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Comments Due by: **August 27, 2018**

SC REVENUE RULING #18- x [DRAFT - 8/10/18 – “DOC. 2”]

- SUBJECT:** Persons Using Another Person’s Online Marketplace To Sell Their Products – Registration and Tax Collection Guidance (Sales and Use Tax)
- EFFECTIVE DATE:** Applies to all periods open under the statute, unless another date is otherwise specified in this advisory opinion.
- SUPERSEDES:** All previous documents and oral directives in conflict herewith.
- REFERENCE:** Chapter 36 of Title 12, D.C. Code of Laws (2014, Supp. 2017)
- AUTHORITY:** S.C. Code Ann. Section 12-4-320 (2014)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3
- SCOPE:** The purpose of a Revenue Ruling is to provide guidance to the public. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department’s position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

PURPOSE:

The purpose of this advisory opinion is to inform persons whose products are listed and sold on another person’s online marketplace of the application of the South Carolina sales and use tax to such sales in light of the U.S. Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018). This decision allows South Carolina to require certain retailers with no physical presence in South Carolina to collect and remit South Carolina sales and use tax on products sold to locations in South Carolina.

RETAILERS LIABLE FOR SOUTH CAROLINA SALES AND USE TAX

The South Carolina sales and use tax requires any person engaged in the business of selling tangible personal property at retail (*i.e.*, a retailer) to obtain a retail license and remit the sales and use tax to the Department. This requirement applies to all tangible personal property sold in South Carolina by the retailer, regardless of whether such property is owned by the retailer or a third party, such as a consignment sale or an auction sale.

An “online marketplace” is a person engaged in the business of facilitating a retail sale of tangible personal property by (1) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur and (2) collecting

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or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party, regardless of whether the online marketplace receives compensation or other consideration in exchange for its services. An online marketplace includes any related entity assisting the marketplace in sales, storage, distribution, payment collection, or in any other manner with respect to the marketplace.

It is the Department's position that under existing South Carolina law an online marketplace, as defined above, is the retailer of all tangible personal property sold on its website. Accordingly, an online marketplace which has substantial nexus with South Carolina must obtain a retail license and remit the South Carolina sales and use tax on all taxable sales made through its website, whether the product sold is owned by the online marketplace or owned by another person.

The online marketplace is the same as any other retailer selling another person's product, such as a consignment store or an auction house. For example, the operator of a consignment store is a retailer and must obtain a retail license and remit the South Carolina sales and use tax on all products sold in the consignment store, including products owned by another person. The person who places his items in the consignment store to be sold by the store is not the retailer and is not liable for the sales and use tax on sales made through the consignment store.

Note: A person who uses an online marketplace as described above to sell his products may also sell his products at his own store or on his own website. If such person has either physical or economic nexus with South Carolina, he must obtain a retail license and remit the sales and use tax on sales made at his own store or on his own website that are sold into South Carolina. See **SC Revenue Ruling #18-XX, "Retailers Without a Physical Presence ("Remote Sellers") – Economic Nexus" for more information.**

CURRENT LITIGATION WITH ONLINE MARKETPLACE

The Department is currently in litigation with Amazon Services, LLC, an online marketplace with a physical presence in South Carolina, with respect to sales of tangible personal property owned by another person and made via the Amazon marketplace.

The Department maintains that under South Carolina law as summarized above, Amazon Services, LLC is the retailer responsible for remitting the South Carolina sales and use tax on all taxable sales of products on Amazon.com, including products owned by another person that are listed and sold on Amazon.com and for which payments are collected or processed by Amazon.

GUIDANCE FOR PERSONS USING AN ONLINE MARKETPLACE TO SELL THEIR PRODUCTS DURING THE LITIGATION PROCESS

Since the Department anticipates that it may be several years before the Amazon litigation is resolved, the Department has issued guidance to persons whose products are listed and sold on the Amazon marketplace to protect such persons from incurring a large sales and use tax liability if the courts ultimately rule against the Department and in favor of Amazon.

