

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 581

BY REVENUE AND TAXATION COMMITTEE

AN ACT

1 RELATING TO SALES TAX; PROVIDING A SHORT TITLE; PROVIDING LEGISLATIVE IN-
2 TENT; AMENDING SECTION 63-3610, IDAHO CODE, TO FURTHER DEFINE THE TERM
3 "RETAILER"; AMENDING SECTION 63-3611, IDAHO CODE, TO FURTHER DEFINE THE
4 TERM "RETAILER ENGAGED IN BUSINESS IN THIS STATE"; PROVIDING SEVERABIL-
5 ITY; AND PROVIDING AN EFFECTIVE DATE.
6

7 Be It Enacted by the Legislature of the State of Idaho:

8 SECTION 1. SHORT TITLE. This act shall be known and may be cited as the
9 "Nexus Modernization Act."

10 SECTION 2. LEGISLATIVE INTENT. The Commerce Clause of the United States
11 Constitution as currently interpreted by the United States Supreme Court
12 prohibits states from imposing sales and use tax collection obligations on
13 out-of-state businesses unless the business has a substantial nexus with
14 the taxing state. The Legislature recognizes that the United States Supreme
15 Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) held
16 that a person or entity must have a physical presence in the taxing state
17 in order to find that a substantial nexus for sales and use tax collection
18 purposes exists. The Legislature finds that the reasoning of *Quill Corp. v.*
19 *North Dakota* no longer applies for the reasons discussed below.

20 The Legislature further recognizes that the Commerce Clause prohibits
21 states from imposing a burden on interstate commerce only when it consti-
22 tutes an undue burden. See, e.g. *International Harvester Co. v. Depart-*
23 *ment of Treasury*, 322 U.S. 340 (1944). The Legislature finds that, due to the
24 ready availability of sales and use tax collection software, it is no longer
25 an undue burden for companies without a physical presence in Idaho to accu-
26 rately compute, collect and remit their sales and use tax obligations.

27 The Legislature further finds that given the exponential expansion of
28 online commerce and related technology, it is no longer an undue burden for
29 states to require remote sellers to collect sales and use tax.

30 The Legislature further finds the sales and use tax system established
31 under Idaho law does not pose an undue burden on out-of-state retailers and
32 provides sufficient simplification to warrant the collection and remittance
33 of use taxes by out-of-state retailers that are due and owing to Idaho.

34 Nothing in this act may be construed as relieving in-state businesses
35 and other businesses having substantial nexus with Idaho from their Idaho
36 sales and use tax collection obligations.

37 SECTION 3. That Section 63-3610, Idaho Code, be, and the same is hereby
38 amended to read as follows:

1 63-3610. RETAILER. The term "retailer" includes:

2 (a) Every seller who makes any retail sale or sales of tangible personal
3 property or any sale as described in section 63-3612(2), Idaho Code, and ev-
4 every person engaged in the business of making retail sales at auction of tan-
5 gible personal property owned by the person or others.

6 (b) Every person engaged in the business of making sales for storage,
7 use, or other consumption or in the business of making sales at auction of
8 tangible personal property owned by the person or others for storage, use, or
9 other consumption.

10 (c) Every person making more than two (2) retail sales of tangible per-
11 sonal property or any sale as described in section 63-3612(2), Idaho Code,
12 during any twelve (12) month period, including sales made in the capacity of
13 assignee for the benefit of creditors, or receiver or trustee in bankruptcy,
14 or every person making fewer sales who holds himself out as engaging in the
15 business of ~~selling such tangible personal property at retail~~ making retail
16 sales or who sells a motor vehicle.

17 (d) When the state tax commission determines that it is necessary for
18 the efficient administration of this act to regard any salesmen, representa-
19 tives, peddlers, or canvassers as agents of the dealers, distributors, su-
20 pervisors, or employers under whom they operate or from whom they obtain the
21 tangible personal property sold by them, irrespective of whether they are
22 making sales on their own behalf or on behalf of such dealers, distributors,
23 supervisors, or employers, the state tax commission may so regard them and
24 may regard the dealers, distributors, supervisors, or employers as retail-
25 ers for the purpose of this act.

