

Kansas expands sales and use tax nexus

April 19, 2013

In brief

On April 16, 2013, Kansas Governor Sam Brownback signed [S.B. 83](#), which generally creates a presumption that out-of-state retailers are doing business in the state for sales and use tax purposes based on the activities of other persons, applicable starting July 1, 2013. The bill also adopts 'click-through' nexus, applicable to sales made 90 days after the bill is published in the Kansas Register. Out-of-state retailers should be aware that, following the enactment of S.B. 83, the activities of an unrelated entity or person could potentially create Kansas sales and use tax nexus.

In detail

Nexus based on activities of other persons

Effective July 1, 2013, a retailer is presumed to be doing business in Kansas for sales and use tax purposes if another person with Kansas sales and use tax nexus:

- sells the same or a substantially similar line of products as the retailer and does so under the same or a substantially similar business name
- maintains a distribution house, sales house, warehouse or similar place of business in Kansas that delivers or facilitates the sale or delivery of property sold by the retailer to consumers
- uses trademarks, service marks, or trade names in the state that are the same or substantially similar to those used by the retailer
- delivers, installs, assembles or performs maintenance services for the retailer's customers within the state
- facilitates the retailer's delivery of property to customers in the state by allowing the retailer's customers to pick up property sold by the retailer at an office, distribution facility, warehouse, storage place or similar place of business maintained by the person in the state
- has a franchisee or licensee operating under its trade name if the franchisee or the

licensee is required to collect the tax under the Kansas retailers' sales tax act, or

- conducts any other activities in the state that are significantly associated with the retailer's ability to establish and maintain a market in the state for the retailer's sales.

Additionally, a retailer is presumed to be doing business in Kansas if an affiliated person conducting the above activities in Kansas has sales and use tax nexus with the state. An 'affiliated person' generally means any person that is a member of the same 'controlled group of corporations' under IRC sec. 1563(a) as the retailer.

Either presumption may be rebutted by demonstrating that the activities of the in-state

person or affiliated person are not significantly associated with the retailer's ability to establish or maintain a market in Kansas for the retailer's sales.

Click-through nexus

S.B. 83 provides that a retailer is presumed to be doing business in Kansas for sales and use tax purposes if the retailer enters into an agreement with one or more Kansas residents under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link or an internet website, by telemarketing, by an in-person oral presentation, or otherwise, to the retailer. The cumulative gross receipts from such sales must exceed \$10,000 during the preceding 12 months.

This presumption may be rebutted by submitting proof that the residents with whom the retailer has an agreement did not engage in any activity within Kansas that was significantly associated with the retailer's ability to establish or maintain the retailer's market in the state during the preceding 12 months. Such proof may consist of sworn

written statements, obtained in good faith, from all of the residents with whom the retailer has an agreement stating that they did not engage in any solicitation in the state on behalf of the retailer during the preceding year.

The click-through nexus provision is applicable for sales made and uses occurring on or after 90 days after the publication of S.B. 83 in the [Kansas Register](#).

Repealed nexus presumptions

The expanded nexus provisions of S.B. 83 replace two current nexus presumptions under Kansas law. Currently, through June 30, 2013, a retailer is presumed to be doing business in Kansas if:

- the retailer sells the same or a substantially similar line of products as a related Kansas retailer and does so under the same or a substantially similar business name, or the Kansas facilities or Kansas employees of a related Kansas retailer are used to advertise, promote or facilitate sales by the retailer to consumers; or

- the Kansas business maintains a distribution house, sales house, warehouse, or similar place of business in Kansas that delivers property sold by the retailer to consumers.

The two above presumptions are repealed under S.B. 83 effective July 1, 2013.

The takeaway

While awaiting movement in Congress on the Main Street Fairness Act, more and more states are enacting expanded nexus statutes. S.B. 83 has two aspects of concern for potential Kansas taxpayers. First, it appears that some of the nexus-creating activities do not have to be performed in Kansas. Second, while S.B. 83 contains nexus provisions for an in-state 'affiliate,' other provisions presume nexus based on an in-state entity defined only as a 'person.' Accordingly, out-of-state retailers should be aware that, following the enactment of S.B. 83, it is possible that the activities of an unrelated entity or person could create Kansas sales and use tax nexus.

Let's talk

If you have any questions regarding S.B. 83 please contact one of the following professionals:

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