

House Bill 168 (AS PASSED HOUSE AND SENATE)

By: Representatives Knight of the 126<sup>th</sup>, Channell of the 116<sup>th</sup>, and Holt of the 112<sup>th</sup>

A BILL TO BE ENTITLED

AN ACT

To amend Title 48 of the Official Code of Georgia Annotated, relating to revenue and taxation, so as to define the terms "Internal Revenue Code" and "Internal Revenue Code of 1986" and thereby incorporate certain provisions of the federal law into Georgia law; to provide for the revision of sales and use tax provisions for streamlined sales tax purposes; to change and provide for definitions; to change and provide for exemptions; to change provisions related to deductions for bad debts; to change certain provisions relating to taxability burden of proof; to change certain provisions relating to reporting and accounting methods; to change certain provisions relating to dealer returns and estimated tax liability; to change certain provisions relating to sourcing; to provide for certification of review software; to provide for liability and relief from liability; to provide for an effective date; to provide applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

**SECTION 1.**

Title 48 of the Official Code of Georgia Annotated, relating to revenue and taxation, is amended in Code Section 48-1-2, relating to definitions regarding revenue and taxation, by revising paragraph (14) as follows:

"(14) 'Internal Revenue Code' or 'Internal Revenue Code of 1986' means for taxable years beginning on or after January 1, ~~2009~~ 2010, the provisions of the United States Internal Revenue Code of 1986, as amended, provided for in federal law enacted on or before January 1, ~~2010~~ 2011, except that Section 85(c), Section 108(i), Section 163(e)(5)(F), Section 164(a)(6), Section 164(b)(6), Section 168(b)(3)(I), Section 168(e)(3)(B)(vii), Section 168(e)(3)(E)(ix), Section 168(e)(8), Section 168(k) (but not excepting Section 168(k)(2)(A)(i), Section 168(k)(2)(D)(i), and Section 168(k)(2)(E)), Section 168(m), Section 168(n), Section 172(b)(1)(H), Section 172(b)(1)(J), Section 172(j), Section 179(f), Section 199, Section 810(b)(4), Section 1400L, Section 1400N(d)(1), Section 1400N(f), Section 1400N(j), Section 1400N(k), and Section 1400N(o) of the

Internal Revenue Code of 1986, as amended, shall be treated as if they were not in effect, and except that Section 168(e)(7), Section 172(b)(1)(F), Section 172(i)(1), and Section 1221 of the Internal Revenue Code of 1986, as amended, shall be treated as they were in effect before the 2008 enactment of federal Public Law 110-343, and except that Section 163(i)(1) of the Internal Revenue Code of 1986, as amended, shall be treated as it was in effect before the 2009 enactment of federal Public Law 111-5, and except that Section 13(e)(4) of 2009 federal Public Law 111-92 shall be treated as if it was not in effect, and except that the limitations provided in Section 179(b)(1) shall be \$250,000.00 for tax years beginning in 2010 and shall be \$250,000.00 for tax years beginning in 2011, and except that the limitations provided in Section 179(b)(2) shall be \$800,000.00 for tax years beginning in 2010 and shall be \$800,000.00 for tax years beginning in 2011. For taxable years beginning on or after January 1, 2009, the terms 'Internal Revenue Code' or 'Internal Revenue Code of 1986' shall also include the provisions of federal Public Law 111-126 as enacted on January 22, 2010. In the event a reference is made in this title to the Internal Revenue Code or the Internal Revenue Code of 1954 as it existed on a specific date prior to January 1, ~~2010~~ 2011, the term means the provisions of the Internal Revenue Code or the Internal Revenue Code of 1954 as it existed on the prior date. Unless otherwise provided in this title, any term used in this title shall have the same meaning as when used in a comparable provision or context in the Internal Revenue Code of 1986, as amended. For taxable years beginning on or after January 1, ~~2009~~ 2010, provisions of the Internal Revenue Code of 1986, as amended, which were as of January 1, ~~2010~~ 2011, enacted into law but not yet effective shall become effective for purposes of Georgia taxation on the same dates upon which they become effective for federal tax purposes."

