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Comments Due by: **August 13, 2019**

SC REVENUE RULING #19-x [PUBLIC DRAFT – 7/23/2019]

SUBJECT: Marketplace Facilitators and Third Parties Whose Products are Sold Via a Marketplace – Guidance and Tax Obligations (Sales and Use Tax)

EFFECTIVE DATE: April 26, 2019

REFERENCES: S.C. Code Ann. Section 12-36-70 (2014) (Act No. 21 of 2019)
S.C. Code Ann. Section 12-36-71 (Act No. 21 of 2019)
S.C. Code Ann. Section 12-36-90 (2014) (Act No. 21 of 2019)
S.C. Code Ann. Section 12-36-130 (2014) (Act No. 21 of 2019)
S.C. Code Ann. Section 12-36-910 (2014)
S.C. Code Ann. Section 12-36-1310 (2014)
S.C. Code Ann. Section 12-36-1340 (2014) (Act No. 21 of 2019)

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 It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Department advisory opinion.

PURPOSE

The purpose of this advisory opinion is to provide sales and use tax guidance to persons operating as a marketplace facilitator who operate a marketplace where tangible personal property is sold in or into South Carolina in light of the enactment of Act No. 21 of 2019, effective April 26, 2019.¹ In addition, this advisory opinion provides guidance to third parties whose products are sold through these marketplaces.

¹ The enactment of Code Section 12-36-71 in 2019 does not represent a change in tax policy relating to South Carolina sales and use taxes. Its purpose is to further set forth and clarify South Carolina's longstanding requirement that any person engaged in business as a retailer must remit sales and use tax on every retail sale of tangible personal property by the retailer, whether the tangible personal property is owned by the retailer or another person (e.g., on consignment, by auction, or in any other manner).

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LAW

Code Section 12-36-910 imposes the sales tax and reads, in part:

(A) A sales tax, equal to [six]² percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.

Code Section 12-36-1310 imposes the use tax and reads, in part:

(A) A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of [six]³ percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State.

Code Section 12-36-1340 describes who is required to collect use tax and reads, in part:

Each seller making retail sales of tangible personal property for storage, use, or other consumption in this State shall collect and remit the tax in accordance with this chapter and shall obtain from the department a retail license as provided in this chapter, if the retail seller:

* * *

(3) solicits and receives purchases or orders by an agent, an independent contractor, a representative, an Internet website, or any other means;

* * *

(5) operates as a marketplace facilitator; or

(6) meets constitutional standards for economic nexus with South Carolina for purposes of the sales and use tax.

Code Section 12-36-70 defines “retailer” and “seller,” in part, as follows:

“Retailer” and “seller” include every person:

(1)(a) selling or auctioning tangible personal property whether owned by the person or others;

* * *

(2)(a) maintaining a place of business or qualifying to do business in this State; or

² See Code Section 12-36-1110 which increased the sales tax rate to 6% from 5%.

³ See Code Section 12-36-1110 which increased the use tax rate to 6% from 5%.

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(3) operating as a marketplace facilitator, as defined in Section 12-36-71.

Code Section 12-36-71 defines “marketplace facilitator” as follows:

(A)(1) “Marketplace facilitator” means any person engaged in the business of facilitating a retail sale of tangible personal property by:

(a) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur; and

(b) collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party.

(2) If a person meets the criteria set forth in item (1), then that person is a marketplace facilitator regardless of whether the person receives compensation or other consideration in exchange for his services.

(B) A marketplace may be physical or electronic and includes, but is not limited to, any space, store, booth, catalog, website, television or radio broadcast, or similar place, medium, or forum.

(C) For purposes of subsection (A), a marketplace facilitator includes any related entities assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace.

(D) When a marketplace facilitator is comprised of multiple entities, the entity that lists or advertises, or allows the listing or advertising of, the products sold at retail in the marketplace is the entity responsible for remitting the sales and use tax to the State.

