

BILL ANALYSIS

Senate Research Center
85R8165 BEF-F

S.B. 1713
By: Uresti
Finance
4/7/2017
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 1713 does not expand a tax, levy a tax, increase a tax, or change who owes the tax, it only changes who is required to send the tax to the state. Under current law, when a person makes a purchase from an out-of-state online retailer, they are required to send the sales tax in to the Texas comptroller of public accounts (comptroller) separate from their purchase. This requirement is little known, and rarely ever complied with. S.B. 1713 expands the sales tax nexus threshold for out-of-state retailers, by establishing an economic presence standard for sales tax purposes. This would require large out-of-state (mostly online) retailers to collect sales tax when a person in Texas makes a purchase, and remit it to the state in the same way Texas based companies are required to.

Currently, businesses must have a physical nexus, or presence, in Texas in order to collect the Texas sales tax. Many online retailers that collectively sell billions in goods and services to Texans are not considered as having a physical nexus in Texas and thus are not required to collect and remit Texas sales tax. This disadvantages Texas brick-and-mortar and Texas based online retailers as they must collect and remit sales tax, while online out of state retailers do not.

Studies have estimated that Texas is not collecting anywhere between \$247 million and \$1.8 billion in sales taxes per year. Given that e-commerce is now 8.3 percent of all commerce—almost three times the portion of a decade ago and rising—the state should update our sales tax system in order to better reflect the current economic climate.

As proposed, S.B. 1713 amends current law relating to the administration and collection of the state use tax as applied to certain persons engaged in business in this state, requires a permit, and creates an offense.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Texas comptroller of public accounts in SECTION 2 (Section 151.1065, Tax Code) and SECTION 5 (Sections 151.109, 151.110, and 151.111, Tax Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 151.008(b), Tax Code, to redefine "seller" and "retailer."

SECTION 2. Amends Subchapter D, Chapter 151, Tax Code, by adding Section 151.1065, as follows:

Sec. 151.1065. REFERRER'S PERMIT REQUIRED. (a) Provides that this section applies only to a referrer as defined by Section 151.110 who received at least \$10,000 in fees, commissions, or other consideration from other retailers for services described by Section 151.110(a) performed by the referrer in this state in the year preceding the year in which an application under this section is due or at least \$7,500 in fees, commissions, or other consideration from other retailers for services described by Section 151.110(a) performed by the referrer in this state in the first three calendar quarters of the year in which an application under this section is due.

(b) Prohibits a referrer from engaging in activity described by Section 151.110(a) in this state without a permit issued as provided by this section.

(c) Requires a referrer, not later than December 1 of each year, to apply to the Texas comptroller of public accounts (comptroller) for a referrer's permit.

(d) Requires the comptroller to issue a referrer's permit to an applicant not later than the 15th day after the date the comptroller receives the application for the permit. Provides that the permit is valid for the 12-month period beginning on January 1 of the year following the year in which the permit is issued.

(e) Prohibits the comptroller from charging, or requiring security from, a referrer for a referrer's permit.

(f) Provides that a referrer's permit is valid only for the referrer to which it is issued and prohibits the permit from being assigned.

(g) Requires the comptroller to revoke a referrer's permit if the referrer fails to file the report or provide the notice required under Section 151.111.

(h) Authorizes the comptroller to adopt rules necessary to implement and administer this section.

SECTION 3. Amends Section 151.107, Tax Code, by adding Subsections (c-1), (c-2), (c-3), (c-4), and (c-5), as follows:

(c-1) Provides that for purposes of this subchapter (Imposition and Collection of Use Tax) and in relation to the use tax, a retailer is a retailer engaged in business in this state if the retailer engages in any part of a sale, lease, or rental of a taxable item to a purchaser in this state, regardless of whether the retailer contracts with a third party to perform all or any part of the transaction, or whether the retailer performs all or any part of the transaction through an entity in which the retailer holds a substantial ownership interest or that holds a substantial ownership interest in the retailer. Provides that for purposes of this subsection, the sale, lease, or rental of an item includes certain actions. Provides that the act of shipping an item by common carrier to a purchaser in this state is not considered engaging in the sale, lease, or rental of a taxable item for purposes of this subsection.

