

MAINE STATE LEGISLATURE

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126th MAINE LEGISLATURE

FIRST REGULAR SESSION-2013

Legislative Document

No. 319

H.P. 228

House of Representatives, February 7, 2013

An Act To Provide Tax Fairness to Small Businesses in the State

(EMERGENCY)

Reference to the Committee on Taxation suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative BERRY of Bowdoinham.
Cosponsored by President ALFOND of Cumberland and
Representatives: BECK of Waterville, Speaker EVES of North Berwick, KNIGHT of
Livermore Falls, McCABE of Skowhegan.

1 **Emergency preamble.** Whereas, acts and resolves of the Legislature do not
2 become effective until 90 days after adjournment unless enacted as emergencies; and

3 **Whereas,** Maine law requires a retailer of goods or services to collect sales and use
4 tax on the purchase of those goods or services; and

5 **Whereas,** a retailer located in another state who makes sales to persons in this State
6 does not collect and remit Maine sales and use tax even when that retailer has a nexus
7 with the State; and

8 **Whereas,** the loss of revenue to the State from this failure to collect and remit sales
9 and use tax has been estimated at over \$60,000,000 annually; and

10 **Whereas,** aside from the loss of revenue, businesses located in the State that comply
11 with the requirement to collect and remit Maine sales and use tax are put at a competitive
12 disadvantage with businesses that fail to collect and remit Maine sales and use tax; and

13 **Whereas,** in the judgment of the Legislature, these facts create an emergency within
14 the meaning of the Constitution of Maine and require the following legislation as
15 immediately necessary for the preservation of the public peace, health and safety; now,
16 therefore,

17 **Be it enacted by the People of the State of Maine as follows:**

18 **PART A**

19 **Sec. A-1. 36 MRSA §1752, sub-§10,** as repealed and replaced by PL 1997, c.
20 393, Pt. A, §41, is amended to read:

21 **10. Retailer.** "Retailer" means a person who makes retail sales ~~or and~~ who is
22 ~~required to register by section 1754-A or 1754-B or who is registered under section~~
23 ~~1756;~~

24 A. Required to register by section 1754-A or 1754-B; or

25 B. Registered under section 1756.

26 **Sec. A-2. 36 MRSA §1754-B, sub-§1, ¶D,** as amended by PL 2005, c. 218, §18,
27 is further amended to read:

28 D. Every person that has a substantial physical presence in this State sufficient to
29 satisfy the requirements of the due process and commerce clauses of the United
30 States Constitution and that makes retail sales in this State of tangible personal
31 property or taxable services on behalf of a principal that is outside of this State if the
32 principal is not the holder of a valid registration certificate; For purposes of this
33 paragraph, paragraph E and paragraph G, the following activities do not constitute a
34 substantial physical presence in this State sufficient to satisfy the requirements of the
35 due process and commerce clauses of the United States Constitution:

1 (1) Solicitation of business in this State through catalogs, flyers, telephone or
2 electronic media when delivery of ordered goods is effected by the United States
3 mail or by an interstate 3rd-party common carrier;

4 (2) Attending trade shows, seminars or conventions in this State;

5 (3) Holding a meeting of a corporate board of directors or shareholders or
6 holding a company retreat or recreational event in this State;

7 (4) Maintaining a bank account or banking relationship in this State; or

8 (5) Using a vendor in this State for printing;

9 **Sec. A-3. 36 MRSA §1754-B, sub-§1, ¶E**, as enacted by PL 1995, c. 640, §3, is
10 amended to read:

11 E. Every agent, representative, salesperson, solicitor or distributor that has a
12 substantial physical presence in this State sufficient to satisfy the requirements of the
13 due process and commerce clauses of the United States Constitution and that receives
14 compensation by reason of sales of tangible personal property or taxable services
15 made outside this State by a principal for use, storage or other consumption in this
16 State;

17 **Sec. A-4. 36 MRSA §1754-B, sub-§1, ¶G**, as amended by PL 2007, c. 328, §5,
18 is further amended to read:

19 G. Every seller of tangible personal property or taxable services that has a substantial
20 physical presence in this State sufficient to satisfy the requirements of the due process
21 and commerce clauses of the United States Constitution. ~~The following activities do~~
22 ~~not constitute a substantial physical presence for the purpose of this paragraph:~~

23 ~~(1) Solicitation of business in this State through catalogs, flyers, telephone or~~
24 ~~electronic media when delivery of ordered goods is effected by the United States~~
25 ~~mail or by an interstate 3rd party common carrier;~~

26 ~~(2) Attending trade shows, seminars or conventions in this State;~~

27 ~~(3) Holding a meeting of a corporate board of directors or shareholders or~~
28 ~~holding a company retreat or recreational event in this State;~~

29 ~~(4) Maintaining a bank account or banking relationship in this State; or~~

30 ~~(5) Using a vendor in this State for printing, drop shipping or telemarketing~~
31 ~~services;~~

32 **Sec. A-5. 36 MRSA §1754-B, sub-§1, ¶H**, as amended by PL 2009, c. 373, §5,
33 is repealed.

34 **Sec. A-6. 36 MRSA §1754-B, sub-§1-A** is enacted to read:

35 **1-A. Persons presumptively required to register.** This subsection creates a
36 rebuttable presumption that a seller not subject to subsection 1 is engaged in the business
37 of selling taxable personal property or services for use in this State and is required to
38 register as a retailer with the assessor.