QUESTIONS AND ANSWERS

OVERVIEW OF MARKETPLACE FACILITATOR

1. Q. Is a “marketplace facilitator” a retailer under South Carolina sales and use tax law?

A. Yes.

2. Q. What is a marketplace facilitator?

A. A marketplace facilitator is any person engaged in the business of facilitating a retail sale of tangible personal property by:

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- a. listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur **and**
- b. collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party.

A marketplace facilitator also includes any related entities assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace. See Code Section 12-36-71 for a complete definition of a marketplace facilitator.

3. Q. What is a “marketplace”?

A. A “marketplace” includes, but is not limited to, any space, store, booth, catalog, website, television or radio broadcast, or similar place, medium, or forum. A marketplace may be physical or electronic.

4. Q. What are examples of “marketplace facilitators”?

A. The following businesses who list or advertise, or allow the listing or advertising of, the products of another person and collect or process payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party, are examples of “marketplace facilitators.” A marketplace facilitator can sell or lease any type of product subject to sales and use tax, including sales of meals, clothing, lodging, vehicles, machinery, and equipment.

- Brick and Mortar Retailer without an Online Presence - An antique mall in South Carolina that allows third parties to display their products for sale.
- Brick and Mortar Retailer with an Online Presence - A retailer with brick and mortar locations in South Carolina that also sells its products and products owned by third parties via its website.
- Online Only Retailer - An online retailer that sells its products and products owned by third parties via its website or an online retailer that sells only products owned by third parties via its website. (See Example 1 at the end of this advisory opinion).
- Online Food Ordering, Payment, and Delivery Retailer - An online retailer that sells meals prepared by independent restaurants via its website and mobile app and delivers the meals through its independent contractors or employees. (See Example 2 at the end of this advisory opinion that illustrates the sales and use tax responsibilities of the marketplace facilitator and the third party).

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5. Q. Is a marketplace facilitator responsible for remitting state and local sales and use tax for products sold via its marketplace?

A. Yes. A marketplace facilitator is the retailer and is responsible for remitting state and local sales and use tax for all products sold via its marketplace (i.e., products owned by the marketplace facilitator, products owned by third parties, and any other products sold via its marketplace) unless otherwise exempt or excluded from the tax. The responsibility for remitting the sales and use tax applies regardless of whether the marketplace facilitator or a third party delivers the products.

SALES AND USE TAX OBLIGATIONS OF A MARKETPLACE FACILITATOR AND A THIRD PARTY WHOSE PRODUCTS ARE SOLD VIA A MARKETPLACE⁴

6. Q. What are the sales and use tax obligations of a marketplace facilitator?

A. Since a marketplace facilitator is a retailer, a marketplace facilitator must comply with all sales and use tax obligations under South Carolina's sales and use tax law for a retailer. These obligations include obtaining a retail license, filing a return, and remitting the proper sales and use tax with respect to all products sold through its marketplace.

7. Q. Is a third party whose products are sold only through a marketplace operated by a marketplace facilitator required to obtain a retail license and remit the sales and use tax?

A. No. Since the third party's products are sold only through a marketplace operated by a marketplace facilitator, the third party is not a retailer and, therefore, is not required to obtain a retail license or remit sales and use tax on such sales.

Note: A third party whose products are sold only through a marketplace operated by a marketplace facilitator and who currently has a South Carolina retail license does not need a retail license and should close its retail license account. See Form C-278, "Account Closing Form," for additional information. For current MyDORWAY users, the C-278 can be completed online.

8. Q. Is a third party whose products are sold through a marketplace operated by a marketplace facilitator and via its own website or retail brick and mortar store required to obtain a retail license and remit the sales and use tax?

A. Yes. Since some of the third party's products are sold via its own website or retail brick and mortar store, the third party is a retailer and is required to obtain a retail license and remit sales and use tax with respect to sales made through its own website or retail brick and mortar store. However, the third party is not responsible for remitting the sales and use tax on its products sold through a marketplace operated by a marketplace facilitator.

