

HOUSE BILL No. 2103

By Committee on Taxation

1-24

1 AN ACT concerning sales and use taxation; relating to nexus; amending
2 K.S.A. 2012 Supp. 79-3702 and repealing the existing section.

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4 *Be it enacted by the Legislature of the State of Kansas:*

5 New Section 1. (a) If any person sells or leases tangible personal
6 property to the state, a state department, a state agency or an agent thereof,
7 that person and any affiliated person shall, as a prerequisite for any such
8 sale or lease, register with the department of revenue as a retailer and
9 comply with all legal requirements imposed on a retailer, including the
10 requirement to collect and remit sales or use tax on all taxable sales of
11 tangible personal property to customers in this state.

12 (b) Any ruling, agreement or contract, whether written or oral,
13 express or implied, between a retailer and this state's executive branch, or
14 any other state agency or department, stating, agreeing or ruling that the
15 retailer is not required to collect sales and use tax in this state despite the
16 presence of a warehouse, distribution center or fulfillment center in the
17 state that is owned or operated by the retailer or an affiliated person of the
18 retailer shall be null and void, unless it is specifically approved by a
19 majority vote of each of the chambers of the Kansas legislature.

20 (c) As used in this section, "affiliated person" means any person that
21 is a member of the same "controlled group of corporations" as defined in
22 section 1563(a) of the federal internal revenue code as the retailer or any
23 other entity that, notwithstanding its form of organization, bears the same
24 ownership relationship to the retailer as a corporation that is a member of
25 the same "controlled group of corporations" as defined in section 1563(a)
26 of the federal internal revenue code.

27 Sec. 2. K.S.A. 2012 Supp. 79-3702 is hereby amended to read as
28 follows: 79-3702. For the purposes of this act: (a) "Purchase price" means
29 the consideration paid or given or contracted to be paid or given by any
30 person to the seller of an article of tangible personal property for the article
31 purchased. The term shall include, in addition to the consideration paid or
32 given or contracted to be paid or given, the actual cost of transportation
33 from the place where the article was purchased to the person using the
34 same in this state. If a cash discount is allowed and taken on the sale it
35 shall be deducted in arriving at the purchase price.

36 (b) The meaning ascribed to words and phrases in K.S.A. 79-3602,

1 and amendments thereto, insofar as is practicable, shall be applicable
2 herein unless otherwise provided. The provisions of K.S.A. 79-3601 to 79-
3 3625, inclusive, 79-3650, K.S.A. 2012 Supp. 79-3693 and 79-3694, and
4 amendments thereto, relating to enforcement, collection and
5 administration, insofar as practicable, shall have full force and effect with
6 respect to taxes imposed under the provisions of this act.

7 (c) "Use" means the exercise within this state by any person of any
8 right or power over tangible personal property incident to the ownership of
9 that property, except that it shall not include processing, or the sale of the
10 property in the regular course of business, and except storage as
11 hereinafter defined.

12 (d) "Storage" means any keeping or retaining in this state for any
13 purpose except sale in the regular course of business or subsequent use
14 solely outside this state of tangible personal property purchased from a
15 retailer.

16 (e) "Storage" and "use" do not include the keeping, retaining or
17 exercising of any right or power over tangible personal property shipped or
18 brought into this state for the purpose of subsequently transporting it
19 outside the state for use thereafter solely outside the state, or for the
20 purpose of being processed, fabricated, or manufactured into, attached to
21 or incorporated into, other tangible personal property to be transported
22 outside the state and thereafter used solely outside the state.

23 (f) "Property used in processing" means: (1) Any tangible personal
24 property which, when used in fabrication, compounding, manufacturing or
25 germination, becomes an integral part of the new article resulting from
26 such fabrication, compounding, manufacturing, or germination, and
27 intended to be sold ultimately at retail; *and* (2) fuel which is consumed in
28 creating power, heat, or steam for processing or for generating electric
29 current.