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The Department issued a news release in February 2018 advising such persons that the Department will accept their application for a retail license so they could remit the tax on sales of their products made via the Amazon marketplace. This would protect such persons from incurring a large sales and use tax liability if the courts ultimately rule against the Department and in favor of Amazon.

With the U.S. Supreme Court's decision in *Wayfair*, the Department is re-issuing this guidance as an advisory opinion. The original news release is attached as an exhibit to this Revenue Ruling.

Below is a summary of the guidance for persons using an online marketplace to sell their products:

- ◆ **Users of Amazon Marketplace:** Persons whose products are listed and sold on the Amazon marketplace may submit an application for a retail license and begin remitting the South Carolina sales and use tax for all taxable sales made into South Carolina until the current Amazon litigation is resolved.
- ◆ **Users of Other Online Marketplaces:** Persons whose products are listed and sold on another online marketplace similar to Amazon, whereby the products are listed and sold on the marketplace and the marketplace collects or processes the payment from the customer, may submit an application for a retail license and begin remitting the South Carolina sales and use tax for all taxable sales made into South Carolina until the current Amazon litigation is resolved. Note: It is recommended that such persons first contact the online marketplace to determine if the marketplace is, or will be, remitting the South Carolina sales and use tax on such sales into South Carolina.

Since the Department maintains that online marketplaces, as defined in this document, are the retailers of all products sold on their websites under South Carolina law, the opportunity for a person whose products are listed and sold on another person's online marketplace to obtain a retail license and remit the sales and use tax is voluntary. As noted above, the Department is providing this opportunity to allow such persons to take action that should prevent them from incurring a large sales and use tax liability for sales made via the online marketplace if the courts ultimately rule against the Department and in favor of Amazon.

Once the current Amazon litigation is resolved, the Department will issue additional guidance for both operators of online marketplaces and persons whose products are listed and sold on such online marketplaces.

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EXHIBIT

NEWS RELEASE – FEBRUARY 23, 2018

*SCDOR Now Accepting Retail Sales Tax Applications from Third Party Suppliers
of Products Sold on Amazon.com to SC Purchasers*

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SCDOR Now Accepting Retail Sales Tax Applications from Third Party Suppliers of Products Sold on Amazon.com to SC Purchasers

FOR IMMEDIATE RELEASE -
2/23/2018

The South Carolina Department of Revenue (SCDOR) is now accepting retail sales tax applications from third-party suppliers whose products are sold on Amazon.com to South Carolina purchasers. The purpose for accepting these applications is to give these retailers the ability to collect and remit the appropriate Sales and Use Tax for these sales until the current legal matter between the SCDOR and Amazon Services, LLC is resolved.

The SCDOR maintains that under South Carolina law, Amazon Services, LLC is the retailer responsible for collecting and remitting Sales and Use Tax on all goods sold on Amazon.com. On July 21, 2017, Amazon Services, LLC filed a legal challenge to South Carolina's Sales and Use Tax laws, asserting it is not the retailer and is not responsible for collecting and remitting Sales and Use Tax on third-party supplier products sold on Amazon.com.

The SCDOR filed a motion with the Administrative Law Court to compel Amazon Services, LLC to begin collecting Sales and Use Tax on all sales made through Amazon.com and to hold such taxes in a trust until the Court decides Amazon's legal challenge. The motion was denied, but the case is ongoing and scheduled for trial in November of 2018.

Following the Court's denial of the motion, several third-party suppliers requested guidance from the SCDOR regarding their potential tax liability if the Court ultimately rules in favor of Amazon Services, LLC and finds that third-party suppliers—rather than Amazon Services, LLC—are the retailers responsible for collecting and remitting Sales and Use Tax on goods sold on Amazon.com. As a result, the SCDOR will now accept retail sales tax applications and allow third-party suppliers to remit Sales and Use Tax for their products sold on Amazon.com.

How to Register

- Third-party suppliers who have already registered as a retailer may keep their current license.
- Third-party suppliers wishing to register as a retailer may register online using the SCDOR's 24/7 online tax service portal, MyDORWAY, or file by paper using the SCDOR-111.