

Assembly Bill No. 1087

Passed the Assembly September 11, 2009

Chief Clerk of the Assembly

Passed the Senate September 4, 2009

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2009, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Section 10286.1 of the Public Contract Code, and to amend Sections 6011 and 6012 of the Revenue and Taxation Code, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

AB 1087, Ma. State Board of Equalization: sales and use taxes: administration: transportation charges: public contracts with expatriate corporations: tax treaty.

The Sales and Use Tax Law imposes a tax on retailers measured by 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 the sales price of the property. That law provides various exclusions from gross receipts and sales price, including an exclusion for separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, as specified.

This bill would state that charges for transportation are separately stated when stated as a single amount and not combined in a single amount with other charges.

Existing law regarding contracting between state agencies and private contractors sets forth requirements for the procurement of materials, supplies, equipment, and services by state agencies. Existing law sets out the various responsibilities of the Department of General Services, and other state agencies, in overseeing and implementing state contracting procedures and policies. Existing law prohibits a state agency from entering into any contract with an expatriate corporation, as defined, or its subsidiary, unless certain conditions are met. Existing law defines an expatriate corporation as a foreign incorporated entity that is publicly traded in the United States and that meets specified criteria.

This bill would revise the definition of an expatriate corporation to also require that the entity be domiciled in a jurisdiction that does not have an income tax treaty with the United States.

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

SECTION 1. It is the intent of the Legislature in enacting this act to clarify that a state agency shall not enter into any contract with an expatriate corporation located in a foreign jurisdiction that does not have an income tax treaty with the United States.

SEC. 2. Section 10286.1 of the Public Contract Code is amended to read:

10286.1. (a) For purposes of this part, except as otherwise provided in subdivisions (b) and (c), a state agency shall not enter into any contract with an expatriate corporation or its subsidiaries.

(b) (1) For purposes of this article, an “expatriate corporation” means a foreign incorporated entity that is publicly traded in the United States to which all of the following apply:

(A) The United States is the principal market for the public trading of the foreign incorporated entity.

(B) The foreign incorporated entity has no substantial business activities in the place of incorporation.

(C) The foreign incorporated entity is domiciled in a jurisdiction that does not have an income tax treaty with the United States.

(D) Either clause (i) or clause (ii) applies:

(i) The foreign entity was established in connection with a transaction or series of related transactions pursuant to which (I) the foreign entity directly or indirectly acquired substantially all of the properties held by a domestic corporation or all of the properties constituting a trade or business of a domestic partnership or related foreign partnership, and (II) immediately after the acquisition, more than 50 percent of the publicly traded stock, by vote or value, of the foreign entity is held by former shareholders of the domestic corporation or by former partners of the domestic partnership or related foreign partnership. For purposes of subclause (II), any stock sold in a public offering related to the transaction or a series of transactions is disregarded.

(ii) The foreign entity was established in connection with a transaction or series of related transactions pursuant to which (I) the foreign entity directly or indirectly acquired substantially all of the properties held by a domestic corporation or all of the properties constituting a trade or business of a domestic partnership or related foreign partnership, and (II) the acquiring foreign entity

is more than 50 percent owned, by vote or value, by domestic shareholders or partners.

(iii) For purposes of this subparagraph, indirect acquisition of property includes the acquisition of a stock share, or any portion thereof, of the owner of that property.

(2) Notwithstanding subdivision (a), a state agency may contract with an expatriate corporation, or its subsidiary, if it was an expatriate corporation before January 1, 2004, to which both of the following apply:

(A) The foreign entity provides, by operation of law, by provisions of its governing documents, by resolution of its board of directors, or in any other manner, at least the following shareholders' rights:

(i) Shareholders of the entity have the right to inspect, at a principal place of business in the United States, copies of the entity's books and records, including, but not limited to, shareholder names, addresses, and shareholdings in accordance with the corporation law, as amended from time to time and as that law is interpreted by the courts, of the United States jurisdiction in which the entity was previously incorporated, or, if the entity was not previously incorporated, in accordance with the terms set forth in the Model Business Corporation Act, as that act may be amended from time to time, provided that, if the corporate law of the United States jurisdiction in which the entity was previously incorporated or the Model Business Corporation Act does not provide access to the shareholder names, addresses, and shareholdings, these books and records are available for inspection by shareholders for purposes properly related to their status as shareholders of the entity.