30 (g) "Retailer" means every person engaged in the business of selling
31 tangible personal property for use within the meaning of this act, except
32 that, when in the opinion of the director it is necessary for the efficient
33 administration of this act to regard any salesperson, representatives,
34 truckers, peddlers or canvassers as the agents of the dealers, distributors,
35 supervisors, employers or persons under whom they operate or from whom
36 they obtain the tangible personal property sold by them, irrespective of
37 whether they are making sales on their own behalf or on behalf of such
38 dealers, distributors, supervisors, employers, or persons, the director may
39 so regard them and may regard the dealers, distributors, supervisors,
40 employers, or persons as retailers for the purposes of this act.

41 (h) (1) "Retailer doing business in this state" or any like term, means:
42 (A) Any retailer ~~having or~~ maintaining in this state, permanently,
43 temporarily, directly or indirectly through a subsidiary, agent or

1 representative, an office, distribution house, sales house, warehouse or
2 other place of business;

3 (B) any retailer ~~having~~ using an employee, independent contractor,
4 agent, representative, salesperson, canvasser ~~or~~, solicitor *or other person*
5 operating in this state either permanently or temporarily, ~~under the~~
6 ~~authority of the retailer or its subsidiary~~, for the purpose of selling,
7 delivering, installing, assembling, servicing, repairing, soliciting sales or
8 the taking of orders for tangible personal property;

9 (C) any retailer, including a contractor, repair person or other service
10 provider, who enters this state to perform services that are enumerated in
11 K.S.A. 79-3603, and amendments thereto, and who is required to secure a
12 retailer's sales tax registration certificate before performing those services;

13 (D) any retailer deriving rental receipts from a lease of tangible
14 personal property situated in this state;

15 (E) ~~any person having a franchisee or licensee operating under its~~
16 ~~trade name if the franchisee or the licensee is required to collect the tax~~
17 ~~under the Kansas retailers' sales tax act~~;

18 (F) ~~any person regularly maintaining a stock of tangible personal~~
19 ~~property in this state for sale in the normal course of business; and~~

20 (G)(F) any retailer who has any other contact with this state that
21 would allow this state to require the retailer to collect and remit tax under
22 the provisions of the constitution and laws of the United States.

23 (2) A retailer shall be presumed to be doing business in this state if
24 *any of the following occur*:

25 (A) ~~Both of the following conditions exist:~~

26 (i) ~~The retailer holds a substantial ownership interest in, or is owned~~
27 ~~in whole substantial part by, a retailer maintaining a sales location in~~
28 ~~Kansas; and~~

29 (ii) ~~the retailer sells the same or a substantially similar line of~~
30 ~~products as the related Kansas retailer and does so under the same or a~~
31 ~~substantially similar business name, or the Kansas facilities or Kansas~~
32 ~~employees of the related Kansas retailer are used to advertise, promote or~~
33 ~~facilitate sales by the retailer to consumers.~~

34 (B) ~~The retailer holds a substantial ownership interest in, or is owned~~
35 ~~in whole or in substantial part by, a business that maintains a distribution~~
36 ~~house, sales house, warehouse or similar place of business in Kansas that~~
37 ~~delivers property sold by the retailer to consumers.~~

38 (C) ~~For purposes of paragraphs (A) and (B):~~

39 (i) ~~"Substantial ownership interest" means an interest in an entity that~~
40 ~~is not less than the degree of ownership of equity interest in an entity that~~
41 ~~is specified by Section 78p of Title 15 of the United States Code, or any~~
42 ~~successor to that statute, with respect to a person other than a director or~~
43 ~~officer; and~~

1 ~~(ii) "ownership" means and includes both direct ownership, and~~
2 ~~indirect ownership through a parent, subsidiary or affiliate. Any person,~~
3 ~~other than a common carrier acting in its capacity as such, that has nexus~~
4 ~~with the state sufficient to require such person to collect and remit taxes~~
5 ~~under the provisions of the constitution and laws of the United States if~~
6 ~~such person were making taxable retail sales of tangible personal property~~
7 ~~or services in this state:~~

8 (i) *Sells the same or a substantially similar line of products as the*
9 *retailer and does so under the same or a substantially similar business*
10 *name;*

