

AMENDED IN SENATE JUNE 15, 2011

AMENDED IN SENATE JUNE 14, 2011

CALIFORNIA LEGISLATURE—2011–12 FIRST EXTRAORDINARY SESSION

**ASSEMBLY BILL**

**No. 28**

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**Introduced by Assembly Member Blumenfield**

May 19, 2011

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An act to amend Section 6203 of the Revenue and Taxation Code, relating to taxation, and making an appropriation therefor, to take effect immediately, bill related to the budget.

LEGISLATIVE COUNSEL'S DIGEST

AB 28, as amended, Blumenfield. 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 further define a retailer engaged in business in this state as a retailer that has substantial nexus with this state and a retailer upon whom federal law permits the state to impose a use tax collection

duty. The bill would also include specified retailers as retailers engaged in business in this state and would eliminate an exclusion.

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.~~ This bill would also provide that a retailer entering specified agreements to purchase advertising is not a retailer engaged in business in this state. ~~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 \$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 also provide that a retailer entering into 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 also include as a retailer engaged in business in this state as a retailer that is a member of a commonly controlled group, as defined under the Corporation Tax Law, and a member of a combined reporting group, as defined, that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer, performs services in this state in connection with tangible personal property to be sold by the retailer.

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

This bill would appropriate \$1,000 from the General Fund to the State Board of Equalization for administrative operations.

The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. Governor Schwarzenegger issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on December 6, 2010. Governor Brown issued a proclamation on January

20, 2011, declaring and reaffirming that a fiscal emergency exists and stating that his proclamation supersedes the earlier proclamation for purposes of that constitutional provision.

This bill would state that it addresses the fiscal emergency declared and reaffirmed by the Governor by proclamation issued on January 20, 2011, pursuant to the California Constitution.

This bill would declare that it is to take immediate effect as a bill providing for appropriations related to the Budget Bill.

Vote: majority. Appropriation: yes. 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 any retailer that has substantial  
19 nexus with this state for purposes of the commerce clause of the  
20 United States Constitution and any retailer upon whom federal  
21 law permits this state to impose a use tax collection duty. “Retailer  
22 engaged in business in this state” specifically includes, but is not  
23 limited to, any of the following:

24 (1) Any retailer maintaining, occupying, or using, permanently  
25 or temporarily, directly or indirectly, or through a subsidiary, or  
26 agent, by whatever name called, an office, place of distribution,

1 sales or sample room or place, warehouse or storage place, or other  
 2 place of business.

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

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

10 (4) Any retailer that is a member of a commonly controlled  
 11 group, as defined in Section 25105, and is a member of a combined  
 12 reporting group, as defined in paragraph (3) of subdivision (b) of  
 13 Section 25106.5 of Title 18 of the California Code of Regulations,  
 14 that includes another member of the retailer’s commonly controlled  
 15 group that, pursuant to an agreement with or in cooperation with  
 16 the retailer, performs services in this state in connection with  
 17 tangible personal property to be sold by the retailer, including, but  
 18 not limited to, design and development of tangible personal  
 19 property sold by the retailer, or the solicitation of sales of tangible  
 20 personal property on behalf of the retailer.

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

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

38 ~~(C) Notwithstanding subparagraph (B), an agreement under~~  
 39 ~~which a retailer engages a person in this state to place an~~  
 40 ~~advertisement on an Internet Web site operated by that person, or~~

1 ~~operated by another person in this state, is not an agreement~~  
2 ~~described in subparagraph (A), unless the person entering the~~  
3 ~~agreement with the retailer also directly or indirectly solicits~~  
4 ~~potential customers in this state through use of flyers, newsletters,~~  
5 ~~telephone calls, electronic mail, blogs, microblogs, social~~  
6 ~~networking sites, or other means of direct or indirect solicitation~~  
7 ~~specifically targeted at potential customers in this state.~~

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

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

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

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

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

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

1 telephone calls, electronic mail, blogs, microblogs, social  
2 networking sites, or other means of direct or indirect solicitation  
3 specifically targeted at potential customers in this state.

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

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

12 (d) Except as provided in this subdivision, a retailer is not a  
13 “retailer engaged in business in this state” under paragraph (2) of  
14 subdivision (c) if that retailer’s sole physical presence in this state  
15 is to engage in convention and trade show activities as described  
16 in Section 513(d)(3)(A) of the Internal Revenue Code, and if the  
17 retailer, including any of his or her representatives, agents,  
18 salespersons, canvassers, independent contractors, or solicitors,  
19 does not engage in those convention and trade show activities for  
20 more than 15 days, in whole or in part, in this state during any  
21 12-month period and did not derive more than one hundred  
22 thousand dollars (\$100,000) of net income from those activities  
23 in this state during the prior calendar year. Notwithstanding the  
24 preceding sentence, a retailer engaging in convention and trade  
25 show activities, as described in Section 513(d)(3)(A) of the Internal  
26 Revenue Code, is a “retailer engaged in business in this state,” and  
27 is liable for collection of the applicable use tax, with respect to  
28 any sale of tangible personal property occurring at the convention  
29 and trade show activities and with respect to any sale of tangible  
30 personal property made pursuant to an order taken at or during  
31 those convention and trade show activities.

32 (e) Any limitations created by this section upon the definition  
33 of “retailer engaged in business in this state” shall only apply for  
34 purposes of tax liability under this code. Nothing in this section is  
35 intended to affect or limit, in any way, civil liability or jurisdiction  
36 under Section 410.10 of the Code of Civil Procedure.

37 SEC. 2. The provisions of this act are severable. If any  
38 provision of this act or its application is held invalid, that invalidity  
39 does not affect other provisions or applications that can be given  
40 effect without the invalid provision of application.

1 SEC. 3. The sum of one thousand dollars (\$1,000) is hereby  
2 appropriated from the General Fund to the State Board of  
3 Equalization for administrative operations.

4 SEC. 4. This act addresses the fiscal emergency declared and  
5 reaffirmed by the Governor by proclamation on January 20, 2011,  
6 pursuant to subdivision (f) of Section 10 of Article IV of the  
7 California Constitution.

8 SEC. 5. This act is a bill providing for appropriations related  
9 to the Budget Bill within the meaning of subdivision (e) of Section  
10 12 of Article IV of the California Constitution, has been identified  
11 as related to the budget in the Budget Bill, and shall take effect  
12 immediately.

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