(ii) The entity permits its shareholders to bring derivative proceedings on behalf of the entity, provided that these derivative proceedings are brought on a basis and under the terms applicable under the law, as amended from time to time and as interpreted by, or required by, the courts of the United States jurisdiction in which the entity was previously incorporated, or, if the entity was not previously incorporated, on a basis and under the terms set forth in the Model Business Corporations Act as that act may be amended from time to time and as it is interpreted by, or required by, the courts.

(iii) Entity transactions in which any director is interested are approved in accordance with the applicable law, as amended from time to time and as interpreted by the courts, of the United States jurisdiction in which the entity was previously incorporated, or, if the entity was not previously incorporated, in accordance with the terms set forth in the Model Business Corporations Act, as may be amended from time to time and as interpreted by the courts.

(iv) The entity has consented to the jurisdiction, for any otherwise available cause of action by or on behalf of the entity's shareholders, including any pendent state causes of action, of all of the following courts:

(I) The state courts of one or more states.

(II) The United States federal courts in any state in which the entity consents to the jurisdiction of that state's courts pursuant to subclause (I).

(v) The entity has appointed an agent for service of process in the state or states in which the entity has consented to jurisdiction, as described in clause (iv), and the entity meets at least one of the following conditions:

(I) The entity has unencumbered assets in the United States, which assets may include equity or debt investments in United States companies, with a book value in excess of fifty million dollars (\$50,000,000), and the entity delivers to the Secretary of State an opinion of an attorney licensed in the United States that judgments rendered against the entity may be satisfied by using these assets.

(II) The entity posts a bond or similar security in an amount of at least fifty million dollars (\$50,000,000).

(III) The entity has directors' and officers' insurance in an amount of at least fifty million dollars (\$50,000,000).

(vi) The entity agrees that, in connection with any lawsuit brought against it by its shareholders in any court in which the entity has consented to jurisdiction as described in clause (iv), the entity will provide to the court notice of the manner in which the entity complied with clause (v) and, if the entity complied with that clause in the manner specified in subclause (I) of clause (v), a copy of the opinion described in that subclause.

(vii) Shareholder approval is required for any sale of all or substantially all of the entity's assets in accordance with the law, as amended from time to time and as it is interpreted by the courts,

of the United States jurisdiction in which it was previously incorporated, or, if it was not previously incorporated, in accordance with the terms set forth in the Model Business Corporations Act, as it may be amended from time to time.

(viii) The directors and officers of the entity occupy a fiduciary relationship with the entity and its shareholders and these directors and officers, in performing their duties, act in good faith in a manner that a director or officer believes to be in the best interests of the entity and its shareholders, as that standard of care is interpreted by the courts.

(ix) The entity agrees to hold no more than one of every four annual shareholder meetings in a location outside the United States and, in the event that the entity holds an annual meeting outside the United States, the entity agrees to provide access to that meeting through a Web cast or other technology that allows the entity's shareholders to do both of the following:

(I) Listen to the meeting, watch the meeting, or both.

(II) Send questions that will be addressed at the meeting.

(x) The entity provides a description of the shareholder rights described in clauses (i) to (ix), inclusive, and any subsequent changes to these rights, on the entity's Web site or in its 10K filings with the United States Securities and Exchange Commission.

(B) The entity uses worldwide combined reporting to calculate the income on which it pays taxes to the state.

(c) The chief executive officer of a state agency or his or her designee may waive the prohibition specified in subdivision (a) if the executive officer or his or her designee has made a written finding that the contract is necessary to meet a compelling public interest. For purposes of this section, a "compelling public interest" includes, but is not limited to, ensuring the provision of essential services, ensuring the public health and safety, or an emergency as defined in Section 1102. If a waiver is granted to a vendor pursuant to this subdivision, the requirement to submit a declaration of compliance, as set forth in paragraph (1) of subdivision (d), does not apply to that vendor.

(d) (1) For purposes of this chapter, "state agency" means every state office, department, division, bureau, board, commission, and the California State University, but does not include the University of California, the Legislature, the courts, or any agency in the judicial branch of government.

(2) On or after January 1, 2004, all state agencies shall, as a condition of the contract, require any vendor that is offered a contract to do business with the state to submit a declaration stating that the vendor is eligible to contract with the state pursuant to this section.

(3) A vendor that declares as true any material matter in a declaration described in this subdivision that he or she knows to be false is guilty of a misdemeanor.

(e) (1) Except as provided in paragraph (2) and subdivision (f), this section applies to contracts that are entered into on or after January 1, 2004.

(2) With respect to an entity that was an expatriate corporation, as defined in paragraph (1) of subdivision (b), before January 1, 2004, this section applies to contracts that are entered into on or after April 1, 2004.

