

CHAPTER 364

TAXATION

HOUSE BILL 14-1269

BY REPRESENTATIVE(S) Court and Williams, Becker, Fields, Fischer, Hullinghorst, Labuda, McCann, Melton, Moreno, Pabon, Peniston, Ryden, Salazar, Schafer, Ginal, Kagan, Singer, Young, Ferrandino;
also SENATOR(S) Johnston, Heath, Kefalas, Nicholson, Schwartz, Todd.

AN ACT

CONCERNING THE CIRCUMSTANCES UNDER WHICH A PERSON WHO SELLS ITEMS SUBJECT TO SALES TAX MUST COLLECT SUCH SALES TAX ON BEHALF OF THE STATE.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Short title. This act shall be known and may be cited as the "Marketplace Fairness and Small Business Protection Act".

SECTION 2. In Colorado Revised Statutes, 39-26-102, **amend** (3) as follows:

39-26-102. Definitions. As used in this article, unless the context otherwise requires:

(3) "Doing business in this state" means the selling, leasing, or delivering in this state, or any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property OR TAXABLE SERVICES by a retail sale as defined in this section, for use, storage, distribution, or consumption within this state. ~~This term~~ SUBSECTION (3) AFFECTS THE IMPOSITION, APPLICATION, OR COLLECTION OF SALES AND USE TAXES ONLY. "DOING BUSINESS IN THIS STATE" includes, but shall not be limited to, the following acts or methods of transacting business:

(a) The maintaining within this state, directly or indirectly or by a subsidiary, of an office, ~~distributing house~~ DISTRIBUTION FACILITY, salesroom, ~~or house,~~ warehouse, STORAGE PLACE, or other SIMILAR place of business, INCLUDING THE EMPLOYMENT OF A RESIDENT OF THIS STATE WHO WORKS FROM A HOME OFFICE IN THIS STATE.

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(b) (H) The soliciting, either by direct representatives, indirect representatives, manufacturers' agents, or by distribution of catalogues or other advertising, or by use of any communication media, or by use of the newspaper, radio, or television advertising media, or by any other means whatsoever, of business from persons residing in this state and by reason thereof receiving orders from, or selling or leasing tangible personal property to, such persons residing in this state for use, consumption, distribution, and storage for use or consumption in this state.

(c) A REMOTE SELLER DOING BUSINESS IN THIS STATE WITH RESPECT TO ANY REMOTE SALE SUBJECT TO TAX IN ACCORDANCE WITH SECTION 39-26-104 (2).

~~(H) (d) Presumptive physical presence - component member with physical presence. (I) Commencing March 1, 2010, if a retailer that does not collect Colorado sales tax~~ A PERSON IS PRESUMED TO BE DOING BUSINESS IN THIS STATE IF SUCH PERSON IS part of a controlled group of corporations, and that controlled group has a component member, OTHER THAN A COMMON CARRIER ACTING IN ITS CAPACITY AS SUCH, that is a retailer with HAS physical presence in this state ~~the retailer that does not collect Colorado sales tax is presumed to be doing business in this state. For purposes of this subparagraph (H), "controlled group of corporations" has the same meaning as set forth in section 1563 (a) of the federal "Internal Revenue Code of 1986", as amended, and "component member" has the same meaning as set forth in section 1563 (b) of the federal "Internal Revenue Code of 1986", as amended. This presumption may be rebutted by proof that during the calendar year in question, the component member that is a retailer with physical presence in this state did not engage in any constitutionally sufficient solicitation in this state on behalf of the retailer that does not collect Colorado sales tax~~ AND SUCH COMPONENT MEMBER WITH PHYSICAL PRESENCE:

(A) SELLS UNDER THE SAME OR A SIMILAR BUSINESS NAME TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SIMILAR TO THAT SOLD BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED;

(B) MAINTAINS AN OFFICE, DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS IN THIS STATE TO FACILITATE THE DELIVERY OF TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SOLD BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED TO SUCH PERSON'S IN-STATE CUSTOMERS;

(C) USES TRADEMARKS, SERVICE MARKS, OR TRADE NAMES IN THIS STATE THAT ARE THE SAME OR SUBSTANTIALLY SIMILAR TO THOSE USED BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED;

(D) DELIVERS, INSTALLS, OR ASSEMBLES TANGIBLE PERSONAL PROPERTY IN THIS STATE, OR PERFORMS MAINTENANCE OR REPAIR SERVICES ON TANGIBLE PERSONAL PROPERTY IN THIS STATE, WHICH TANGIBLE PERSONAL PROPERTY IS SOLD TO IN-STATE CUSTOMERS BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED; OR

(E) FACILITATES THE DELIVERY OF TANGIBLE PERSONAL PROPERTY TO IN-STATE CUSTOMERS OF THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED BY ALLOWING SUCH CUSTOMERS TO PICK UP TANGIBLE PERSONAL PROPERTY SOLD BY

SUCH PERSON AT AN OFFICE, DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS MAINTAINED IN THIS STATE.

(II) FOR PURPOSES OF THIS PARAGRAPH (d), "CONTROLLED GROUP OF CORPORATIONS" HAS THE SAME MEANING AS SET FORTH IN SECTION 1563 (a) OF THE FEDERAL "INTERNAL REVENUE CODE OF 1986", AS AMENDED, AND "COMPONENT MEMBER" HAS THE SAME MEANING AS SET FORTH IN SECTION 1563 (b) OF THE FEDERAL "INTERNAL REVENUE CODE OF 1986", AS AMENDED. "CONTROLLED GROUP OF CORPORATIONS" AND "COMPONENT MEMBER" ALSO INCLUDE ANY ENTITY THAT, NOTWITHSTANDING ITS FORM OF ORGANIZATION, BEARS THE SAME OWNERSHIP RELATIONSHIP TO THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED AS A CORPORATION THAT WOULD QUALIFY AS A COMPONENT MEMBER OF THE SAME CONTROLLED GROUP OF CORPORATIONS AS THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED.