(c-2) Provides that for purposes of this subchapter and in relation to the use tax, a retailer is a retailer engaged in business in this state if, to facilitate the sale, lease, or rental of a taxable item to a purchaser in this state, the retailer directly or through a third party uses direct response marketing, a referrer with a significant economic presence in this state, or another person who has a significant economic presence in this state and with whom the retailer enters into an agreement for the person to refer potential purchasers to the retailer, regardless of whether the referral is not related to a sale, lease, or rental of tangible personal property but subsequently results in a sale, lease, or rental of that property.

(c-3) Provides that an agreement described by Subsection (c-2)(3) does not include an agreement under which a retailer purchases advertisements from a person in this state to be delivered by television or radio, in print, on the Internet, or through another means, unless the agreement includes the payment of advertising revenue to the person based wholly or partly on the sales resulting from the advertising.

(c-4) Provides that Subsection (c-2) does not apply to a retailer described by that subsection if each person with whom the retailer has entered into an agreement to refer potential purchasers to the retailer does not have a significant economic presence in this state and certifies to the retailer annually that the person meets that requirement.

(c-5) Requires the comptroller to prescribe the form of the certification described by Subsection (c-4). Provides that a person who intentionally or negligently provides false

information in the certification commits an offense punishable in the same manner as an offense under Section 151.708 (Selling Without Permit; Criminal Penalty).

SECTION 4. Amends Section 151.107(d), Tax Code, by amending Subdivision (1) and adding Subdivisions (1-a) and (1-b), to define "direct response marketing" and "referrer," and redesignate existing text under Subdivision (1-a).

SECTION 5. Amends Subchapter D, Chapter 151, Tax Code, by adding Sections 151.1075, 151.109, 151.110, and 151.111, as follows:

Sec. 151.1075. RETAILER PRESUMED TO BE ENGAGED IN BUSINESS IN THIS STATE. (a) Provides that for purposes of this subchapter and in relation to the use tax, a retailer is presumed to be engaged in business in this state if, in the previous calendar year or the current calendar year, the retailer has certain total receipts or certain sales.

(b) Provides that a retailer described by Subsection (a) is required to comply with the requirements of this chapter unless the retailer rebuts the presumption under that subsection by proving that it does not have substantial economic nexus with this state.

(c) Provides that for purposes of this subchapter and in relation to the use tax, a retailer is presumed to be engaged in business in this state if the retailer is related, as provided by Subsection (d), to a person engaged in business in this state who takes certain actions.

(d) Provides that for purposes of Subsection (c), a retailer is related to a person engaged in business in this state if the retailer and the person have a relationship described by Section 267(b) or 707(b)(1), Internal Revenue Code of 1986 or have an ownership relationship designed with a principal purpose of avoiding the application of Subsection (c).

(e) Authorizes a retailer to rebut the presumption under Subsection (c) for a reporting period by proving by a preponderance of evidence that the person engaged in business in this state did not engage in any activities on the retailer's behalf during the reporting period sufficient to establish the retailer's substantial economic nexus with this state.

Sec. 151.109. MARKETPLACE PROVIDERS. (a) Defines "marketplace provider."

(b) Provides that a marketplace provider's facilitation of a sale, lease, or rental described by Subsection (a)(1) (relating to defining "marketplace provider" as a person who facilitates the sales, lease, or rental of a retailer's tangible personal property) that results in a sale, lease, or rental by the other retailer is considered the making of a sale by the marketplace provider for purposes of Sections 151.008(a) (relating to the definition of "seller" and "retailer") and 151.103 (Collection By Retailer; Purchaser's Receipt). Provides that, notwithstanding Section 151.103, the marketplace provider is not required to collect a use tax imposed under this subchapter that is due from a purchaser if the retailer for whom the marketplace provider facilitates the sale, lease, or rental collects the tax from the purchaser.

