

AMENDED IN SENATE AUGUST 29, 2011

AMENDED IN ASSEMBLY MAY 2, 2011

AMENDED IN ASSEMBLY MARCH 3, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 155

**Introduced by Assembly Member Members Charles Calderon and
Skinner**

(Principal coauthor: Senator Hancock)

January 18, 2011

An act to ~~amend~~ *to repeal and add* Section 6203 of the Revenue and Taxation Code, relating to taxation, *and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

AB 155, as amended, Charles Calderon. ~~Use tax—State Board of Equalization: administration:~~ *retailer engaged in business in this state.*

Existing law imposes a sales tax on retailers measured by the gross receipts from the sale of tangible personal property sold at retail in this state, and a use tax 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 requires every retailer engaged in business in this state, as defined, and making sales of tangible personal property for storage, use, or other consumption in this state to collect the tax from the purchaser. ~~The commerce clause of the United States Constitution allows a state to compel a retailer to collect use tax if the retailer has a substantial nexus with the state.~~ *Existing law defines a “retailer engaged in business in this state” to include a retailer entering into an agreement or*

agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an Internet-based link or an Internet Web site, or otherwise, provided that 2 specified conditions are met, including the condition that the retailer, within the preceding 12 months, has total cumulative sales of tangible personal property to purchasers in this state in excess of \$500,000.

This bill would define 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., for purposes of that definition, revise that condition to increase the amount of total cumulative sales of tangible personal property to purchasers in this state to an amount in excess of \$1,000,000.

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

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: majority ²/₃. 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 repealed.*
 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.*

1 ~~(b) As respects leases constituting sales of tangible personal~~
2 ~~property, the tax shall be collected from the lessee at the time~~
3 ~~amounts are paid by the lessee under the lease.~~

4 ~~(c) “Retailer engaged in business in this state” as used in this~~
5 ~~section and Section 6202 means any retailer that has substantial~~
6 ~~nexus with this state for purposes of the commerce clause of the~~
7 ~~United States Constitution and any retailer upon whom federal~~
8 ~~law permits this state to impose a use tax collection duty. “Retailer~~
9 ~~engaged in business in this state” specifically includes, but is not~~
10 ~~limited to, any of the following:~~

11 ~~(1) Any retailer maintaining, occupying, or using, permanently~~
12 ~~or temporarily, directly or indirectly, or through a subsidiary, or~~
13 ~~agent, by whatever name called, an office, place of distribution,~~
14 ~~sales or sample room or place, warehouse or storage place, or other~~
15 ~~place of business.~~

16 ~~(2) Any retailer having any representative, agent, salesperson,~~
17 ~~canvasser, independent contractor, or solicitor operating in this~~
18 ~~state under the authority of the retailer or its subsidiary for the~~
19 ~~purpose of selling, delivering, installing, assembling, or the taking~~
20 ~~of orders for any tangible personal property.~~

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

23 ~~(4) Any retailer that is a member of a commonly controlled~~
24 ~~group, as defined in Section 25105, and is a member of a combined~~
25 ~~reporting group, as defined in paragraph (3) of subdivision (b) of~~
26 ~~Section 25106.5 of Title 18 of the California Code of Regulations,~~
27 ~~that includes another member of the retailer’s commonly controlled~~
28 ~~group that, pursuant to an agreement with or in cooperation with~~
29 ~~the retailer, performs services in this state in connection with~~
30 ~~tangible personal property to be sold by the retailer, including, but~~
31 ~~not limited to, design and development of tangible personal~~
32 ~~property sold by the retailer, or the solicitation of sales of tangible~~
33 ~~personal property on behalf of the retailer.~~

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

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

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

9 (B) ~~An agreement under which a retailer purchases~~
10 ~~advertisements from a person or persons in this state, to be~~
11 ~~delivered on television, radio, in print, on the Internet, or by any~~
12 ~~other medium, is not an agreement described in subparagraph (A),~~
13 ~~unless the advertisement revenue paid to the person or persons in~~
14 ~~this state consists of commissions or other consideration that is~~
15 ~~based upon sales of tangible personal property.~~

