

By: Otto

H.B. No. 2403

A BILL TO BE ENTITLED

AN ACT

relating to a retailer engaged in business in this state.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 151.008(b), Tax Code, is amended to read as follows:

(b) "Seller" and "retailer" include:

(1) a person in the business of making sales at auction of tangible personal property owned by the person or by another;

(2) a person who makes more than two sales of taxable items during a 12-month period, including sales made in the capacity of an assignee for the benefit of creditors or receiver or trustee in bankruptcy;

(3) a person regarded by the comptroller as a seller or retailer under Section 151.024 of this code;

(4) a hotel, motel, or owner or lessor of an office or residential building or development that contracts and pays for telecommunications services for resale to guests or tenants; []

(5) a person who engages in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items; and

1 (6) any person who, pursuant to an agreement with a
2 person with an ownership interest in or title to tangible personal
3 property, has been entrusted with the possession of any such
4 property and has the power, without further action on the part of
5 the person with an ownership interest in or title to the tangible
6 personal property, to sell, lease, or rent the property.

7 SECTION 2. Section 151.107, Tax Code, is amended by
8 amending Subsections (a) and (b) and adding Subsections (c), (d),
9 (e), and (f) to read as follows:

10 Sec. 151.107. RETAILER ENGAGED IN BUSINESS IN THIS STATE.

11 (a) For the purpose of this subchapter and in relation to the use
12 tax, a retailer is engaged in business in this state if the
13 retailer:

14 (1) maintains, occupies, or uses in this state
15 permanently, temporarily, directly, or indirectly or through a
16 subsidiary or agent by whatever name, an office, [~~place of~~]
17 distribution center, sales or sample room or place, warehouse,
18 storage place, or any other [~~place of~~] physical location where
19 business is conducted;

20 (2) has a representative, agent, salesman, canvasser,
21 or solicitor operating in this state under the authority of the
22 retailer or its subsidiary for the purpose of selling or delivering
23 or the taking of orders for a taxable item;

24 (3) derives [~~rentals~~] receipts from [~~a~~] the sale,
25 lease, or rental of tangible personal property situated in this
26 state;

27 (4) engages in regular or systematic solicitation of

1 sales of taxable items in this state by the distribution of
2 catalogs, periodicals, advertising flyers, or other advertising,
3 by means of print, radio, or television media, or by mail,
4 telegraphy, telephone, computer data base, cable, optic,
5 microwave, or other communication system for the purpose of
6 effecting sales of taxable items;

7 (5) solicits orders for taxable items by mail or
8 through other media and under federal law is subject to or permitted
9 to be made subject to the jurisdiction of this state for purposes of
10 collecting the taxes imposed by this chapter;

11 (6) has a franchisee or licensee operating under its
12 trade name if the franchisee or licensee is required to collect the
13 tax under this section;

14 (7) utilizes a website on a server in this state from
15 which digital goods are sold or delivered; [~~or~~]

16 (8) holds a substantial ownership interest in, or is
17 owned in whole or in substantial part by, a person who maintains a
18 location in this state from which business is conducted, if:

19 (A) the retailer sells the same or a
20 substantially similar line of products as the related retailer in
21 this state and does so under the same or substantially similar
22 business name; or,

23 (B) the facilities or employees of the related
24 person in this state are used to advertise, promote, or facilitate
25 sales by the retailer to consumers or to perform activities that are
26 intended to establish or maintain a marketplace in this state for
27 the retailer, including receiving or exchanging returned

1 merchandise;

2 (9) holds a substantial ownership interest in, or is
3 owned in whole or in substantial part by, a person that maintains a
4 distribution center, warehouse, or similar location in this state
5 that delivers property sold by the retailer to consumers; or

6 (10) [~~7~~] otherwise does business in this state.

7 (b) "Substantial ownership interest" as used in this
8 section means:

9 (1) at least 50 percent, directly or indirectly, of
10 the total combined voting power of all classes of stock of the
11 corporation, or at least 50 percent, directly or indirectly, of the
12 beneficial ownership interest in the voting stock of the
13 corporation;

14 (2) at least 50 percent, directly or indirectly, of
15 the capital or profits interest in the partnership;

16 (3) at least 50 percent, directly or indirectly, of
17 the capital or profits interest in the association;

18 (4) at least 50 percent, directly or indirectly, of
19 the current beneficial interest in the trust corpus or income;

20 (5) either at least 50 percent, directly or
21 indirectly, of the total membership interest of the limited
22 liability company or at least 50 percent, directly or indirectly,
23 of the beneficial ownership interest in the membership interest of
24 the limited liability company; or

25 (6) at least 50 percent, directly or indirectly, of
26 the capital or profits interest in the entity.

27 (c) "Ownership" as used in this section means, and includes

1 but is not limited to, both direct ownership and indirect ownership
2 through a parent, subsidiary, or affiliate.

3 (d) [~~(b)~~] Notwithstanding any other provision of law, a
4 broadcaster, printer, outdoor advertising firm, advertising
5 distributor, or publisher that broadcasts, publishes, displays, or
6 distributes paid commercial advertising in this state that is
7 intended to be disseminated primarily to consumers located in this
8 state and is only secondarily disseminated to bordering
9 jurisdictions, including advertising appearing exclusively in a
10 Texas edition or section of a national publication, is considered
11 for purposes of this section to be the agent of the person placing
12 the advertisement and that person placing the advertisement is
13 considered a retailer engaged in business in this state. The agency
14 relationship recognized by this subsection is for the sole purpose
15 of providing a presence in this state for the imposition of a tax on
16 out-of-state advertisers or sellers. The agent has no
17 responsibility to report, or liability to pay, a tax for the
18 out-of-state advertiser or seller and is not restricted by this
19 subchapter from accepting ads from out-of-state advertisers or
20 sellers.

21 SECTION 3. APPLICABILITY OF FORMER LAW. The change in law
22 made by the Act does not affect tax liability accruing before the
23 effective date of this Act. That liability continues in effect as
24 if this Act had not been enacted, and the former law is continued in
25 effect for those taxes.

26 SECTION 4. This Act takes effect January 1, 2012.