## SECTION 2.

Said title is further amended in Code Section 48-8-2, relating to sales and use tax definitions, by adding new paragraphs to read as follows:

"(11.1) 'Dietary supplement' means any product, other than tobacco, intended to supplement the diet that:

(A) Contains one or more of the following dietary ingredients:

(i) A vitamin;

(ii) A mineral;

(iii) An herb or other botanical;

(iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or

(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in this subparagraph;

(B) Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

(C) Is required to be labeled as a dietary supplement, identifiable by the 'Supplements Facts' box found on the label as required pursuant to 21 C.F.R. Section 101.36."

"(20.1) 'Over-the-counter drug' means a drug that contains a label that identifies the product as a drug as required by 21 C.F.R. Section 201.66. The 'over-the-counter drug' label includes:

(A) A 'Drug Facts' panel; or

(B) A statement of the 'active ingredient(s)' with a list of those ingredients contained in the compound, substance, or preparation."

"(39.1) 'Tobacco' means cigarettes, cigars, chewing or pipe tobacco, or any other item that includes tobacco."

### SECTION 3.

Said title is further amended in said Code section by revising paragraphs (16), (29), and (34) to read as follows:

"(16) 'Food and food ingredients' means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. 'Food and food ingredients' shall not include alcoholic beverages, dietary supplements, or tobacco."

"(29) 'Prosthetic device' means a replacement, corrective, or supportive device including repair and replacement parts for the same worn on or in the body to:

(A) Artificially replace a missing portion of the body;

(B) Prevent or correct physical deformity or malfunction; or

(C) Support a weak or deformed portion of the body.

'Prosthetic device' shall not include hearing aids."

"(34)(A) 'Sales price' applies to the measure subject to sales tax and means the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise without any deduction for the following:

(i) The seller's cost of the property sold;

(ii) The cost of materials used, labor, or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

(iii) Charges by the seller for any services necessary to complete the sale, ~~other than delivery and installation charges; and~~

(iv) Delivery charges;

~~(v) Installation charges; and~~

~~(vi) Credit for any trade-in, except as otherwise provided in division (vii) of subparagraph (B) of this paragraph.~~

(B) 'Sales price' shall not include:

(i) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale;

(ii) Interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(iv) Installation charges if they are separately stated on the invoice, billing, or similar document given to the purchaser;

~~(v) Charges by the seller for any services necessary to complete the sale if they are separately stated on the invoice, billing, or similar document given to the purchaser;~~

~~(vi)~~ Telecommunications nonrecurring charges if they are separately stated on the invoice, billing, or similar document; and

~~(vii)~~(vi) Credit for any ~~motor vehicle~~ trade-in.

(C) 'Sales price' shall include consideration received by the seller from third parties if:

(i) The seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;

(ii) The seller has an obligation to pass the price reduction or discount through to the purchaser;

(iii) The amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and

(iv) One of the following criteria is met:

(I) The purchaser presents a coupon, certificate, or other documentation to the seller to claim a price reduction or discount where the coupon, certificate, or documentation is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate, or documentation is presented;

(II) The purchaser identifies himself or herself to the seller as a member of a group or organization entitled to a price reduction or discount; provided, however, that a

'preferred customer' card that is available to any patron shall not constitute membership in such a group; or

(III) The price reduction or discount is identified as a ~~third-party~~ third-party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser."

#### SECTION 4.

Said title is further amended in Code Section 48-8-3, relating to exemptions from sales and use tax, by revising paragraphs (12), (18), (47), (50), (52), (54), and (57) as follows:

"(12) ~~School lunches~~ Food and food ingredients and prepared food sold and served to pupils and employees of public schools as part of a school lunch program;"

"(18) Charges made for the transportation of tangible personal property except delivery charges by the seller associated with the sale of taxable tangible personal property, including, but not limited to, charges for accessorial services such as refrigeration, switching, storage, and demurrage made in connection with interstate and intrastate transportation of the property;"

"(47)(A)(i) The sale or use of ~~controlled substances and~~ drugs which are lawfully ~~dispensed~~ dispensable only by prescription for the treatment of natural persons, and ~~sales~~ the sale or use of prescription eyeglasses and contact lenses including, without limitation, prescription contact lenses distributed by the manufacturer to licensed dispensers as free samples not intended for resale and labeled as such; and