(f) (1) The declaration requirement set forth in subdivision (d) does not apply to a credit card purchase of goods of two thousand five hundred dollars (\$2,500) or less.

(2) The total amount of exemption authorized herein shall not exceed seven thousand five hundred dollars (\$7,500) per year for each company from which a state agency is purchasing goods by credit card. It shall be the responsibility of each state agency to monitor the use of this exemption and adhere to these restrictions on these purchases.

SEC. 3. Section 6011 of the Revenue and Taxation Code is amended to read:

6011. (a) "Sales price" means the total amount for which tangible personal property is sold or leased or rented, as the case may be, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:

(1) The cost of the property sold.

(2) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses.

(3) The cost of transportation of the property, except as excluded by other provisions of this section.

(b) The total amount for which the property is sold or leased or rented includes all of the following:

(1) Any services that are a part of the sale.

(2) Any amount for which credit is given to the purchaser by the seller.

(3) The amount of any tax imposed by the United States upon producers and importers of gasoline and the amount of any tax imposed pursuant to Part 2 (commencing with Section 7301) of this division.

(c) “Sales price” does not include any of the following:

(1) Cash discounts allowed and taken on sales.

(2) The amount charged for property returned by customers when that entire amount is refunded either in cash or credit, but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned. For the purpose of this section, refund or credit of the entire amount shall be deemed to be given when the purchase price less rehandling and restocking costs are refunded or credited to the customer. The amount withheld for rehandling and restocking costs may be a percentage of the sales price determined by the average cost of rehandling and restocking returned merchandise during the previous accounting cycle.

(3) The amount charged for labor or services rendered in installing or applying the property sold.

(4) (A) The amount of any tax (not including, however, any manufacturers’ or importers’ excise tax, except as provided in subparagraph (B)) imposed by the United States upon or with respect to retail sales whether imposed upon the retailer or the consumer.

(B) The amount of manufacturers’ or importers’ excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code for which the purchaser certifies that he or she is entitled to either a direct refund or credit against his or her income tax for the federal excise tax paid or for which the purchaser issues a certificate pursuant to Section 6245.5.

(5) The amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California upon or with respect to retail sales of tangible personal property, measured by a stated percentage of sales price or gross receipts, whether imposed upon the retailer or the consumer.

(6) The amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California with respect to the storage, use or other consumption in that city, county, city and county, or rapid transit district of tangible personal

property measured by a stated percentage of sales price or purchase price, whether the tax is imposed upon the retailer or the consumer.

(7) Separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, but the exclusion shall not exceed a reasonable charge for transportation by facilities of the retailer or the cost to the retailer of transportation by other than facilities of the retailer. However, if the transportation is by facilities of the retailer, or the property is sold for a delivered price, this exclusion shall be applicable solely with respect to transportation which occurs after the purchase of the property is made. Charges for transportation are separately stated for the purposes of this paragraph if those charges are stated as a single amount and are not included within a single amount that combines transportation charges with other charges.

(8) Charges for transporting landfill from an excavation site to a site specified by the purchaser, either if the charge is separately stated and does not exceed a reasonable charge or if the entire consideration consists of payment for transportation.

(9) The amount of any motor vehicle, mobilehome, or commercial coach fee or tax imposed by and paid the State of California that has been added to or is measured by a stated percentage of the sales or purchase price of a motor vehicle, mobilehome, or commercial coach.

(10) (A) The amount charged for intangible personal property transferred with tangible personal property in any technology transfer agreement, if the technology transfer agreement separately states a reasonable price for the tangible personal property.

(B) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or like tangible personal property has been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the price at which the tangible personal property was sold, leased, or offered to third parties shall be used to establish the retail fair market value of the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred.

(C) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible

personal property or like tangible personal property has not been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the retail fair market value shall be equal to 200 percent of the cost of materials and labor used to produce the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred.

(D) For purposes of this paragraph, “technology transfer agreement” means any agreement under which a person who holds a patent or copyright interest assigns or licenses to another person the right to make and sell a product or to use a process that is subject to the patent or copyright interest.

(11) The amount of any tax imposed upon diesel fuel pursuant to Part 31 (commencing with Section 60001).

(12) (A) The amount of tax imposed by any Indian tribe within the State of California with respect to a retail sale of tangible personal property measured by a stated percentage of the sales or purchase price, whether the tax is imposed upon the retailer or the consumer.

