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Texas expands sales tax nexus, extends use of pre-margin tax credits, makes other changes

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Authored by: Adam Weinreb

Enacted Texas legislation expands sales tax nexus standards, modifies the definition of sale for resale, extends the period for which taxpayers may utilize pre-margin tax credits, and makes other changes. [[S.B. 1](#), enacted 7/19/11]

Nexus

(Article 30) Under the legislation, a retailer is engaged in business in Texas if it holds a substantial (50 percent threshold) interest in, or is owned in whole or substantial part by, a person that maintains a:

1. business location in the state from which business is conducted and either (a) the retailer sells the same or similar line of products and sells those products under a same or similar name as the person with the in-state business location; or (b) the facilities or employees of the person with the in-state location are used to either: advertise, promote, or facilitate sales by the retailer to consumers, or perform any other activity on behalf of the retailer that is intended to establish or maintain an in-state marketplace for the retailer, including receiving or exchanging returned merchandise;
2. distribution center, warehouse or similar location in the state and delivers property sold by the retailer to consumers.



The legislation also expands the definition of "seller" and "retailer" to include a person who, under agreement with another person, is: (a) entrusted with possession of tangible personal property that the other person has title to or ownership interest in; and (b) authorized to sell, lease, or rent the property without additional action by the person having the title or ownership interest.

These changes take effect on January 1, 2012.

Other sales-use tax changes

(Article 12) The legislation expands the definition of sale for resale to mean the sale of tangible personal property to a purchaser that acquires the property for the purpose of transferring it as an integral part of performing a contract with the federal government, but only if the purchaser: allocates and bills the cost of the property as a direct or indirect cost; and transfers title to the property to the federal government under the contract and applicable federal regulations. An exclusion from the definition is created for sales of tangible personal property or taxable service to a purchaser that acquires the property or service in order to perform a non-taxable service, regardless of whether title transfers to the customer, unless the property or taxable service is purchased for the purpose of reselling it to the U.S. via a contract with certain deemed federal agencies (e.g., Department of Defense, Homeland Security). These changes take effect on October 1, 2011.

(Article 13) The legislation also requires taxpayers, who do not otherwise prepay pursuant to Tax Code Sec. 151.424, to prepay in August 2013, an additional 25 percent of the amount the taxpayer must otherwise remit to the Comptroller. The amount of this payment can be credited against the next payment the taxpayer is required to remit.

Other changes

In addition, the legislation:

- (Article 31) extends for four years, until December 31, 2016, the period in which taxpayers can claim unused pre-margin tax franchise tax credits against their margin tax liability;
- (Article 5) reduces the unclaimed property dormancy periods for utility deposits to one year from 18 months from the triggering event;
- (Article 9) requires licensed distributors and importers to prepay certain motor fuel taxes on August 28, 2013; and
- (Article 10) requires permittees to prepay certain taxes on mixed and alcoholic beverages during August 2013.

PwC observes

"The Texas legislature, in an effort to deal with the state's significant budget shortfall, and the apparent perception of inequities that have either resulted from or are the focus of recent litigation, has enacted changes to the timing of certain upcoming tax receipts. The legislature has also enacted changes in reaction to the Amazon lawsuit

as well as the *Health Care Services Corporation* (Blue Cross Blue Shield) 2011 court decision," explains William Waltman, SALT Partner with PwC in Houston.

"The changes to the nexus provisions, in the form of changing the 'engaged in business' statute, are Texas' attempt to shore up its position that out of state online retailers have nexus based on the actions of their affiliates.

"Also, the 'sale for resale' amendment is a clear attempt to patch the hole left by the *Heath Care Services Corporation* decision, which upheld the sale-for-resale exemption on a broad category of purchases of tangible personal property and taxable services for use in administering different health insurance programs for the federal government." But, interestingly, the patch appears to largely focus on industries other than aerospace and defense, leaving what should be some continuing opportunities for those industries in Texas," Waltman observes

For more information, please do not hesitate to contact:

<i>William Waltman</i>	<i>(713) 356-8076</i>	<i>william.p.waltman@us.pwc.com</i>
<i>John Cooney</i>	<i>(713) 356-8080</i>	<i>john.m.cooney@us.pwc.com</i>
<i>Bill Essay</i>	<i>(713) 356-6050</i>	<i>william.j.essay@us.pwc.com</i>
<i>Scott Fischer</i>	<i>(214) 754-7589</i>	<i>scott.w.fischer@us.pwc.com</i>
<i>Mitch Hall</i>	<i>(214) 754-4530</i>	<i>mittchell.hall@us.pwc.com</i>
<i>Andrew Kim</i>	<i>(713) 356-5137</i>	<i>andrew.d.kim@us.pwc.com</i>
<i>Adam Weinreb</i>	<i>(646) 471-4409</i>	<i>adam.weinreb@us.pwc.com</i>

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