

House Bill 111 (AS PASSED HOUSE AND SENATE)

By: Representative O`Neal of the 146th

A BILL TO BE ENTITLED
AN ACT

1 To amend Chapter 8 of Title 48 of the Official Code of Georgia Annotated, relating to sales
2 and use taxes, so as to change the definition of the term "dealer" for purposes of sales and
3 use taxation; to change certain provisions regarding payment of sales and use tax by
4 contractors furnishing tangible personal property and services; to provide for a definition; to
5 provide for powers, duties, and authority of the state revenue commissioner; to provide an
6 effective date; to repeal conflicting laws; and for other purposes.

7 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

8 **SECTION 1.**

9 Chapter 8 of Title 48 of the Official Code of Georgia Annotated, relating to sales and use
10 taxes, is amended by striking paragraph (3) of Code Section 48-8-2, relating to definitions
11 regarding sales and use tax, and inserting in its place a new paragraph (3) to read as follows:

12 "(3) 'Dealer' means every person who:

13 (A) Has sold at retail, used, consumed, distributed, or stored for use or consumption
14 in this state tangible personal property and who cannot prove that the tax levied by this
15 article has been paid on the sale at retail or on the use, consumption, distribution, or
16 storage of the tangible personal property;

17 (B) Imports or causes to be imported tangible personal property from any state or
18 foreign country for sale at retail, or for use, consumption, distribution, or storage for use
19 or consumption in this state;

20 (C) Is the lessee or renter of tangible personal property and who pays to the owner of
21 the property a consideration for the use or possession of the property without acquiring
22 title to the property;

23 (D) Leases or rents tangible personal property for a consideration, permitting the use
24 or possession of the property without transferring title to the property;

(E) Maintains or has within this state, indirectly or by a subsidiary, an office, ~~distributing house, distribution center,~~ salesroom; or ~~house, sales office,~~ warehouse, ~~service enterprise,~~ or any other place of business;

(F) Manufactures or produces tangible personal property for sale at retail or for use, consumption, distribution, or storage for use or consumption in this state;

(G) Sells at retail, offers for sale at retail, or has in his possession for sale at retail, or for use, consumption, distribution, or storage for use or consumption in this state tangible personal property;

(H) Solicits business by ~~representatives~~ an agent, employee, representative, or any other person; or ~~engages~~

(I) Engages in the regular or systematic solicitation of a consumer market in this state, unless the dealer's only activity in this state is: by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio, or television media, by telegraphy, telephone, computer data base, cable optic, microwave, or other communication system. Each dealer as defined in this subparagraph shall collect the tax imposed by this article from the purchaser, lessee, or renter, as applicable, and no action seeking either legal or equitable relief on a sale, lease, rental, or other transaction may be had in this state by the dealer unless it is affirmatively shown that this article has been fully complied with; or

(i) Advertising or solicitation by:

(I) Direct mail, catalogs, periodicals, or advertising fliers;

(II) Means of print, radio, or television media; or

(III) Telephone, computer, the Internet, cable, microwave, or other communication system; or

(ii) The delivery of tangible personal property within this state solely by common carrier or United States mail.

The exceptions provided in divisions (i) and (ii) of this subparagraph shall not apply to any requirements under Code Section 48-8-14;

(J) Is an affiliate that sells at retail, offers for sale at retail in this state, or engages in the regular or systematic solicitation of a consumer market in this state through a related dealer located in this state unless:

(i) The in-state dealer to which the affiliate is related does not engage in any of the following activities on behalf of the affiliate:

(I) Advertising;

(II) Marketing;

(III) Sales; or

(IV) Other services; and

1 (ii) The in-state dealer to which the affiliate is related accepts the return of tangible
2 personal property sold by the affiliate and also accepts the return of tangible personal
3 property sold by any person or dealer that is not an affiliate on the same terms and
4 conditions as an affiliate's return;

5 As used in this subparagraph, the term 'affiliate' means any person that is related
6 directly or indirectly through one or more intermediaries, controls, is controlled by, is
7 under common control with, or is subject to the control of a dealer described in
8 subparagraphs (A) through (I) of this paragraph or in this subparagraph; or

9 ~~(H)~~(K) Notwithstanding any of the provisions contained in this paragraph, with respect
10 to a person that is not a resident or domiciliary of Georgia, that does not engage in any
11 other business or activity in Georgia, and that has contracted with a commercial printer
12 for printing to be conducted in Georgia, such person shall not be deemed a 'dealer' in
13 Georgia merely because such person:

14 (i) Owns tangible or intangible property which is located at the Georgia premises of
15 a commercial printer for use by such printer in performing services for the owner;

16 (ii) Makes sales and distributions of printed material produced at and shipped or
17 distributed from the Georgia premises of the commercial printer;

18 (iii) Performs activities of any kind at the Georgia premises of the commercial printer
19 which are directly related to the services provided by the commercial printer; or

20 (iv) Has printing, including any printing related activities, and distribution related
21 activities performed by the commercial printer in Georgia for or on its behalf,

22 nor shall such person, absent any contact with Georgia other than with or through the
23 use of the commercial printer or the use of the United States Postal Service or a
24 common carrier, have an obligation to collect sales or use tax from any of its customers
25 located in Georgia based upon the activities described in divisions (i) through (iv) of
26 this subparagraph. In no event described in this subparagraph shall such person be
27 considered to have a fixed place of business in Georgia at either the commercial
28 printer's premises or at any place where the commercial printer performs services on
29 behalf of that person.

30 (L) Each dealer shall collect the tax imposed by this article from the purchaser, lessee,
31 or renter, as applicable, and no action seeking either legal or equitable relief on a sale,
32 lease, rental, or other transaction may be had in this state by the dealer unless the dealer
33 has fully complied with this article.