(ii) The sale or use of ~~those controlled substances and~~ drugs lawfully dispensable by prescription for the treatment of natural persons which are dispensed or distributed without charge to physicians, dentists, clinics, hospitals, or any other person or entity located in Georgia by a pharmaceutical manufacturer or distributor; and the use of ~~controlled substances, drugs, new animal drugs, and medical devices~~ drugs and durable medical equipment lawfully dispensed or distributed without charge solely for the purposes of a clinical trial approved by either the United States Food and Drug Administration or by an institutional review board.

(B) For purposes of this paragraph, the term:

(i) ~~'Controlled substance'~~ means the same as provided in Code Section 16-13-1.

~~(ii)~~(i) 'Drug' means the same as provided in Code Section 48-8-2 but shall not include over-the-counter drugs or tobacco.

~~(iii)~~(ii) 'Institutional review board' means an institutional review board as provided in 21 C.F.R. Section 56.

~~(iv)~~ 'Medical device' means a device as defined in subsection (h) of 21 U.S.C. Section 321.

~~(v) 'New animal drug' means a new animal drug as defined in subsection (v) of 21 U.S.C. Section 321.~~

(C) The commissioner is authorized to prescribe forms and promulgate rules and regulations deemed necessary in order to administer and effectuate this paragraph;"

~~"(50) Sales of blood measuring devices, other monitoring equipment, or insulin delivery systems used exclusively by diabetics and sales of insulin, insulin syringes, and blood glucose level measuring strips dispensed without a prescription;"~~

~~"(52) Reserved The sale or use of hearing aids;"~~

~~"(54) The sale or use of any durable medical equipment that is sold or used pursuant to a prescription or prosthetic device that is sold or used pursuant to a prescription prescribed by a physician;"~~

~~"(57)(A) The sale of food and food ingredients to an individual consumer for off-premises human consumption, to the extent provided in subparagraph (B) of this paragraph.~~

(B) For the purposes of this paragraph, the term 'food and food ingredients' as defined in Code Section 48-8-2 shall not include prepared food, ~~alcoholic beverages, or tobacco as defined in Code Section 48-8-2~~ drugs, or over-the-counter drugs.

(C) The exemption provided for in this paragraph shall not apply to the sale or use of food and food ingredients when purchased for any use in the operation of a business.

~~(C)(i)(D)(i)~~ (D)(i) The exemption provided for in this paragraph shall not apply to any local sales and use tax levied or imposed at any time.

(ii) For the purposes of this subparagraph, the term 'local sales and use tax' shall mean any sales tax, use tax, or local sales and use tax which is levied and imposed in an area consisting of less than the entire state, however authorized, including, but not limited to, such taxes authorized by or pursuant to constitutional amendment; by or pursuant to Section 25 of an Act approved March 10, 1965 (Ga. L. 1965, p. 2243), as amended, the 'Metropolitan Atlanta Rapid Transit Authority Act of 1965'; by or pursuant to any article of this chapter.

~~(D)(E)~~ (E) The commissioner shall adopt rules and regulations to carry out the provisions of this paragraph;"

## SECTION 5.

Said title is further amended by revising Code Section 48-8-38, relating to taxability burden of proof, as follows:

"48-8-38.

(a) All gross sales of a retailer are subject to the tax imposed by this article until the contrary is established. The burden of proving that a sale of tangible personal property is

not a sale at retail is upon the person who makes the sale unless ~~he~~ such person takes from the purchaser a certificate stating that the property is purchased for resale or is otherwise exempt.

(b) The certificate relieves the seller from the burden of proof as provided in subsection (a) of this Code section if the seller acquires from the purchaser a properly completed certificate.

(c) The certificate shall include such information as is determined by the commissioner and is signed by the purchaser if it is a paper exemption certificate.

(d) A purchaser claiming an exemption electronically shall use the standard form as adopted by the Streamlined Sales Tax Governing Board.

(e) A seller shall obtain the same information for proof of a claimed exemption regardless of the medium in which the transaction occurred.

