

AMENDED IN SENATE SEPTEMBER 9, 2011

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 Members Charles Calderon and Skinner
(Principal coauthor: Senator Hancock)

January 18, 2011

An act 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. 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. Existing law defines a “retailer engaged in business in this state” to include *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;*

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; *and 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; *revise the definition of a “retailer engaged in business in this state” to temporarily eliminate the above-mentioned inclusions in that definition, and would condition the commencement of the operation of these inclusions upon the enactment of a certain federal law and the state’s election to implement that law. This bill, for purposes of ~~that definition~~ one of those inclusions, would revise ~~that the~~ cumulative sales 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: $\frac{2}{3}$. 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 SEC. 2. Section 6203 is added to the Revenue and Taxation
- 4 Code, to read:
- 5 6203. (a) Except as provided by Sections 6292 and 6293, every
- 6 retailer engaged in business in this state and making sales of
- 7 tangible personal property for storage, use, or other consumption
- 8 in this state, not exempted under Chapter 3.5 (commencing with

1 Section 6271) or Chapter 4 (commencing with Section 6351), shall,
2 at the time of making the sales or, if the storage, use, or other
3 consumption of the tangible personal property is not then taxable
4 hereunder, at the time the storage, use, or other consumption
5 becomes taxable, collect the tax from the purchaser and give to
6 the purchaser a receipt therefor in the manner and form prescribed
7 by the board.

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

11 (c) “Retailer engaged in business in this state” as used in this
12 section and Section 6202 means and includes any of the following:

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

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

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

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

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

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

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

1 located in this state which is not directly or indirectly owned by
2 the retailer when the orders result from the electronic display of
3 products on that same network. The exclusion provided by this
4 subdivision shall apply only to a computer telecommunications
5 network that consists substantially of online communications
6 services other than the displaying and taking of orders for
7 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)
14 of subdivision (c) if that retailer’s sole physical presence in this
15 state is to engage in convention and trade show activities as
16 described in Section 513(d)(3)(A) of the Internal Revenue Code,
17 and if the retailer, including any of its 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,”
27 and is liable for collection of the applicable use tax, with respect
28 to any sale of tangible personal property occurring at the
29 convention and trade show activities and with respect to any sale
30 of tangible personal property made pursuant to an order taken at
31 or during 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 apply only for
34 purposes of tax liability under this code. Nothing in this section
35 is intended to affect or limit, in any way, civil liability or
36 jurisdiction under Section 410.10 of the Code of Civil Procedure.

37 ~~SEC. 2.~~

38 SEC. 3. Section 6203 is added to the Revenue and Taxation
39 Code, to read:

1 6203. (a) Except as provided by Sections 6292 and 6293, every
2 retailer engaged in business in this state and making sales of
3 tangible personal property for storage, use, or other consumption
4 in this state, not exempted under Chapter 3.5 (commencing with
5 Section 6271) or Chapter 4 (commencing with Section 6351),
6 shall, at the time of making the sales or, if the storage, use, or other
7 consumption of the tangible personal property is not then taxable
8 hereunder, at the time the storage, use, or other consumption
9 becomes taxable, collect the tax from the purchaser and give to
10 the purchaser a receipt therefor in the manner and form prescribed
11 by the board.

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

15 (c) “Retailer engaged in business in this state” as used in this
16 section and Section 6202 means any retailer that has substantial
17 nexus with this state for purposes of the commerce clause of the
18 United States Constitution and any retailer upon whom federal
19 law permits this state to impose a use tax collection duty. “Retailer
20 engaged in business in this state” specifically includes, but is not
21 limited to, any of the following:

22 (1) Any retailer maintaining, occupying, or using, permanently
23 or temporarily, directly or indirectly, or through a subsidiary, or
24 agent, by whatever name called, an office, place of distribution,
25 sales or sample room or place, warehouse or storage place, or other
26 place of business.

27 (2) Any retailer having any representative, agent, salesperson,
28 canvasser, independent contractor, or solicitor operating in this
29 state under the authority of the retailer or its subsidiary for the
30 purpose of selling, delivering, installing, assembling, or the taking
31 of orders for any tangible personal property.

