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Senate Bills 658 and 659 (as introduced 10-31-13)
Sponsor: Senator Jim Ananich
Committee: Economic Development

Date Completed: 1-29-14

CONTENT

Senate Bills 658 and 659 would amend the General Sales Tax Act and the Use Tax Act, respectively, to do the following:

- Create a presumption that a person was making sales, or a seller was required to collect the use tax, based on related business activities of another person that had substantial nexus with the State, or if an affiliated person had substantial nexus with the State.
- Create a presumption that a person was making sales in Michigan, or a seller was required to collect the use tax, based on an agreement with another person for the referral of customers, if gross receipts from sales to referred customers in Michigan exceeded \$10,000 in the previous 12 months.
- Allow either presumption to be rebutted by a demonstration or proof that the other person's or the affiliated person's activities in Michigan were not significantly associated with the person's or seller's ability to establish or maintain a market in Michigan.
- Nullify any ruling or agreement between a person or seller and the State that the person or seller was not required to collect sales or use taxes despite the presence of a warehouse or distribution center in Michigan, unless specifically approved by the Legislature.
- Require a person who sold tangible personal property to the State, and any affiliated person, to obtain a license under the General Sales Tax Act and comply with that Act or comply with the Use Tax Act.

Sales Presumption

Under Senate Bill 658, a person would be presumed to be engaged in the business of making sales at retail in Michigan and, under Senate Bill 659, a seller would be presumed to be required to collect and remit a use tax, if any other person that had substantial nexus with the State, except for a common carrier acting in that capacity, did any of the following:

- Sold a similar line of products as the person or seller and did so under the same or a similar business name.
- Maintained an office distribution facility, warehouse, storage place, or similar place of business in Michigan to facilitate the delivery of property or services sold by the person or seller to the person's or seller's customers.
- Used trademarks, service marks, or trade names in Michigan that were the same as or substantially similar to those used by the person or seller.
- Delivered, installed, assembled, or performed maintenance services for the person's or seller's customers within Michigan.

-- Conducted any other activities in Michigan that were significantly associated with the person's or seller's ability to establish and maintain a market in Michigan for the person's or seller's sales.

The presumption also would apply if any affiliated person had substantial nexus with the State.

The presumption could be rebutted by a demonstration that the other person's or the affiliated person's activities in Michigan were not significantly associated with the person's or seller's ability to establish or maintain a market in Michigan for the person's or seller's sales.

As used in both bills, "affiliated person" would mean any person that is a member of the same controlled group of corporations as the seller or is a member of any other entity that bears the same ownership relationship to the seller as a corporation that is a member of the same controlled group of corporations.

"Controlled group of corporations" would mean that term as defined in the Internal Revenue Code (26 USC 1563). (That definition includes parent-subsidiary controlled groups of corporations, brother-sister controlled groups of corporations, combined groups of corporations, and certain insurance companies.)

Referral Agreements

Beginning 90 days after the bills' effective dates, under Senate Bill 658 a person would be presumed to be engaged in the business of making sales at retail in Michigan and, under Senate Bill 659, a seller would be presumed to be required to collect and remit a use tax, if the person or seller entered into an agreement with one or more other people under which the other person, for a commission or other consideration, while within Michigan directly or indirectly referred potential customers to the person or seller, whether by a link on an internet website, an in-person oral presentation, telemarketing, or any other means, if the cumulative gross receipts from sales to customers in Michigan who were referred under such an agreement, exceeded \$10,000 during the immediately preceding 12 months. This presumption would apply without regard to the date the person or seller and the other person entered into the agreement. The bill specifies that "the immediately preceding 12 months" would include the 12 months that occurred before the effective date of the bills.

This presumption could be rebutted by the submission of proof that the other person with whom the person or seller had an agreement did not engage in any activity within Michigan that was significantly associated with the person's or seller's ability to establish or maintain the person's or seller's market in Michigan during the immediately preceding 12 months. Proof could include sworn written statements from all of the people in Michigan with whom the person or seller had an agreement, stating that they did not engage in any solicitation in Michigan on behalf of the person or seller during that period, if those statements were provided and obtained in good faith.

Nullification of Agreement with the State

The bills specify that any ruling, agreement, or contract, whether written or oral, express or implied, between a person or a seller (as applicable) and Michigan's executive branch or any other State agency or department, stating, agreeing, or ruling that the person or seller was not required to collect sales tax or collect and remit use tax despite the presence of a warehouse, distribution center, or fulfillment center in Michigan that was owned or operated by the person or seller or an affiliated person would be null and void unless specifically approved by a majority vote of the Senate and House of Representatives.

Sales to the State

If any person sold tangible personal property to the State, a State department, a State agency, or an agent of the State, a State department, or State agency, that person and any affiliated person would have to obtain a license as required under the General Sales Tax Act and comply with all requirements of the Act, or comply with all requirements of the Use Tax Act, as a prerequisite for the sale.

Proposed MCL 205.53a (S.B. 658)
Proposed MCL 205.93g (S.B. 659)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills would increase General Fund and School Aid Fund revenue by approximately \$45.0 million per year and local unit revenue by approximately \$5.0 million per year. The actual split between the State and local units, and between the General Fund and School Aid Fund, would depend on the revenue collected under the sales tax relative to that collected under the use tax. The School Aid Fund receives one-third of use tax revenue, with the remainder directed to the General Fund. In contrast, for most sales, approximately 73.3% of sales tax revenue is directed to the School Aid Fund, 10% is directed to local units through constitutional revenue sharing provisions, and much of the rest is directed to the General Fund.

Fiscal Analyst: David Zin

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.