(f) The department shall relieve a seller of the tax otherwise applicable if the seller obtains a fully completed exemption certificate approved by the Streamlined Sales Tax Governing Board, the department, or the Multistate Tax Commission or captures the relevant data elements required under the Streamlined Sales and Use Tax Agreement within 90 days subsequent to the date of sale. If the seller has not obtained a fully completed exemption certificate or all relevant data elements required under the Streamlined Sales and Use Tax Agreement within 90 days subsequent to the date of sale, the department shall provide the seller with 120 days subsequent to a request for substantiation to either:

(1) Obtain a fully completed exemption certificate from the purchaser, taken in good faith which means that the seller obtain a certificate that claims an exemption that:

(A) Was statutorily available on the date of the transaction in the jurisdiction where the transaction is sourced;

(B) Could be applicable to the item being purchased; and

(C) Is reasonable for the purchaser's type of business; or

(2) Obtain other information establishing that the transaction was not subject to the tax.

(g) The department shall relieve a seller of the tax otherwise applicable if the seller obtains a blanket exemption certificate from a purchaser with which the seller has a recurring business relationship."

## SECTION 6.

Said title is further amended by revising Code Section 48-8-45, relating to reporting and accounting methods, as follows:

"48-8-45.

(a) Any ~~person~~ dealer taxable under this article having both cash and credit sales may report the sales on either the cash or accrual basis of accounting. Each election of a basis

of accounting shall be made on the first return filed and, once made, the election shall be irrevocable unless the commissioner grants written permission for a change. Permission for a change in the basis of accounting shall be granted only upon written application and under rules and regulations promulgated by the commissioner.

(b) Any ~~person~~ dealer reporting on a cash basis of accounting shall include in each return all cash sales made during the period covered by the return and all collections made in any period on credit sales of prior periods and shall pay the tax on the sales at the time of filing the return.

(c) Any ~~person~~ dealer reporting on the accrual basis of accounting shall be allowed a deduction for bad debts under rules and regulations of the commissioner. Any deduction taken or refund claimed that is attributed to bad debts shall not accrue or include interest.

~~(d) An assignee of private label credit card debt purchased directly from a dealer without recourse or a credit card bank which extends such credit to customers under a private label credit card program shall be allowed a deduction for private label credit card bad debts under rules and regulations of the commissioner. An issuer or assignee of private label credit card debt may claim its deduction for private label credit card bad debts on a return filed by a member of an affiliated group as defined under 26 U.S.C. Section 1504. The bad debt may be deducted on the return for the period during which the bad debt is written off as uncollectable in the claimant's books and records and is eligible to be deducted for federal income tax purposes. Any such deduction for such bad debt shall be reported as a separate line item on the claimant's sales and use tax return. If such deduction is not reported as a line item, it shall be disallowed. A claimant who is not required to file federal income tax returns may deduct a bad debt on a return filed for the period in which the bad debt is written off as uncollectable in the claimant's books and records and the claimant would be eligible for a bad debt deduction for federal income tax purposes if the claimant was required to file a federal income tax return.~~

(e) If a deduction is taken for a bad debt and the debt is subsequently collected in whole or in part, the tax on the amount so collected must be paid and reported on the return filed for the period in which the collection is made. For the purposes of reporting a payment received on a previously claimed bad debt, any payments made on a debt or account are applied first proportionally to the taxable price of the property or service and the sales tax thereon, and, secondly, to interest, service charges, and any other charges.

(f)(1) As used in this subsection, 'assignee' includes but is not limited to:

(A) Assignees of promissory notes, accounts, or accounts receivable; or

(B) Financial institutions that do not make taxable retail sales but that finance retail sales by making loans or issuing credit cards to purchasers.



(2) The deduction and refund provided for in this Code section are not assignable. The deduction and refund provided for in this Code section are only available to a dealer that makes a taxable retail sale, remits tax on that sale, and subsequently incurs a bad debt with respect to that sale. Assignees may not take a deduction or claim a refund pursuant to this Code section.

