If any*
17 *provision of this act or its application is held invalid, that invalidity*
18 *shall not affect other provisions or applications that can be given*
19 *effect without the invalid provision or application.*