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BILL ANALYSIS

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Senate Bills 658 and 659 (as enrolled)
Sponsor: Senator Jim Ananich
Senate Committee: Economic Development
House Committee: Tax Policy

Date Completed: 1-13-15

CONTENT

Senate Bills 658 and 659 would amend the General Sales Tax Act and the Use Tax Act, respectively, to do the following:

- **Create a presumption that a seller was engaged in the business of making sales at retail in Michigan, or had nexus with Michigan and would be required to collect the use tax, if the seller or an affiliated person engaged in or performed certain activities related to sales.**
- **Create a presumption that a seller was engaged in the business of making sales at retail in Michigan, or had nexus with Michigan and would be required to collect the use tax, if the seller entered into certain agreements with one or more Michigan residents.**
- **Allow either presumption to be rebutted by a demonstration that the activity or agreement was not significantly associated with the seller's ability to establish or maintain a market in Michigan.**
- **Specify that the bills would apply to transactions occurring on or after their effective date, and that the 12 months before that date would be included as part of the immediately preceding 12 months for purposes of the presumption for business agreements.**

The bills would take effect on October 1, 2015.

Presumption for Sales Activities

Under Senate Bill 658, a seller that sold tangible personal property to a purchaser in Michigan would be presumed to be engaged in the business of making sales at retail in Michigan if the seller or a person (including an affiliated person) other than a common carrier acting as a common carrier, engaged in or performed any of the following activities in Michigan:

- Sold a similar line of products as the seller and did so under the same business name, or a similar business name, as the seller.
- Used its employees, agents, representatives, or independent contractors in Michigan to promote or facilitate sales by the seller to purchasers in Michigan.
- Maintained, occupied, or used an office or similar place of business in Michigan to facilitate the delivery or sale of tangible personal property sold by the seller to the seller's purchasers in Michigan.
- Used, with the seller's consent or knowledge, trademarks, service marks, or trade names in Michigan that were the same as or substantially similar to those used by the seller.

-- Delivered, installed, assembled, or performed maintenance or repair services for the seller's purchasers in Michigan.
-- Facilitated the sale of tangible personal property to purchasers in Michigan by allowing them to pick up or return tangible personal property sold by the seller at an office, distribution facility, warehouse, storage place, or similar place of business maintained by that person in Michigan.
-- Shared management, business systems, business practices, or employees with the seller, or in the case of an affiliated person, engaged in intercompany transactions related to the activities occurring with the seller to establish or maintain the seller's market in Michigan.
-- Conducted any other activities in Michigan that were significantly associated with the seller's ability to establish and maintain a market in Michigan for the seller's sales of tangible personal property to purchasers in Michigan.

Under Senate Bill 659, a seller that sold tangible personal property would be presumed to have nexus with Michigan and would have to register with the Department of Treasury and collect the use tax, if the seller or a person (including an affiliated person) other than a common carrier acting as a common carrier engaged in or performed any of those activities in Michigan. (Senate Bill 659 refers to the sale of tangible personal property to purchasers in Michigan for storage, use, or consumption in Michigan.)

Under both bills, the presumption could be rebutted by a demonstration that a seller's or person's activities in Michigan were not significantly associated with the seller's ability to establish or maintain a market in Michigan for the seller's sales of tangible personal property to purchasers in Michigan.

The bills would define "affiliated person" as either of the following:

-- Any person that is a part of the same controlled group of corporations as the seller.
-- Any other person that bears the same ownership relationship to the seller as a corporation that is a member of the same controlled group of corporations.

"Controlled group of corporations" would mean that term as defined in a section of the Internal Revenue Code (26 USC 1563(a)).

Presumption for Business Agreements

In addition to the presumption described above, under Senate Bill 658, a seller of tangible personal property would be presumed to be engaged in the business of making sales at retail of tangible personal property in Michigan if the seller entered into an agreement, directly or indirectly, with one or more Michigan residents under which the resident, for a commission or other consideration, directly or indirectly, referred potential purchaser, whether by a link on an internet website, in-person oral presentation, or otherwise, to the seller, if both of the following conditions were satisfied:

-- The cumulative gross receipts from sales by the seller to purchasers in Michigan who were referred to the seller by all residents of Michigan who had an agreement with the seller were greater than $10,000 during the immediately preceding 12 months.
-- The seller's total cumulative gross receipts from sales to purchasers in Michigan exceeded $50,000 during the immediately preceding 12 months.

Under Senate Bill 659, a seller of tangible personal property would be presumed to have nexus with Michigan and would have to register with the Department of Treasury and collect the use tax, if the seller entered into such an agreement with one or more Michigan residents. (Senate Bill 659 refers to sales for storage, use, or consumption in Michigan.)

Under both bills, the presumption could be rebutted by a demonstration that the Michigan residents with whom the seller had an agreement did not engage in any solicitation or any other activity within Michigan that was significantly associated with the seller's ability to establish or maintain a market in Michigan for the seller's sales of tangible personal property to purchasers in Michigan. The presumption would have to be considered rebutted by evidence of all of the following:

-- Written agreements prohibiting all of the residents who had an agreement with the seller from engaging in any solicitation activities in Michigan on the seller's behalf.
-- Written statements from all of the residents who had an agreement with the seller stating that the resident representatives did not engage in any solicitation or other activities in Michigan on behalf of the seller during the immediately preceding 12 months, if the statements were provided and obtained in good faith.

An agreement under which a seller bought advertisements from a person in Michigan, to be delivered through television, radio, print, the internet, or any other medium would not be an agreement described in this presumption unless the advertisement revenue paid to the person in Michigan consisted of commissions or other consideration that was based upon completed sales of tangible personal property.

Scope of Bills

The bills would apply to transactions occurring on or after their effective date and without regard to the date the seller and the resident entered into an agreement. The 12 months before the bills' effective date would be included as part of the immediately preceding 12 months for purposes of the presumption involving a business agreement.

Proposed MCL 205.52b (S.B. 658) Legislative Analyst: Patrick Affholter
Proposed MCL 205.95a (S.B. 659)

FISCAL IMPACT

The bills would have an indeterminate positive fiscal impact on State and local government, depending on how broadly the definitions and provisions of the bills would be applied, and how affiliates and businesses would respond to the legislation. Assuming the provisions of the bills applied broadly and affiliate networks were relatively unresponsive to the legislation, the bills would increase General Fund revenue by approximately $10.0 million per year, School Aid Fund revenue by approximately $44.0 million per year, and local unit revenue by approximately $6.0 million per year. To the extent that the bills' provisions were applied more narrowly, or that affiliate networks were dissolved and/or restructured in response to the legislation, the bills would generate less revenue.

The actual split between the State and local units, and between the General Fund and the School Aid Fund, would depend on the revenue collected under the General Sales Tax Act relative to that collected under the Use Tax Act. The School Aid Fund receives one-third of use tax revenue, with the remainder directed to the General Fund, although if House Joint Resolution UU is approved by the voters, the portion of use tax revenue to the School Aid Fund would increase. In contrast, for most sales, approximately 73.3% of sales tax revenue is directed to the School Aid Fund, 10% is directed to local units through constitutional revenue sharing provisions, and much of the rest is directed to the General Fund.

Fiscal Analyst: David Zin

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