SENATE BILL NO. 382–SENATORS FORD, KIHUEN, WOODHOUSE, SMITH, SPEARMAN; ATKINSON, PARKS AND SEGERBLOM

MARCH 17, 2015

JOINT SPONSOR: ASSEMBLYMAN MUNFORD

Referred to Committee on Revenue and Economic Development

SUMMARY—Revises provisions relating to sales and use taxes. (BDR 32-660)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to taxation; enacting provisions relating to the imposition, collection and remittance of sales and use taxes by retailers located outside this State; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

The Commerce Clause of the United States Constitution prohibits a state from requiring a retailer to collect sales and use taxes unless the activities of the retailer have a substantial nexus with the taxing state. (*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)) Existing law requires every retailer whose activities create such a nexus with this State to impose, collect and remit the sales and use taxes imposed in this State. (NRS 372.724, 374.724) This bill provides that a retailer who engages in certain specified activities is required to collect and remit the sales and use taxes imposed in this State.

Section 1 of this bill requires the Department of Taxation to submit a report to the Director of the Legislative Counsel Bureau concerning each finding, ruling or agreement by the Department or the Nevada Tax Commission which provides that the provisions of existing law requiring a retailer to impose, collect and remit sales and use taxes do not apply to the retailer even though the retailer or an affiliate owns or operates a warehouse, distribution center, fulfillment center or other similar facility in this State.

Sections 2 and 5 of this bill enact provisions based on a Colorado law which creates a presumption that a retailer is required to impose, collect and remit sales and use taxes if the retailer is: (1) part of a controlled group of business entities that has a component member who has physical presence in this State; and (2) the

component member with such physical presence engages in certain activities in this State that relate to the ability of the retailer to make retail sales to residents of this State. (Ch. 364, Colo. Session Laws 2014, at p. 1740) Under **sections 2 and 5**, a retailer may rebut this presumption by providing proof that the component member with physical presence in this State did not engage in any activity in this State that was significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services.

Sections 3 and 6 of this bill enact a provision based on a New York law which creates a presumption that a retailer is required to impose, collect and remit sales and use taxes if: (1) the retailer enters into an agreement with a resident of this State under which the resident receives certain consideration for referring potential customers to the retailer through a link on the resident's Internet website or otherwise; and (2) the cumulative gross receipts from sales by the retailer to customers in this State through all such referrals exceeds a certain amount during the preceding four quarterly periods. A retailer may rebut this presumption by providing proof that each resident with whom the retailer has an agreement did not engage in any activity that was significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services during the preceding four quarterly periods. In *Overstock.com v. New York State Department of Taxation and Finance*, 987 N.E.2d 621 (2013), the New York Court of Appeals held that the New York law is facially constitutional because, through these agreements with New York residents, a retailer may establish a sufficient nexus with the State of New York to satisfy the requirements of the United States Constitution.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 360 of NRS is hereby amended by adding thereto a new section to read as follows:

Not later than 30 days after the Department or the Nevada Tax Commission makes a finding or ruling, or enters into an agreement with a retailer providing, that the provisions of chapters 372 and 374 of NRS relating to the imposition, collection and remittance of the sales tax, and the collection and remittance of the use tax, do not apply to the retailer, despite the presence in this State of an office, distribution facility, warehouse or storage place or similar place of business which is owned or operated by the retailer or an affiliate of the retailer, whether the finding, ruling or agreement is written or oral and whether the finding, ruling or agreement is express or implied, the Department shall submit a report of the finding, ruling or agreement to the Director of the Legislative Counsel Bureau for transmittal to:

1. If the Legislature is in session, the Legislature; or

2. If the Legislature is not in session, the Legislative Commission.

Sec. 1.5. Chapter 372 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. ***1. Except as otherwise provided in this section, it is presumed that the provisions of this chapter relating to the imposition, collection and remittance of the sales tax, and the collection and remittance of the use tax, apply to a retailer if:***

(a) The retailer is part of a controlled group of corporations that has a component member, other than a common carrier acting in its capacity as such, that has physical presence in this State; and

(b) The component member with physical presence in this State:

(1) Sells a similar line of products or services as the retailer and does so under a business name that is the same or similar to that of the retailer;

(2) Maintains an office, distribution facility, warehouse or storage place or similar place of business in this State to facilitate the delivery of tangible personal property sold by the retailer to the retailer's customers;

(3) Uses trademarks, service marks or trade names in this State that are the same or substantially similar to those used by the retailer;

(4) Delivers, installs, assembles or performs maintenance services for the retailer's customers within this State;

(5) Facilitates the retailer's delivery of tangible personal property to customers in this State by allowing the retailer's customers to pick up tangible personal property sold by the retailer at an office, distribution facility, warehouse, storage place or similar place of business maintained by the component member in this State; or

(6) Conducts any other activities in this State that are significantly associated with the retailer's ability to establish and maintain a market in this State for the retailer's products or services.

2. A retailer may rebut the presumption set forth in subsection 1 by providing proof satisfactory to the Department that, during the calendar year in question, the activities of the component member with physical presence in this State are not significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services.

3. In administering the provisions of this chapter, the Department shall construe the terms "seller," "retailer" and "retailer maintaining a place of business in this State" in accordance with the provisions of this section.

4. As used in this section:

(a) "Component member" has the meaning ascribed to it in section 1563(b) of the Internal Revenue Code, 26 U.S.C. § 1563(b), and includes any entity that, notwithstanding its form of organization, bears the same ownership relationship to the retailer as a corporation that would qualify as a component member of the same controlled group of corporations as the retailer.