(c) Authorizes a marketplace provider, for purposes of Subsection (b), to presume that a retailer registered with the comptroller under Section 151.106 (Registration of Retailers) collects the use tax from a purchaser.

(d) Provides that, subject to Subsection (e), a marketplace provider is not subject to liability under Subchapter L (Prohibited Acts and Civil and Criminal Penalties) for failing to collect or remit the appropriate amount of use tax if, in determining the amount, the marketplace provider relies exclusively on information provided

by the retailer for whom the marketplace provider facilitates the sale, lease, or rental of the tangible personal property on which the tax is due.

(e) Provides that Subsection (d) does not apply if the marketplace provider and the retailer for whom the marketplace provider facilitated the sale, lease, or rental of tangible personal property have an ownership relationship designed with a principal purpose of relieving the marketplace provider of liability as authorized by Subsection (d) or the marketplace provider and the other retailer have a relationship described by Section 267(b) or 707(b)(1), Internal Revenue Code of 1986.

(f) Provides that nothing in this section is authorized to be construed as affecting the ability of a marketplace provider and another retailer to enter into an agreement regarding the requirements of this chapter.

(g) Authorizes the comptroller to adopt rules necessary to implement and administer this section, including rules establishing the requirements for an entity to be considered a marketplace provider.

Sec. 151.110. REFERRERS. (a) Defines "referrer."

(b) Provides that for purposes of this subchapter and in relation to the use tax, a referrer who makes a referral to another retailer that results in a sale, lease, or rental of the other retailer's tangible personal property to a purchaser in this state is a retailer engaged in business in this state.

(c) Provides that a referrer's facilitation of a sale, lease, or rental described by Subsection (a)(1) (relating to defining "referrer" as a person who lists certain items for the purpose of facilitating the sale, lease, or rental of a retailer's tangible personal property) that results in a sale, lease, or rental by the other retailer is considered the making of a sale by the referrer for purposes of Sections 151.008(a) and 151.103, and the listed price of the item for sale, lease, or rent is presumed to be the sales price for purposes of Sections 151.101 (Use Tax Imposed) and 151.103. Provides that, notwithstanding Section 151.103, the referrer is not required to collect a use tax imposed under this subchapter that is due from a purchaser if the retailer for whom the referrer facilitates the sale, lease, or rental collects the tax from the purchaser or the referrer holds a referrer's permit issued under Section 151.1065 and is in compliance with Section 151.111.

(d) Authorizes a referrer, for purposes of Subsection (c), to presume that a retailer registered with the comptroller under Section 151.106 collects the use tax from a purchaser.

(e) Provides that, subject to Subsection (f), a referrer is not subject to liability under Subchapter L for failing to collect or remit the appropriate amount of use tax if, in determining the amount, the referrer relies exclusively on information provided by the retailer for whom the referrer facilitates the sale, lease, or rental of the tangible personal property on which the tax is due.

(f) Provides that Subsection (e) does not apply if the referrer and the retailer for whom the referrer facilitated the sale, lease, or rental of tangible personal property have an ownership relationship designed with a principal purpose of relieving the referrer of liability as authorized by Subsection (e) or the referrer and the other retailer have a relationship described by Section 267(b) or 707(b)(1), Internal Revenue Code of 1986.

(g) Authorizes the comptroller to adopt rules necessary to implement and administer this section, including rules establishing the requirements for an entity to be considered a referrer.

Sec. 151.111. REFERRER'S ANNUAL REPORT; NOTICE TO RETAILERS. (a) Provides that this section applies only to a referrer who is required to hold a referrer's permit under Section 151.1065.

(b) Requires a referrer, on January 1 of each year, to file with the comptroller a report that contains, for the preceding 12-month period certain information and provide notice to each retailer with whom the referrer entered into an agreement described by Section 151.110(a)(1) during the preceding 12-month period that the retailer's sales in this state may be subject to a use tax under the laws of this state and the referrer is required to annually report the information described by Subdivision (1) to this state.