16 (C) ~~Notwithstanding subparagraph (B), an agreement under~~
17 ~~which a retailer engages a person in this state to place an~~
18 ~~advertisement on an Internet Web site operated by that person, or~~
19 ~~operated by another person in this state, is not an agreement~~
20 ~~described in subparagraph (A), unless the person entering the~~
21 ~~agreement with the retailer also directly or indirectly solicits~~
22 ~~potential customers in this state through use of flyers, newsletters,~~
23 ~~telephone calls, electronic mail, blogs, microblogs, social~~
24 ~~networking sites, or other means of direct or indirect solicitation~~
25 ~~specifically targeted at potential customers in this state.~~

26 (D) ~~For purposes of this paragraph, "retailer" includes an entity~~
27 ~~affiliated with a retailer within the meaning of Section 1504 of the~~
28 ~~Internal Revenue Code.~~

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

34 (d) ~~Except as provided in this subdivision, a retailer is not a~~
35 ~~"retailer engaged in business in this state" under paragraph (2) of~~
36 ~~subdivision (c) if that retailer's sole physical presence in this state~~
37 ~~is to engage in convention and trade show activities as described~~
38 ~~in Section 513(d)(3)(A) of the Internal Revenue Code, and if the~~
39 ~~retailer, including any of his or her representatives, agents,~~
40 ~~salespersons, canvassers, independent contractors, or solicitors,~~

1 does not engage in those convention and trade show activities for
2 more than 15 days, in whole or in part, in this state during any
3 12-month period and did not derive more than one hundred
4 thousand dollars (\$100,000) of net income from those activities
5 in this state during the prior calendar year. Notwithstanding the
6 preceding sentence, a retailer engaging in convention and trade
7 show activities, as described in Section 513(d)(3)(A) of the Internal
8 Revenue Code, is a “retailer engaged in business in this state,” and
9 is liable for collection of the applicable use tax, with respect to
10 any sale of tangible personal property occurring at the convention
11 and trade show activities and with respect to any sale of tangible
12 personal property made pursuant to an order taken at or during
13 those convention and trade show activities.

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

19 *SEC. 2. Section 6203 is added to the Revenue and Taxation*
20 *Code, to read:*

21 *6203. (a) Except as provided by Sections 6292 and 6293, every*
22 *retailer engaged in business in this state and making sales of*
23 *tangible personal property for storage, use, or other consumption*
24 *in this state, not exempted under Chapter 3.5 (commencing with*
25 *Section 6271) or Chapter 4 (commencing with Section 6351), shall,*
26 *at the time of making the sales or, if the storage, use, or other*
27 *consumption of the tangible personal property is not then taxable*
28 *hereunder, at the time the storage, use, or other consumption*
29 *becomes taxable, collect the tax from the purchaser and give to*
30 *the purchaser a receipt therefor in the manner and form prescribed*
31 *by the board.*

32 *(b) As respects leases constituting sales of tangible personal*
33 *property, the tax shall be collected from the lessee at the time*
34 *amounts are paid by the lessee under the lease.*

35 *(c) “Retailer engaged in business in this state” as used in this*
36 *section and Section 6202 means any retailer that has substantial*
37 *nexus with this state for purposes of the commerce clause of the*
38 *United States Constitution and any retailer upon whom federal*
39 *law permits this state to impose a use tax collection duty. “Retailer*

1 engaged in business in this state” specifically includes, but is not
2 limited to, any of the following:

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

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

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

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

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

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

37 (ii) The retailer, within the preceding 12 months, has total
38 cumulative sales of tangible personal property to purchasers in
39 this state in excess of one million dollars (\$1,000,000).

1 (B) An agreement under which a retailer purchases
2 advertisements from a person or persons in this state, to be
3 delivered on television, radio, in print, on the Internet, or by any
4 other medium, is not an agreement described in subparagraph
5 (A), unless the advertisement revenue paid to the person or persons
6 in this state consists of commissions or other consideration that
7 is based upon sales of tangible personal property.

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

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

21 (E) This paragraph shall not apply if the retailer can
22 demonstrate that the person in this state with whom the retailer
23 has an agreement did not engage in referrals in the state on behalf
24 of the retailer that would satisfy the requirements of the commerce
25 clause of the United States Constitution.