(b) "Controlled group of corporations" has the meaning ascribed to it in section 1563(a) of the Internal Revenue Code, 26 U.S.C. § 1563(a), and includes any entity that, notwithstanding its form of organization, bears the same ownership relationship to the retailer as a corporation that would qualify as a component member of the same controlled group of corporations as the retailer.

Sec. 3. *1. Except as otherwise provided in this section, it is presumed that the provisions of this chapter relating to:*

(a) The imposition, collection and remittance of the sales tax; and

(b) The collection and remittance of the use tax,

➥ apply to every retailer who enters into an agreement with a resident of this State under which the resident, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers, whether by a link on an Internet website or otherwise, to the retailer, if the cumulative gross receipts from sales by the retailer to customers in this State who are referred to the retailer by all residents with this type of an agreement with the retailer is in excess of $10,000 during the preceding four quarterly periods ending on the last day of March, June, September and December.

2. A retailer may rebut the presumption set forth in subsection 1 by providing proof satisfactory to the Department that each resident with whom the retailer has an agreement did not engage in any activity in this State that was significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services during the preceding four quarterly periods ending on the last day of March, June, September and December. Such proof may consist of the sworn written statements of each resident with whom the retailer has an agreement stating that the resident did not engage in any solicitation in this State on behalf of the retailer during the preceding four quarterly periods ending on the last day of March, June, September and December, if the statements were obtained from each resident and provided to the Department in good faith.

3. In administering the provisions of this chapter, the Department shall construe the terms "seller," "retailer" and

"retailer maintaining a place of business in this State" in accordance with the provisions of this section.

Sec. 4. Chapter 374 of NRS is hereby amended by adding thereto the provisions set forth as sections 5 and 6 of this act.

Sec. 5. *1. Except as otherwise provided in this section, it is presumed that the provisions of this chapter relating to the imposition, collection and remittance of the sales tax, and the collection and remittance of the use tax, apply to a retailer if:*

(a) The retailer is part of a controlled group of corporations that has a component member, other than a common carrier acting in its capacity as such, that has physical presence in this State; and

(b) The component member with physical presence in this State:

(1) Sells a similar line of products or services as the retailer and does so under a business name that is the same or similar to that of the retailer;

(2) Maintains an office, distribution facility, warehouse or storage place or similar place of business in this State to facilitate the delivery of tangible personal property sold by the retailer to the retailer's customers;

(3) Uses trademarks, service marks or trade names in this State that are the same or substantially similar to those used by the retailer;

(4) Delivers, installs, assembles or performs maintenance services for the retailer's customers within this State;

(5) Facilitates the retailer's delivery of tangible personal property to customers in this State by allowing the retailer's customers to pick up tangible personal property sold by the retailer at an office, distribution facility, warehouse, storage place or similar place of business maintained by the component member in this State; or

(6) Conducts any other activities in this State that are significantly associated with the retailer's ability to establish and maintain a market in this State for the retailer's products or services.

2. A retailer may rebut the presumption set forth in subsection 1 by providing proof satisfactory to the Department that, during the calendar year in question, the activities of the component member with physical presence in this State are not significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services.

3. In administering the provisions of this chapter, the Department shall construe the terms "seller," "retailer" and

"retailer maintaining a place of business in this State" in accordance with the provisions of this section.

4. As used in this section:

(a) "Component member" has the meaning ascribed to it in section 1563(b) of the Internal Revenue Code, 26 U.S.C. § 1563(b), and includes any entity that, notwithstanding its form of organization, bears the same ownership relationship to the retailer as a corporation that would qualify as a component member of the same controlled group of corporations as the retailer.

(b) "Controlled group of corporations" has the meaning ascribed to it in section 1563(a) of the Internal Revenue Code, 26 U.S.C. § 1563(a), and includes any entity that, notwithstanding its form of organization, bears the same ownership relationship to the retailer as a corporation that would qualify as a component member of the same controlled group of corporations as the retailer.

Sec. 6. *1. Except as otherwise provided in this section, it is presumed that the provisions of this chapter relating to:*

(a) The imposition, collection and remittance of the sales tax; and

(b) The collection and remittance of the use tax,

➥ apply to every retailer who enters into an agreement with a resident of this State under which the resident, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers, whether by a link on an Internet website or otherwise, to the retailer, if the cumulative gross receipts from sales by the retailer to customers in this State who are referred to the retailer by all residents with this type of an agreement with the retailer is in excess of $10,000 during the preceding four quarterly periods ending on the last day of March, June, September and December.

2. A retailer may rebut the presumption set forth in subsection 1 by providing proof satisfactory to the Department that each resident with whom the retailer has an agreement did not engage in any activity in this State that was significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services during the preceding four quarterly periods ending on the last day of March, June, September and December. Such proof may consist of the sworn written statements of each resident with whom the retailer has an agreement stating that the resident did not engage in any solicitation in this State on behalf of the retailer during the preceding four quarterly periods ending on the last day of March, June, September and December, if such statements were obtained from each resident and provided to the Department in good faith.

3. In administering the provisions of this chapter, the Department shall construe the terms "seller," "retailer" and "retailer maintaining a place of business in this State" in accordance with the provisions of this section.

Sec. 6.5. Notwithstanding the provisions of section 7 of this act, in determining whether, pursuant to sections 3 and 6 of this act a retailer has rebutted the presumption that the provisions of chapters 372 and 374 of NRS relating to the imposition, collection and remittance of the sales tax, and the collection and remittance of the use tax, apply to the retailer, any quarterly periods preceding October 1, 2015, may be considered.

Sec. 7. 1. This section and sections 1, 1.5, 2, 4 and 5 of this act become effective on July 1, 2015.

2. Sections 3, 6 and 6.5 of this act become effective on October 1, 2015.

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