26 (e) Persons conducting both contracting and retailing activities.
27 Such persons must keep separate accounts for the retail portion of their
28 business and pay tax in the usual fashion on this portion.

29 SECTION 4. That Section 63-3611, Idaho Code, be, and the same is hereby
30 amended to read as follows:

31 63-3611. RETAILER ENGAGED IN BUSINESS IN THIS STATE. "Retailer en-
32 gaged in business in this state" as used in this chapter means any retailer
33 who utilizes the following acts or methods of transacting business on a regu-
34 lar or systematic basis:

35 (1) Engages in recurring solicitation of purchases from residents of
36 this state or otherwise purposefully directs its business activities at res-
37 idents of this state; and

38 (2) Has sufficient contact with this state, in accordance with the con-
39 stitution of the United States, to allow the state to require the seller to
40 collect and remit use tax on sales of tangible personal property ~~or services~~
41 or any sale as described in section 63-3612(2), Idaho Code, made to customers
42 in this state.

43 (3) The term includes any of the following:

44 (a) Any retailer maintaining, occupying or using, permanently or tem-
45 porarily, directly or indirectly, or through a subsidiary or agent, by
46 whatever name called, an office, place of distribution, sales or sample
47 room or place, warehouse or storage place, or other place of business
48 operated by any person, other than a common carrier acting in its capac-
49 ity as such, or maintaining a stock of goods.

1 (b) Any retailer having any representative, agent, salesman, canvasser
2 or solicitor operating in this state under the authority of the retailer
3 or its subsidiary affiliated person for the purpose of selling, deliv-
4 ering, installing or the taking of orders for any tangible personal
5 property or any sale described in section 63-3612(2), Idaho Code.

6 (c) Any retailer, with respect to a lease or rental, deriving rentals
7 from a lease or rental of tangible personal property situated in this
8 state.

9 (d) Any retailer engaging in any activity in connection with servicing
10 or installing tangible personal property in this state.

11 (e) Any retailer with substantial nexus in this state within the mean-
12 ing of section 63-3615A, Idaho Code.

13 (f) Any retailer having a franchisee or licensee operating under its
14 trade name if the franchisee or licensee is required to collect the tax
15 under the provisions of this section.

16 (g) Any retailer selling, or delivering in this state, or any activ-
17 ity in this state in connection with the selling, or delivering in this
18 state, of tangible personal property or making any sale as described in
19 section 63-3612(2), Idaho Code, for use, storage, distribution or con-
20 sumption within this state.

21 (h) Any retailer maintaining within this state, directly or indirectly
22 or by an affiliate, an office, distribution facility, salesroom, ware-
23 house, storage place or other similar place of business, including the
24 employment of a resident of this state who works from an office in this
25 state.

26 (i) Any retailer that engages in, either directly or indirectly,
27 through an affiliated person or other third party, direct response
28 marketing targeted at this state. For purposes of this subsection,
29 direct response marketing includes, but is not limited to, sending,
30 transmitting or broadcasting of flyers, newsletters, telephone calls,
31 targeted electronic mail, text messages, social media messages, or tar-
32 geted mailings; collecting, analyzing and utilizing individual data on
33 purchasers or potential purchasers in this state; using information or
34 software, including cached files, cached software, or cookies or other
35 data-tracking tools, that are stored on property in or distributed
36 within this state; or conducting any other actions that use persons,
37 tangible property, intangible property, digital files or information,
38 or software in this state in an effort to enhance the probability that a
39 person's contacts with a customer in this state will result in a sale to
40 that customer.

41 (j) Any retailer entering into one (1) or more agreements that a person
42 or persons that have nexus under the commerce clause with this state di-
43 rectly or indirectly refer potential purchasers of products to the re-
44 tailer for a commission or other consideration, whether by an internet-
45 based link or an internet website or otherwise.