26 (d) Except as provided in this subdivision, a retailer is not a
27 “retailer engaged in business in this state” under paragraph (2)
28 of subdivision (c) if that retailer’s sole physical presence in this
29 state is to engage in convention and trade show activities as
30 described in Section 513(d)(3)(A) of the Internal Revenue Code,
31 and if the retailer, including any of his or her representatives,
32 agents, salespersons, canvassers, independent contractors, or
33 solicitors, does not engage in those convention and trade show
34 activities for more than 15 days, in whole or in part, in this state
35 during any 12-month period and did not derive more than one
36 hundred thousand dollars (\$100,000) of net income from those
37 activities in this state during the prior calendar year.
38 Notwithstanding the preceding sentence, a retailer engaging in
39 convention and trade show activities, as described in Section
40 513(d)(3)(A) of the Internal Revenue Code, is a “retailer engaged

1 *in business in this state,” and is liable for collection of the*
2 *applicable use tax, with respect to any sale of tangible personal*
3 *property occurring at the convention and trade show activities*
4 *and with respect to any sale of tangible personal property made*
5 *pursuant to an order taken at or during those convention and trade*
6 *show activities.*

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

12 *SEC. 3. The provisions contained in Section 2 of this act are*
13 *severable. If any provision of Section 2 of this act or its application*
14 *is held invalid, that invalidity shall not affect other provisions or*
15 *applications that can be given effect without the invalid provision*
16 *or application.*

17 *SEC. 4. This act is an urgency statute necessary for the*
18 *immediate preservation of the public peace, health, or safety within*
19 *the meaning of Article IV of the Constitution and shall go into*
20 *immediate effect. The facts constituting the necessity are:*

21 *In order to lessen the burden at the earliest possible time on*
22 *small businesses that are otherwise required to collect use tax, it*
23 *is necessary that this act take effect immediately.*

24 ~~SECTION 1. Section 6203 of the Revenue and Taxation Code~~
25 ~~is amended to read:~~

26 ~~6203. (a) Except as provided by Sections 6292 and 6293, every~~
27 ~~retailer engaged in business in this state and making sales of~~
28 ~~tangible personal property for storage, use, or other consumption~~
29 ~~in this state, not exempted under Chapter 3.5 (commencing with~~
30 ~~Section 6271) or Chapter 4 (commencing with Section 6351),~~
31 ~~shall, at the time of making the sales or, if the storage, use, or other~~
32 ~~consumption of the tangible personal property is not then taxable~~
33 ~~hereunder, at the time the storage, use, or other consumption~~
34 ~~becomes taxable, collect the tax from the purchaser and give to~~
35 ~~the purchaser a receipt therefor in the manner and form prescribed~~
36 ~~by the board.~~

37 ~~(b) As respects leases constituting sales of tangible personal~~
38 ~~property, the tax shall be collected from the lessee at the time~~
39 ~~amounts are paid by the lessee under the lease.~~

1 (e) “Retailer engaged in business in this state” as used in this
2 section and Section 6202 means and includes any of the following:

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

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

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

24 (4) As respects a lease, any retailer deriving rentals from a lease
25 of tangible personal property situated in this state.

26 (5) (A) Any retailer soliciting orders for tangible personal
27 property by mail if the solicitations are substantial and recurring
28 and if the retailer benefits from any banking, financing, debt
29 collection, telecommunication, or marketing activities occurring
30 in this state or benefits from the location in this state of authorized
31 installation, servicing, or repair facilities.

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

35 (6) Notwithstanding Section 7262, a retailer specified in
36 paragraph (5), and not specified in paragraph (1), (2), (3) or (4),
37 is a “retailer engaged in business in this state” for the purposes of
38 this part and Part 1.5 (commencing with Section 7200) only.

39 (d) (1) For purposes of this section, “engaged in business in
40 this state” does not include the taking of orders from customers in

1 this state through a computer telecommunications network located
 2 in this state which is not directly or indirectly owned by the retailer
 3 when the orders result from the electronic display of products on
 4 that same network. The exclusion provided by this subdivision
 5 shall apply only to a computer telecommunications network that
 6 consists substantially of online communications services other
 7 than the displaying and taking of orders for products.

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

12 (e) 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 (e) 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 (f) 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.

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