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

34 (4) Any retailer that is a member of a commonly controlled
35 group, as defined in Section 25105, and is a member of a combined
36 reporting group, as defined in paragraph (3) of subdivision (b) of
37 Section 25106.5 of Title 18 of the California Code of Regulations,
38 that includes another member of the retailer’s commonly controlled
39 group that, pursuant to an agreement with or in cooperation with
40 the retailer, performs services in this state in connection with

1 tangible personal property to be sold by the retailer, including, but
2 not limited to, design and development of tangible personal
3 property sold by the retailer, or the solicitation of sales of tangible
4 personal property on behalf of the retailer.

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

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

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

19 (B) An agreement under which a retailer purchases
20 advertisements from a person or persons in this state, to be
21 delivered on television, radio, in print, on the Internet, or by any
22 other medium, is not an agreement described in subparagraph (A),
23 unless the advertisement revenue paid to the person or persons in
24 this state consists of commissions or other consideration that is
25 based upon sales of tangible personal property.

26 (C) Notwithstanding subparagraph (B), an agreement under
27 which a retailer engages a person in this state to place an
28 advertisement on an Internet Web site operated by that person, or
29 operated by another person in this state, is not an agreement
30 described in subparagraph (A), unless the person entering the
31 agreement with the retailer also directly or indirectly solicits
32 potential customers in this state through use of flyers, newsletters,
33 telephone calls, electronic mail, blogs, microblogs, social
34 networking sites, or other means of direct or indirect solicitation
35 specifically targeted at potential customers in this state.

36 (D) For purposes of this paragraph, "retailer" includes an entity
37 affiliated with a retailer within the meaning of Section 1504 of the
38 Internal Revenue Code.

39 (E) This paragraph shall not apply if the retailer can demonstrate
40 that the person in this state with whom the retailer has an agreement

1 did not engage in referrals in the state on behalf of the retailer that
2 would satisfy the requirements of the commerce clause of the
3 United States Constitution.

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

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

29 ~~SEC. 3.~~

30 ~~SEC. 5.~~ The provisions contained in Section-2 3 of this act are
31 severable. If any provision of Section-2 3 of this act or its
32 application is held invalid, that invalidity shall not affect other
33 provisions or applications that can be given effect without the
34 invalid provision or application.

35 *SEC. 6. (a) Sections 1 and 2 of this act shall become operative*
36 *on the effective date of this act.*

37 *(b) Section 3 of this act shall become operative on either of the*
38 *following dates:*

39 *(1) If federal law is enacted on or before July 31, 2012,*
40 *authorizing the states to require a seller to collect taxes on sales*

1 of goods to in-state purchasers without regard to the location of
 2 the seller, and the state does not, on or before September 14, 2012,
 3 elect to implement that law, Section 3 of this act shall become
 4 operative on January 1, 2013, and Section 2 of this act shall
 5 become inoperative on that same date.

6 (2) If federal law is not enacted on or before July 31, 2012,
 7 authorizing the states to require a seller to collect taxes on sales
 8 of goods to in-state purchasers without regard to the location of
 9 the seller, Section 3 of this act shall become operative on
 10 September 15, 2012, and Section 2 of this act shall become
 11 inoperative on that same date.

12 (c) The Director of Finance shall, on or before August 15, 2012,
 13 certify in writing to the Governor, the Senate Committee on Rules,
 14 the Speaker of the Assembly, and the State Board of Equalization
 15 whether or not federal law has been enacted on or before July 31,
 16 2012, authorizing the states to require a seller to collect taxes on
 17 sales of goods or services to in-state purchasers without regard
 18 to the location of the seller.

19 (d) For the period between June 28, 2011, and the effective date
 20 of this act, state law regarding the imposition and collection of
 21 use taxes, including, but not limited to, any reporting requirement
 22 imposed on a seller, shall be administered and applied in
 23 accordance with state law as it read on June 27, 2011.

24 ~~SEC. 4.~~

25 SEC. 7. This act is an urgency statute necessary for the
 26 immediate preservation of the public peace, health, or safety within
 27 the meaning of Article IV of the Constitution and shall go into
 28 immediate effect. The facts constituting the necessity are:

29 ~~In order to lessen the burden at the earliest possible time on small~~
 30 ~~businesses that are otherwise required to collect use tax, it is~~
 31 ~~necessary that this act take effect immediately.~~

32 *In order to clarify and confirm at the earliest possible time the*
 33 *obligations of certain retailers to collect use taxes from California*
 34 *purchasers, it is necessary that this act take effect immediately.*

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2 **CORRECTIONS:**
3 **Title—Page 1.**
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