46 (i) A retailer engaged in the activities described in this para-
47 graph is a "retailer engaged in business in this state" regardless
48 of whether or not the referral is related to the sale of tangible
49 personal property or any sale as described in section 63-3612(2),
50 Idaho Code.

1 (ii) An agreement under which a retailer purchases advertisements
2 from a person or persons in this state, to be delivered on televi-
3 sion, radio, in print, on the internet or by any other medium, is
4 not an agreement described in this paragraph unless the advertise-
5 ment revenue paid to the person or persons in this state consists
6 of commissions or other consideration that is based in whole or in
7 part upon sales of products.

8 (4) A retailer is also engaged in business in this state if any part of
9 the sale process, including listing products for sale, soliciting, brand-
10 ing products, selling products, processing orders, fulfilling orders, pro-
11 viding customer service or accepting or assisting with returns or exchanges,
12 occurs in the state, regardless of whether that part of the process has been
13 subcontracted to an affiliate or third party. The sale process does not in-
14 clude shipping via a common carrier.

15 (5) Except for persons acting in the capacity as a common carrier, a re-
16 tailer is also presumed to be engaged in business in this state if such per-
17 son is related to a retailer over which this state has jurisdiction under the
18 commerce clause of the United States constitution to impose an obligation to
19 collect and remit sales and use tax and such related person:

20 (a) Sells under the same or a similar business name tangible personal
21 property or any transaction as described in section 63-3612(2), Idaho
22 Code, similar to that sold by the person against whom the presumption is
23 asserted;

24 (b) Maintains an office, distribution facility, salesroom, warehouse,
25 storage place or other similar place of business in this state to fa-
26 facilitate the delivery of tangible personal property or any sale as de-
27 scribed in section 63-3612(2), Idaho Code, sold by the person against
28 whom the presumption is asserted to such person's in-state customers;

29 (c) Uses, with consent or knowledge of the person against whom the pre-
30 sumption is asserted, trademarks, service marks or trade names in this
31 state that are the same or substantially similar to those used by the
32 person against whom the presumption is asserted;

33 (d) Delivers, installs or assembles tangible personal property in this
34 state, or performs maintenance or repair services on tangible personal
35 property in this state, which tangible personal property is sold to
36 in-state customers by the person against whom the presumption is as-
37 serted;

38 (e) Facilitates the delivery of tangible personal property to in-state
39 customers of the person against whom the presumption is asserted by
40 allowing such customers to pick up tangible personal property sold by
41 such person at an office, distribution facility, salesroom, warehouse,
42 storage place or other similar place of business maintained in this
43 state; or

44 (f) Shares management, business systems, business practices or employ-
45 ees with the person against whom the presumption is asserted, or engages
46 in intercompany transactions with the person against whom the presump-
47 tion is asserted related to the activities that establish or maintain
48 the market in this state of the person against whom the presumption is
49 asserted.

1 (6) For purposes of this section, two (2) persons are related or affili-
2 ated if:

3 (a) Such persons are related within the meaning of subsections (b) and
4 (c) of section 267 or section 707(b) (1) of the Internal Revenue Code of
5 1986; or

6 (b) Such persons have one (1) or more ownership relationships and such
7 relationships were designed with a principal purpose of avoiding the
8 application of this section.

9 (7) The presumption set forth in this section may be rebutted by a pre-
10 ponderance of evidence that, during the taxable period in question, the re-
11 lated person with nexus under the commerce clause did not engage in any ac-
12 tivities in this state that are sufficient under the commerce clause to es-
13 tablish nexus in this state on behalf of the person against whom the presump-
14 tion is asserted.

15 (8) This section affects the imposition, application or collection of
16 sales and use taxes only.

17 SECTION 5. SEVERABILITY. The provisions of this act are hereby declared
18 to be severable and if any provision of this act or the application of such
19 provision to any person or circumstance is declared invalid for any reason,
20 such declaration shall not affect the validity of the remaining portions of
21 this act.

22 SECTION 6. This act shall be in full force and effect on and after July
23 1, 2016, and shall apply to tax periods beginning on or after July 1, 2016.