

SENATE MOTION

MADAM PRESIDENT:

I move that Senate Bill 459 be amended to read as follows:

- 1 Page 1, between the enacting clause and line 1, begin a new
2 paragraph and insert:
3 "SECTION 1. IC 6-2.5-3-1 IS AMENDED TO READ AS
4 FOLLOWS [EFFECTIVE JULY 1, 2011]: Sec. 1. For purposes of this
5 chapter:
6 (a) "Use" means the exercise of any right or power of ownership
7 over tangible personal property.
8 (b) "Storage" means the keeping or retention of tangible personal
9 property in Indiana for any purpose except the subsequent use of that
10 property solely outside Indiana.
11 (c) "A retail merchant engaged in business in Indiana" includes any
12 retail merchant who makes retail transactions in which a person
13 acquires personal property or services for use, storage, or consumption
14 in Indiana and who:
15 (1) maintains an office, place of distribution, sales location,
16 sample location, warehouse, storage place, or other place of
17 business which is located in Indiana and which the retail
18 merchant maintains, occupies, or uses, either permanently or
19 temporarily, either directly or indirectly, and either by the retail
20 merchant or through a representative, agent, or subsidiary;
21 (2) maintains a representative, agent, salesman, canvasser, or
22 solicitor who, while operating in Indiana under the authority of
23 and on behalf of the retail merchant or a subsidiary of the retail
24 merchant, sells, delivers, installs, repairs, assembles, sets up,
25 accepts returns of, bills, invoices, or takes orders for sales of
26 tangible personal property or services to be used, stored, or
27 consumed in Indiana;
28 (3) is otherwise required to register as a retail merchant under
29 IC 6-2.5-8-1; ~~or~~
30 **(4) satisfies both of the following conditions:**

1 (A) the retail merchant holds a substantial ownership
2 interest in, or is owned in whole or in substantial part by,
3 a retail merchant engaged in business in Indiana; and

4 (B) the retail merchant sells the same or a similar line of
5 products as the related retail merchant in Indiana and does
6 so under the same or a similar business name, or the
7 in-state facilities or in-state employees of the related retail
8 merchant in Indiana are used to advertise, promote, or
9 facilitate sales by the retail merchant to consumers.

10 For purposes of this subdivision, the processing of orders
11 electronically, including by facsimile, telephone, the Internet,
12 or other electronic ordering process, does not relieve a retail
13 merchant of the responsibility for collection of sales or use tax
14 from the purchaser if the retail merchant is a retail merchant
15 engaged in business in Indiana under this subdivision. A retail
16 merchant making sales of tangible personal property, directly
17 or through a subsidiary or other related entity, to purchasers
18 in Indiana by mail, telephone, the Internet, or other media
19 that has a contractual relationship with an entity to provide
20 and perform delivery, installation, assembly, or maintenance
21 services for the retail merchant's purchasers within Indiana
22 is a retail merchant engaged in business in Indiana under this
23 subdivision;

24 (5) holds a substantial ownership interest in, or is owned in
25 whole or in substantial part by, a business that maintains an
26 office, distribution facility, sales or sample facility, warehouse
27 or storage place, or similar place of business in Indiana that
28 delivers property sold by the retail merchant to consumers;

29 (6) derives rents from a lease of tangible personal property
30 situated in Indiana;

31 (7) is either:

32 (A) affiliated with a person that uses in Indiana
33 trademarks, service marks, or trade names that are the
34 same as those the retail merchant uses; or

35 (B) affiliated with a person that engages in activities in
36 Indiana that inure to the benefit of the retail merchant, in
37 its development or maintenance of a market for its goods
38 or services in Indiana, to the extent that those activities of
39 the affiliate are sufficient to satisfy the nexus requirement
40 of the United States Constitution. This subdivision does not
41 narrow the scope of any other provision in this section.
42 Notwithstanding this clause, the activities in Indiana of an
43 affiliated person in providing accounting or legal services
44 or advice to a seller, or in directing the activities of a retail
45 merchant, including making decisions about:

46 (i) strategic planning;

47 (ii) marketing;

- 1 (iii) inventory;
 2 (iv) staffing;
 3 (v) distribution; or
 4 (vi) cash management;
 5 **will not result in a retail merchant being considered as a**
 6 **retail merchant engaged in business in Indiana under this**
 7 **section; or**
 8 ~~(8)~~ (8) may be required by the state to collect tax under this article
 9 to the extent allowed under the Constitution of the United States
 10 and federal law.
- 11 **For purposes of this subsection, "substantial ownership interest"**
 12 **means an interest in an entity that is at least ten percent (10%) of**
 13 **the equity ownership interest of the entity, and "ownership"**
 14 **includes both direct ownership and indirect ownership through a**
 15 **parent, subsidiary or affiliate.**
- 16 (d) Notwithstanding any other provision of this section, tangible or
 17 intangible property that is:
 18 (1) owned or leased by a person that has contracted with a
 19 commercial printer for printing; and
 20 (2) located at the premises of the commercial printer;
 21 shall not be considered to be, or to create, an office, a place of
 22 distribution, a sales location, a sample location, a warehouse, a storage
 23 place, or other place of business maintained, occupied, or used in any
 24 way by the person. A commercial printer with which a person has
 25 contracted for printing shall not be considered to be in any way a
 26 representative, an agent, a salesman, a canvasser, or a solicitor for the
 27 person.
- 28 (e) **A retail merchant that is part of a controlled group of**
 29 **corporations, and that controlled group of corporations has a**
 30 **component member that is a retail merchant engaged in business**
 31 **in Indiana as described in subsection (c)(4) is presumed to be a**
 32 **retail merchant engaged in business in Indiana. This presumption**
 33 **may be rebutted by evidence that during the reporting period at**
 34 **issue the component member that is a retail merchant engaged in**
 35 **business in Indiana did not engage in any of the activities described**
 36 **in this section on behalf of the retail merchant. For purposes of this**
 37 **subsection, "controlled group of corporations" has the meaning set**
 38 **forth in Section 1563(a) of the Internal Revenue Code, and**
 39 **"component member" has the meaning set forth in Section 1563(b)**
 40 **of the Internal Revenue Code.**
- 41 (f) This section may not be considered in determining whether
 42 a person has nexus for any other purpose other than the gross
 43 retail or use taxes.
- 44 (g) The standard of nexus as described this section cannot be
 45 voided or suspended by the department through a contract or
 46 other agreement with a particular entity without legislative
 47 approval."

- 1 Renumber all SECTIONS consecutively.
 (Reference is to SB 459 as printed January 26, 2011.)

Senator WALKER