11 (ii) *maintains a distribution house, sales house, warehouse or similar*
12 *place of business in Kansas that delivers or facilitates the sale or delivery*
13 *of property sold by the retailer to consumers;*

14 (iii) *uses trademarks, service marks, or trade names in the state that*
15 *are the same or substantially similar to those used by the retailer;*

16 (iv) *delivers, installs, assembles or performs maintenance services*
17 *for the retailer's customers within the state;*

18 (v) *facilitates the retailer's delivery of property to customers in the*
19 *state by allowing the retailer's customers to pick up property sold by the*
20 *retailer at an office, distribution facility, warehouse, storage place or*
21 *similar place of business maintained by the person in the state;*

22 (vi) *has a franchisee or licensee operating under its trade name if the*
23 *franchisee or the licensee is required to collect the tax under the Kansas*
24 *retailers' sales tax act; or*

25 (vii) *conducts any other activities in the state that are significantly*
26 *associated with the retailer's ability to establish and maintain a market in*
27 *the state for the retailer's sales.*

28 (B) *Any affiliated person conducting activities in this state described*
29 *in subparagraph (A) or (C) has nexus with this state sufficient to require*
30 *such person to collect and remit taxes under the provisions of the*
31 *constitution and laws of the United States if such person were making*
32 *taxable retail sales of tangible personal property or services in this state.*

33 (C) *The retailer enters into an agreement with one or more residents*
34 *of this state under which the resident, for a commission or other*
35 *consideration, directly or indirectly refers potential customers, whether by*
36 *a link or an internet website, by telemarketing, by an in-person oral*
37 *presentation, or otherwise, to the retailer; if the cumulative gross receipts*
38 *from sales by the retailer to customers in the state who are referred to the*
39 *retailer by all residents with this type of an agreement with the retailer is*
40 *in excess of \$10,000 during the preceding 12 months. This presumption*
41 *may be rebutted by submitting proof that the residents with whom the*
42 *retailer has an agreement did not engage in any activity within the state*
43 *that was significantly associated with the retailer's ability to establish or*

1 *maintain the retailer's market in the state during the preceding 12 months.*
2 *Such proof may consist of sworn written statements from all of the*
3 *residents with whom the retailer has an agreement stating that they did not*
4 *engage in any solicitation in the state on behalf of the retailer during the*
5 *preceding year; provided that such statements were provided and obtained*
6 *in good faith. This subparagraph shall take effect 90 days after the*
7 *enactment of this statute and shall apply to sales made and uses occurring*
8 *on or after the effective date of this subparagraph and without regard to*
9 *the date the retailer and the resident entered into the agreement described*
10 *in this subparagraph. The term "preceding 12 months" as used in this*
11 *subparagraph includes the 12 months commencing prior to the effective*
12 *date of this subparagraph.*

13 *(D) The presumptions in subparagraphs (A) and (B) may be rebutted*
14 *by demonstrating that the activities of the person or affiliated person in*
15 *the state are not significantly associated with the retailer's ability to*
16 *establish or maintain a market in this state for the retailer's sales.*

17 (3) The processing of orders electronically, by fax, telephone, the
18 internet or other electronic ordering process, does not relieve a retailer of
19 responsibility for collection of the tax from the purchaser if the retailer is
20 doing business in this state pursuant to this section.

21 (i) "Director" means the director of taxation.

22 (j) *As used in this section, "affiliated person" means any person that*
23 *is a member of the same "controlled group of corporations" as defined in*
24 *section 1563(a) of the federal internal revenue code as the retailer or any*
25 *other entity that, notwithstanding its form of organization, bears the same*
26 *ownership relationship to the retailer as a corporation that is a member of*
27 *the same "controlled group of corporations" as defined in section 1563(a)*
28 *of the federal internal revenue code.*

29 Sec. 3. K.S.A. 2012 Supp. 79-3702 is hereby repealed.

30 Sec. 4. This act shall take effect and be in force from and after its
31 publication in the statute book.

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