(g) For purposes of calculating the deduction taken or refund claimed, a 'bad debt' shall have the same meaning as defined in 26 U.S.C. Section 166. However, the amount calculated pursuant to 26 U.S.C. Section 166 shall be adjusted to exclude:

(1) Financing charges or interest;

(2) Sales or use taxes charged on the purchase price;

(3) Uncollectable amounts on property that remain in the possession of the seller until the full purchase price is paid;

(4) Expenses incurred in attempting to collect any debt; and

(5) Repossessed property.

(h) For bad debts incurred and written off after January 1, 2011, when the amount of bad debt exceeds the amount of taxable sales for the period during which the bad debt is written off, a refund claim may be filed. The statute of limitations for filing such claim shall be three years from the due date of the return on which the bad debt could first be claimed. Such refund shall be claimed on such form as shall be established by the commissioner.

(i) Where filing responsibilities have been assumed by a certified service provider, the department allows the service provider to claim, on behalf of the seller, any bad debt allowance provided by this Code section. Such refund shall be claimed on such form as shall be established by the commissioner. The certified service provider must credit or refund the full amount of any bad debt allowance or refund received to the seller.

(j) Where the books and records of the party claiming the bad debt allowance support an allocation of the bad debts among the Streamlined Sales Tax member states, such allocation is permitted."

## **SECTION 7.**

Said title is further amended by revising subsections (b) and (c) of Code Section 48-8-49, relating to dealer returns and estimated tax liability, as follows:

"(b)(1) As used in this subsection, the term 'estimated tax liability' means a dealer's tax liability, adjusted to account for any subsequent change in the state sales and use tax rate, based on the dealer's average monthly payments for the last ~~fiscal~~ calendar year.

(2) If the tax liability of a dealer in the preceding calendar year was greater than ~~\$30,000.00~~ \$60,000.00 excluding local sales taxes, the dealer shall file a return and remit to the commissioner not less than 50 percent of the estimated tax liability for the taxable

period on or before the twentieth day of the period. The amount of the payment of the estimated tax liability shall be credited against the amount to be due on the return required under subsection (a) of this Code section. This subsection shall not apply to any dealer whose primary business is the sale of motor fuels who is remitting prepaid state tax under paragraph (2) of subsection (b) of Code Section 48-9-14.

(c) ~~Gross proceeds from rentals~~ Rentals or leases of tangible personal property shall be reported and the tax shall be paid with respect to the ~~gross proceeds~~ sales price in accordance with the rules and regulations prescribed by the commissioner."

### SECTION 8.

Said title is further amended by revising subparagraph (d)(2)(A) of Code Section 48-8-77, relating to sourcing, as follows:

"(A) Except as otherwise provided in this paragraph, sales of 'other direct mail' are sourced in accordance with subparagraph ~~(d)(1)(A)~~ (b)(1)(C) of this Code section;"

### SECTION 9.

Said title is further amended by adding a new Code section as follows:

"48-8-77.1.

(a) For purposes of this Code section, the definitions as provided in Code Section 48-8-161 shall apply.

(b) The department shall review software submitted to the Streamlined Sales Tax Governing Board for certification as a Certified Automated System under Section 501 of the Streamlined Sales and Use Tax Agreement. Such review shall include a review to determine that the program accurately reflects the taxability of the product categories included in the program. Upon approval by the department, the state will certify its acceptance of the software to the Streamlined Sales Tax Governing Board.

(c) The department shall relieve certified service providers and model 2 sellers from liability to the state and local jurisdictions in the state for not collecting sales or use taxes resulting from the certified service provider or model 2 seller relying on the certification provided by the state.

(d) The department shall provide relief from liability to certified service providers for not collecting sales and use taxes in the same manner as provided to sellers under Code Section 48-8-38.

(e) If the department determines that an item or transaction is incorrectly classified as to the item or transaction's taxability, the department shall notify the certified service providers or model 2 sellers of the incorrect classification. The certified service provider

349 or model 2 seller shall have ten days to revise the classification after receipt of notice from  
350 the department of the determination."

351 **SECTION 10.**

352 This Act shall become effective upon its approval by the Governor or upon its becoming law  
353 without such approval and Section 1 of this Act shall be applicable to all taxable years  
354 beginning on or after January 1, 2010.

355 **SECTION 11.**

356 All laws and parts of laws in conflict with this Act are repealed.