34 (M) The commissioner shall promulgate such rules and regulations necessary to
35 administer this paragraph, including other such information, applications, forms, or
36 statements as the commissioner may reasonably require."

SECTION 2.

Said chapter is further amended by striking Code Section 48-8-63, relating to payment of sales and use tax by contractors furnishing tangible personal property and services, and inserting in its place a new Code Section 48-8-63 to read as follows:

"48-8-63.

(a) As used in this Code section, the term 'nonresident subcontractor' means a person who does not have a bona fide place of business in Georgia through the maintaining of a permanent domicile or business facility engaged in contracting real property work and who contracts with a prime or general contractor to perform all or any part of the contract of the prime or general contractor or who contracts with a subcontractor who has contracted to perform any part of the contract entered into by the prime or general contractor.

~~(a)~~(b) Each person who orally, in writing, or by purchase order contracts to furnish tangible personal property and to perform services under the contract within this state shall be deemed to be the consumer of the tangible personal property and shall pay the sales tax imposed by this article at the time of the purchase. Any person so contracting who fails to pay the sales tax at the time of the purchase or at the time the sale is consummated outside the limits of this state shall be liable for the payment of the sales or use tax. This Code section shall not relieve the dealer who made the sale from such dealer's liability to collect and pay the tax on purchases by a contractor.

~~(b)~~(c) Each person who contracts to perform services in this state and who is furnished tangible personal property for use under the contract by the person, or such person's agent or representative, for whom the contract is to be performed, when a sales or use tax has not been paid to this state by the person supplying the tangible personal property, shall be deemed to be the consumer of the tangible personal property so used and shall pay a use tax based on the fair market value of the tangible personal property so used irrespective of whether any right, title, or interest in the tangible personal property becomes vested in the contractors.

~~(c)~~(d) Each person who orally, in writing, or by purchase order contracts to perform any service the principal part of which is the furnishing of machinery which will not be under the exclusive control of the contractor shall be liable to collect a sales tax on the rental value of the machinery so used. If labor and other charges are not separated from the rental charge, the person so contracting shall be liable to collect a sales tax on the entire contract price.

~~(d)~~(e)(1) Any subcontractor who enters into a construction contract with a general or prime contractor shall be liable under this article as a general or prime contractor. Any general or prime contractor who enters into any construction contract or contracts with any nonresident subcontractor, where the total amount of such contract or contracts

1 between such general or prime contractor and any nonresident subcontractors on any
2 given project equals or exceeds \$250,000.00 shall withhold up to 4 percent of the
3 payments due the nonresident subcontractor in satisfaction of any sales or use taxes owed
4 this state.

5 (2) The prime or general contractor shall withhold payments on all contracts that meet
6 the criteria specified in paragraph (1) of this subsection until the nonresident
7 subcontractor furnishes such prime or general contractor with a certificate issued by the
8 commissioner showing that all sales taxes accruing by reason of the contract between the
9 nonresident subcontractor and the general or prime contractor have been paid and
10 satisfied. If the prime or general contractor for any reason fails to withhold up to 4
11 percent of the payments due the nonresident subcontractor under their contract, such
12 prime or general contractor shall become liable for any sales or use taxes due or owed this
13 state by the nonresident subcontractor.

14 ~~(e)~~(f) Whenever a nonresident subcontractor holding a contract with a general or prime
15 contractor has posted with the commissioner either a good and valid bond with a surety
16 company authorized to do business in this state or legal securities in an amount of not less
17 than \$5,000.00 nor more than \$50,000.00, as determined by the commissioner, conditioned
18 that all sales and use taxes which may accrue to this state on account of the execution of
19 contracts that meet the criteria established in paragraph (1) of subsection (e) of this Code
20 section by nonresident subcontractors will be paid when due, no general or prime
21 contractor shall withhold any sums due the nonresident subcontractor under their contract
22 with respect to sales and use taxes.

23 ~~(f)~~(g) Nothing contained in this Code section shall be construed to impose any sales or use
24 tax with respect to the use of tangible personal property owned by the United States in the
25 performance of contracts with the United States when the property is not actually used up
26 and consumed in the performance of the contract. Tangible personal property incorporated
27 into real property construction which loses its identity as tangible personal property shall
28 be deemed to be used up and consumed within the meaning of this subsection.

29 ~~(g)~~(h)(1) Nothing contained in this Code section shall be construed to impose any sales
30 or use tax with respect to the use of tangible personal property owned by the State of
31 Georgia, the University System of Georgia, or any county, municipality, local board of
32 education, or other political subdivision of this state in the performance of contracts with
33 such entities when the property is not actually used up and consumed in the performance
34 of the contract. Tangible personal property incorporated into real property construction
35 which loses its identity as tangible personal property shall be deemed to be used up and
36 consumed within the meaning of this subsection. Any governmental entity which
37 furnishes tangible personal property to a contractor for incorporation into a construction,

1 renovation, or repair project conducted pursuant to a contract with such governmental
2 entity shall issue advance written notice to such contractor of the amount of tax owed for
3 such tangible personal property. The failure of the governmental entity to issue such
4 advance written notice to the contractor of such tax liability shall render such
5 governmental entity liable for such tax.

6 (2) This subsection shall not apply with respect to the use of tangible personal property
7 owned by the United States.

8 (i) The commissioner is authorized to prescribe forms and promulgate rules and
9 regulations deemed necessary in order to administer and effectuate this Code section."

10 **SECTION 3.**

11 This Act shall become effective July 1, 2006.

12 **SECTION 4.**

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