

## **BILL ANALYSIS**

C.S.H.B. 2403  
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Ways & Means  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Many businesses are using business models that allow them to exploit a physical presence loophole in the law and consequently to avoid state sales tax responsibilities, despite creating and maintaining markets across state lines through remote sales while having a physical presence in Texas. With the advent of the Internet and the emergence of e-commerce, the number of sellers maintaining a physical presence while making remote sales to customers has exploded, creating a significant and growing loss of sales tax revenue to the states. This loss of revenue is compounded by the fact that traditional retailers with a storefront presence who must collect state and local sales and use taxes are placed at a competitive disadvantage.

C.S.H.B. 2403 seeks to address the situation by redefining "seller" and "retailer," defining "ownership" and "substantial ownership interest," and clarifying and expanding the conditions that constitute a retailer's being engaged in business in Texas.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 2403 amends the Tax Code to include in the meaning of "seller" or "retailer," for purposes of provisions governing the state sales and use tax, a person who, under an agreement with another person, is entrusted with possession of tangible personal property with respect to which the other person has title or another ownership interest and who under that agreement is authorized to sell, lease, or rent the property without additional action by the person having title to or another ownership interest in the property.

C.S.H.B. 2403 clarifies that a retailer is engaged in business in Texas if the retailer's place of business is a physical location where business is conducted. The bill establishes that a retailer is engaged in business in Texas if the retailer conducts certain activities at the retailer's distribution center, rather than place of distribution. The bill establishes that a retailer is engaged in business in Texas if the retailer derives receipts from the sale of tangible personal property situated in Texas as well as from the lease or rental of such property. The bill adds the following business activities that establish a retailer as being engaged in business in Texas:

- holding a substantial ownership interest in, or being owned in whole or in substantial part by, a person who maintains a location in Texas from which business is conducted if the retailer sells the same or a substantially similar line of products as the person with the location in Texas and sells those products under a business name that is the same as or substantially similar to the business name of the person with the location in Texas or that person's facilities or employees in Texas are used to advertise, promote, or facilitate sales by the retailer to consumers or to perform any other activity on behalf of the retailer intended to establish or maintain a marketplace for the retailer in Texas, including receiving or exchanging returned merchandise; or

- holding a substantial ownership interest in, or being owned in whole or in substantial part by, a person that maintains a distribution center, warehouse, or similar location in Texas that delivers property sold by the retailer to consumers.

C.S.H.B. 2403 provides for the meaning of "ownership," defines "substantial," and makes nonsubstantive changes.

### **EFFECTIVE DATE**

January 1, 2012.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.H.B. 2403 omits a provision included in the original establishing the use of a website on a server in Texas from which digital goods are sold or delivered as a business activity that establishes a retailer as being engaged in business in Texas.

C.S.H.B. 2403 differs from the original by specifying that "ownership" includes direct ownership, common ownership, and indirect ownership through a parent entity, subsidiary or affiliate, whereas the original defines "ownership" to specify that it means and includes, but is not limited to, both direct ownership and indirect ownership through a parent, subsidiary, or affiliate. The substitute differs from the original by defining "substantial" with respect to ownership to mean at least 50 percent, directly or indirectly, of the specified types of ownership for a corporation, trust, limited liability company, and for any entity, including a partnership or association, whether the ownership interest is stock, voting stock, beneficial interest in trust corpus or income, or membership interest, as applicable, whereas the original defines "substantial ownership interest" to mean at least 50 percent of the capital or profits interest in a corporation, partnership, association, trust, limited liability company, or beneficial interest in income or membership interest, as applicable.