(c) Prohibits the report required under Subsection (b) from containing personally identifiable information of any purchaser.

(d) Authorizes a referrer, notwithstanding Subsection (b), to exclude from the report required under that subsection the name of, and any information relating to referrals to, a retailer for whom the referrer makes referrals if the retailer collects the use tax imposed under this subchapter from purchasers in this state. Authorizes a referrer, for purposes of this subsection, to presume that a retailer registered with the comptroller under Section 151.106 collects the tax.

(e) Authorizes the comptroller to adopt rules necessary to implement and administer this section and to prescribe the form of the report and the notice required under this section.

SECTION 6. Amends Section 151.403(b), Tax Code, to require a retailer engaged in business in this state as provided by Section 151.107 (Retailer Engaged in Business in This State), 151.1075, 151.109, or 151.110 to file a tax report with respect to the use tax and makes a nonsubstantive change.

SECTION 7. Provides that the first report and notice required under Section 151.111, Tax Code, as added by this Act, are due January 1, 2018.

SECTION 8. Provides that the change in law made by this Act does not affect tax liability accruing before the effective date of this Act. Provides that liability continues in effect as if this Act had not been enacted, and the former law is continued in effect for the collection of taxes due and for civil and criminal enforcement of the liability for those taxes.

SECTION 9. (a) Authorizes the constitutionality and other validity under the state or federal constitution of all or any part of the amendments made to Chapter 151, Tax Code, by this Act to be determined in an action for declaratory judgment in a district court in Travis County under Chapter 37 (Declaratory Judgments), Civil Practice and Remedies Code, except that this section does not authorize an award of attorney's fees against this state and Section 37.009 (Costs), Civil Practice and Remedies Code, does not apply to an action filed under this section.

(b) Provides that an appeal of a declaratory judgment or order, however characterized, of a district court, including an appeal of the judgment of an appellate court, holding or otherwise determining that all or any part of the amendments made to Chapter 151, Tax Code, by this Act is constitutional or unconstitutional, or otherwise valid or invalid, under the state or federal constitution is an accelerated appeal.

(c) Authorizes an interlocutory appeal, if the judgment or order is interlocutory, to be taken from the judgment or order and provides that it is an accelerated appeal.

(d) Authorizes a district court in Travis County to grant or deny a temporary or otherwise interlocutory injunction or a permanent injunction on the grounds of the constitutionality or unconstitutionality, or other validity or invalidity, under the state or federal constitution of all or any part of the amendments made to Chapter 151, Tax Code, by this Act.

(e) Provides that there is a direct appeal to the Texas Supreme Court (supreme court) from an order, however characterized, of a trial court granting or denying a temporary or otherwise interlocutory injunction or a permanent injunction on the grounds of the constitutionality or unconstitutionality, or other validity or invalidity, under the state or federal constitution of all or any part of the amendments made to Chapter 151, Tax Code, by this Act.

(f) Provides that the direct appeal is an accelerated appeal.

(g) Provides that this section exercises the authority granted by Section 3-b (Appeal from Order Granting or Denying Injunction), Article V (Judicial Department), Texas Constitution.

(h) Provides that the filing of a direct appeal under this section will automatically stay any temporary or otherwise interlocutory injunction or permanent injunction granted in accordance with this section pending final determination by the supreme court, unless the supreme court makes specific findings that the applicant seeking such injunctive relief has pleaded and proved that the applicant has a probable right to the relief it seeks on final hearing and the applicant will suffer a probable injury that is imminent and irreparable, and that the applicant has no other adequate legal remedy.

(i) Provides that an appeal under this section, including an interlocutory, accelerated, or direct appeal, is governed, as applicable, by the Texas Rules of Appellate Procedure, including certain rules.

SECTION 10. Effective date: September 1, 2017.