(III) THE PRESUMPTION SET FORTH IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (d) MAY BE REBUTTED BY PROOF THAT, DURING THE CALENDAR YEAR IN QUESTION, THE COMPONENT MEMBER WITH PHYSICAL PRESENCE DID NOT ENGAGE IN ANY ACTIVITIES IN THIS STATE THAT ARE SUFFICIENT UNDER UNITED STATES CONSTITUTIONAL STANDARDS TO ESTABLISH NEXUS IN THIS STATE ON BEHALF OF THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED.

(e) **Presumptive physical presence - agreement or arrangement with a person with physical presence.** (I) EXCEPT AS PROVIDED IN SUBPARAGRAPH (III) OF THIS PARAGRAPH (e), A PERSON IS PRESUMED TO BE DOING BUSINESS IN THIS STATE IF SUCH PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED ENTERS INTO AN AGREEMENT OR ARRANGEMENT WITH A PERSON WHO HAS PHYSICAL PRESENCE IN THIS STATE, OTHER THAN A COMMON CARRIER ACTING IN ITS CAPACITY AS SUCH, FOR THAT PERSON WHO HAS PHYSICAL PRESENCE TO:

(A) SELL UNDER THE SAME OR A SIMILAR BUSINESS NAME TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SIMILAR TO THAT SOLD BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED;

(B) MAINTAIN AN OFFICE, DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS IN THIS STATE TO FACILITATE THE DELIVERY OF TANGIBLE PERSONAL PROPERTY OR TAXABLE SERVICES SOLD BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED TO SUCH PERSON'S IN-STATE CUSTOMERS;

(C) DELIVER, INSTALL, OR ASSEMBLE TANGIBLE PERSONAL PROPERTY IN THIS STATE, OR PERFORM MAINTENANCE OR REPAIR SERVICES ON TANGIBLE PERSONAL PROPERTY IN THIS STATE, WHICH TANGIBLE PERSONAL PROPERTY IS SOLD TO IN-STATE CUSTOMERS BY THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED; OR

(D) FACILITATE THE DELIVERY OF TANGIBLE PERSONAL PROPERTY TO IN-STATE CUSTOMERS OF THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED BY ALLOWING SUCH CUSTOMERS TO PICK UP TANGIBLE PERSONAL PROPERTY SOLD BY SUCH PERSON AT AN OFFICE, DISTRIBUTION FACILITY, SALESROOM, WAREHOUSE, STORAGE PLACE, OR OTHER SIMILAR PLACE OF BUSINESS MAINTAINED IN THIS STATE.

(II) THE PRESUMPTION SET FORTH IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (e) MAY BE REBUTTED BY PROOF THAT, DURING THE CALENDAR YEAR IN QUESTION, THE PERSON WHO HAS PHYSICAL PRESENCE IN THIS STATE DID NOT ENGAGE IN ANY ACTIVITIES IN THIS STATE THAT ARE SUFFICIENT UNDER UNITED STATES CONSTITUTIONAL STANDARDS TO ESTABLISH NEXUS IN THIS STATE ON BEHALF OF THE PERSON AGAINST WHOM THE PRESUMPTION IS ASSERTED.

(III) **Activity to which presumption does not apply.** THE PRESUMPTION ESTABLISHED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (e) DOES NOT APPLY TO THE FOLLOWING AGREEMENTS OR ARRANGEMENTS:

(A) **Advertising.** AN AGREEMENT OR ARRANGEMENT UNDER WHICH A PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE PURCHASES ADVERTISEMENTS FROM A PERSON TO BE DELIVERED IN THIS STATE ON TELEVISION, RADIO, NEWSPAPERS, MAGAZINES, THE INTERNET, OR ANY OTHER MASS-MARKET MEDIUM;

(B) **Affiliate marketing agreements.** AN AGREEMENT OR ARRANGEMENT BETWEEN AN IN-STATE INDEPENDENT CONTRACTOR OR OTHER REPRESENTATIVE AND A PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE UNDER WHICH SUCH INDEPENDENT CONTRACTOR OR OTHER REPRESENTATIVE, FOR A COST PER ACTION, INCLUDING BUT NOT LIMITED TO A COMMISSION OR OTHER CONSIDERATION BASED ON COMPLETED SALES, DIRECTLY OR INDIRECTLY REFERS POTENTIAL CUSTOMERS THROUGH INTERNET PROMOTIONAL METHODS TO THE PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE; OR

(C) **Small businesses.** AN AGREEMENT OR ARRANGEMENT BETWEEN AN IN-STATE PERSON AND A PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE IF THE CUMULATIVE GROSS RECEIPTS FROM SALES BY THE PERSON WITHOUT DIRECT IN-STATE PHYSICAL PRESENCE TO IN-STATE CUSTOMERS IN THE PRIOR CALENDAR YEAR IS LESS THAN FIFTY THOUSAND DOLLARS.

SECTION 3. Severability. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SECTION 4. Effective date. This act takes effect July 1, 2014.

SECTION 5. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 6, 2014