1 A. As used in this subsection, unless the context otherwise indicates, the following
2 terms have the following meanings.

3 (1) "Affiliated person" means a person that is a member of the same controlled
4 group of corporations as the seller or any other entity that, notwithstanding its
5 form of organization, bears the same ownership relationship to the seller as a
6 corporation that is a member of the same controlled group of corporations. For
7 purposes of this subparagraph, "controlled group of corporations" has the same
8 meaning as in the Code, Section 1563(a).

9 (2) "Person" means an individual or entity that qualifies as a person under the
10 Code, Section 7701(a)(1).

11 (3) "Seller" means a person that sells, other than in a casual sale, tangible
12 personal property or taxable services.

13 B. A seller is presumed to be engaged in the business of selling taxable personal
14 property or services for use in this State if an affiliated person has a substantial
15 physical presence in this State or if any person, other than a person acting in its
16 capacity as a common carrier, that has a substantial physical presence in this State:

17 (1) Sells a similar line of products as the seller and does so under a business
18 name that is the same or similar to that of the seller;

19 (2) Maintains an office, distribution facility, warehouse or storage place or
20 similar place of business in the State to facilitate the delivery of property or
21 services sold by the seller to the seller's customers;

22 (3) Uses trademarks, service marks or trade names in the State that are the same
23 or substantially similar to those used by the seller;

24 (4) Delivers, installs, assembles or performs maintenance services for the seller's
25 customers within the State;

26 (5) Facilitates the seller's delivery of property to customers in the State by
27 allowing the seller's customers to pick up property sold by the seller at an office,
28 distribution facility, warehouse, storage place or similar place of business
29 maintained by the person in the State; or

30 (6) Conducts any activities in the State that are significantly associated with the
31 seller's ability to establish and maintain a market in the State for the seller's sales.

32 A seller who meets the requirements of this paragraph shall register with the assessor
33 and collect and remit taxes in accordance with the provisions of this Part. A seller
34 may rebut the presumption created in this paragraph by demonstrating that the
35 person's activities in the State are not significantly associated with the seller's ability
36 to establish or maintain a market in this State for the seller's sales.

37 C. A seller that does not otherwise meet the requirements of paragraph B is
38 presumed to be engaged in the business of selling tangible personal property or
39 taxable services for use in this State if the seller enters into an agreement with a
40 person under which the person, for a commission or other consideration, while within
41 this State:

1 (1) Directly or indirectly refers potential customers, whether by a link on an
2 Internet website, by telemarketing, by an in-person presentation or otherwise, to
3 the seller; and

4 (2) The cumulative gross receipts from retail sales by the seller to customers in
5 the State who are referred to the seller by all persons with this type of an
6 agreement with the seller are in excess of \$10,000 during the preceding 12
7 months.

8 A seller who meets the requirements of this paragraph shall register with the assessor
9 and collect and remit taxes in accordance with the provisions of this Part.

10 A seller may rebut the presumption created in this paragraph by submitting proof that
11 the person with whom the seller has an agreement did not engage in any activity
12 within the State that was significantly associated with the seller's ability to establish
13 or maintain the seller's market in the State during the preceding 12 months. Such
14 proof may consist of sworn, written statements from all of the persons within this
15 State with whom the seller has an agreement stating that they did not engage in any
16 solicitation in the State on behalf of the seller during the preceding 12 months; these
17 statements must be provided and obtained in good faith.

18 **Sec. A-7. 36 MRSA §1754-B, sub-§4** is enacted to read:

19 **4. Agreement requiring legislative approval.** Any ruling, agreement or contract,
20 whether written or oral, express or implied, between a seller and the Governor or a state
21 agency or department stating, agreeing or ruling that a seller, as defined in subsection
22 1-A, paragraph A, that meets the requirements of subsection 1-A, paragraph B or C is not
23 required to collect sales and use tax in this State is null and void unless it is specifically
24 approved by a majority vote of both Houses of the Legislature.

25 **Sec. A-8. Application.** The provisions of the Maine Revised Statutes, Title 36,
26 section 1754-B, subsection 1-A, paragraph C apply to sales made, uses occurring and
27 services rendered on or after the effective date of this Act regardless of the date on which
28 the seller and the person entered into the agreement described in that paragraph; except
29 that, when calculating the 12-month period for purposes of determining whether the
30 threshold amount specified in Title 36, section 1754-B, subsection 1-A, paragraph C,
31 subparagraph (2) has been met, the 12-month period begins one year immediately
32 preceding the seller's registering as a retailer pursuant to this Act.

33 **PART B**

34 **Sec. B-1. Report and legislation regarding the "Streamlined Sales and**
35 **Use Tax Agreement."** The Department of Administrative and Financial Services,
36 Bureau of Revenue Services shall prepare a report concerning the "Streamlined Sales and
37 Use Tax Agreement," referred to in this section as "the agreement," which is an effort of
38 state governments, with input from local governments and the private sector, to simplify
39 and modernize sales and use tax collection and administration. The report must:

- 40 1. Identify any changes to the Maine Revised Statutes that are needed to conform the
41 State's laws to the agreement and the options available to provide conformity;