(B) The exclusion authorized by subparagraph (A) shall only apply to those retailers who are in substantial compliance with this part.

SEC. 4. Section 6012 of the Revenue and Taxation Code is amended to read:

6012. (a) “Gross receipts” mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(1) The cost of the property sold. However, in accordance with any rules and regulations as the board may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his or her vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business. If that deduction is taken by the retailer, no refund or credit will be allowed to his or her vendor with respect to the sale of the property.

(2) The cost of the materials used, labor or service cost, interest paid, losses, or any other expense.

(3) The cost of transportation of the property, except as excluded by other provisions of this section.

(4) The amount of any tax imposed by the United States upon producers and importers of gasoline and the amount of any tax imposed pursuant to Part 2 (commencing with Section 7301) of this division.

(b) The total amount of the sale or lease or rental price includes all of the following:

(1) Any services that are a part of the sale.

(2) All receipts, cash, credits and property of any kind.

(3) Any amount for which credit is allowed by the seller to the purchaser.

(c) "Gross receipts" do not include any of the following:

(1) Cash discounts allowed and taken on sales.

(2) Sale price of property returned by customers when that entire amount is refunded either in cash or credit, but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned. For the purpose of this section, refund or credit of the entire amount shall be deemed to be given when the purchase price less rehandling and restocking costs are refunded or credited to the customer. The amount withheld for rehandling and restocking costs may be a percentage of the sales price determined by the average cost of rehandling and restocking returned merchandise during the previous accounting cycle.

(3) The price received for labor or services used in installing or applying the property sold.

(4) (A) The amount of any tax (not including, however, any manufacturers' or importers' excise tax, except as provided in subparagraph (B)) imposed by the United States upon or with respect to retail sales whether imposed upon the retailer or the consumer.

(B) The amount of manufacturers' or importers' excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code for which the purchaser certifies that he or she is entitled to either a direct refund or credit against his or her income tax for

the federal excise tax paid or for which the purchaser issues a certificate pursuant to Section 6245.5.

(5) The amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California upon or with respect to retail sales of tangible personal property measured by a stated percentage of sales price or gross receipts whether imposed upon the retailer or the consumer.

(6) The amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California with respect to the storage, use or other consumption in that city, county, city and county, or rapid transit district of tangible personal property measured by a stated percentage of sales price or purchase price, whether the tax is imposed upon the retailer or the consumer.

(7) Separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, but the exclusion shall not exceed a reasonable charge for transportation by facilities of the retailer or the cost to the retailer of transportation by other than facilities of the retailer. However, if the transportation is by facilities of the retailer, or the property is sold for a delivered price, this exclusion shall be applicable solely with respect to transportation which occurs after the sale of the property is made to the purchaser. Charges for transportation are separately stated for the purposes of this paragraph if those charges are stated as a single amount and are not included within a single amount that combines transportation charges with other charges.

(8) Charges for transporting landfill from an excavation site to a site specified by the purchaser, either if the charge is separately stated and does not exceed a reasonable charge or if the entire consideration consists of payment for transportation.

(9) The amount of any motor vehicle, mobilehome, or commercial coach fee or tax imposed by and paid to the State of California that has been added to or is measured by a stated percentage of the sales or purchase price of a motor vehicle, mobilehome, or commercial coach.

(10) (A) The amount charged for intangible personal property transferred with tangible personal property in any technology transfer agreement, if the technology transfer agreement separately states a reasonable price for the tangible personal property.

(B) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or like tangible personal property has been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the price at which the tangible personal property was sold, leased, or offered to third parties shall be used to establish the retail fair market value of the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred.

(C) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or like tangible personal property has not been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the retail fair market value shall be equal to 200 percent of the cost of materials and labor used to produce the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred.

(D) For purposes of this paragraph, “technology transfer agreement” means any agreement under which a person who holds a patent or copyright interest assigns or licenses to another person the right to make and sell a product or to use a process that is subject to the patent or copyright interest.

(11) The amount of any tax imposed upon diesel fuel pursuant to Part 31 (commencing with Section 60001).

(12) (A) The amount of tax imposed by any Indian tribe within the State of California with respect to a retail sale of tangible personal property measured by a stated percentage of the sales or purchase price, whether the tax is imposed upon the retailer or the consumer.

(B) The exclusion authorized by subparagraph (A) shall only apply to those retailers who are in substantial compliance with this part.

For purposes of the sales tax, if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed. Section 1656.1 of the Civil

Code shall apply in determining whether or not the retailers have absorbed the sales tax.

Approved _____, 2009

Governor