⁴ For purposes of sales and use tax obligations, the questions assume the marketplace facilitator or the third party have nexus with South Carolina.

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Example: X sells \$250,000 of its products in South Carolina via its own website and its retail brick and mortar store. In addition, \$100,000 of its products are sold in South Carolina on a marketplace operated by a marketplace facilitator.

X is a retailer only for the sales made through its own website and its retail brick and mortar store. X is, therefore, responsible for remitting sales and use tax on the \$250,000 of products sold through its website and its retail brick and mortar store. The marketplace facilitator is the retailer of all of the products sold through its marketplace and, therefore, is responsible for remitting sales and use tax on the \$100,000 of products sold through its marketplace that are owned by X.

MARKETPLACE FACILITATOR WITHOUT A PHYSICAL PRESENCE IN SOUTH CAROLINA

9. Q. Is a marketplace facilitator without a physical presence in South Carolina (i.e., a “remote seller”) required to obtain a retail license and remit sales and use tax?
- A. Yes, provided such marketplace facilitator has economic nexus with South Carolina.
10. Q. When does a marketplace facilitator have economic nexus with South Carolina for purposes of sales and use tax?
- A. A marketplace facilitator whose gross revenue from sales of tangible personal property⁵ (whether such property is owned by the marketplace facilitator or others), products transferred electronically, and services delivered into South Carolina exceeds \$100,000 in the previous calendar year or the current calendar year has economic nexus (i.e., substantial nexus) with South Carolina.

The \$100,000 economic nexus standard includes:

- the total gross revenue from all sales of tangible personal property delivered into South Carolina, including all taxable retail sales, exempt retail sales, and wholesale sales of tangible personal property;
- the total gross revenue from all sales of products transferred electronically into South Carolina, whether or not the transfer of such product is subject to the South Carolina sales and use tax; and,

⁵ Code Section 12-36-60 defines “tangible personal property,” in part, as “personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under [the South Carolina sales and use tax law].” For services that are specifically subject to the sales and use tax, and therefore by definition are “tangible personal property,” see Code Sections 12-36-910(B), 12-36-1310(B), 12-36-920, and 12-36-2645.

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- the total gross revenue from all services delivered into South Carolina, whether or not the service is subject to the South Carolina sales and use tax.

See Code Section 12-36-70, *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S.Ct. 2080 (2018), and SC Revenue Ruling #18-14.

COMPREHENSIVE EXAMPLES

The following examples address the responsibilities of the marketplace facilitator, the third party, and the calculation upon which the sales and use tax (state and local) is measured. In each example, each party has either economic nexus with South Carolina or a physical presence in South Carolina. The products are sold at retail and are not subject to any sales and use tax exemption or exclusion.

EXAMPLE 1 - Online Retailer

Facts:

Company A is an online retailer who operates a website where the products it owns, and the products owned by third parties, are listed for sale at retail to customers. In some instances, once an order is placed and payment is received through Company A's website, Company A will pack the item and ship it to the customer. In other instances, once an order is placed and payment is received through Company A's website, third party products may be held by the third parties awaiting shipment instructions from Company A. Company A processes payments for all sales taking place through its website and remits payments to third parties for sales of their products, less a fee retained for its services.

Explanation of Sales and Use Tax Responsibilities:

Company A – A Marketplace Facilitator. Because Company A is a marketplace facilitator (i.e., it advertises the products of many individuals and businesses for sale on its marketplace and collects or processes payments for such products), it is responsible for obtaining a retail license, filing a sales and use tax return, and remitting the sales and use tax with respect to all taxable retail sales of products sold through its marketplace (including all taxable retail sales of items owned by third parties), regardless of whether the product is shipped by Company A or the third party.

Note: Because the sales and use tax law specifically imposes the responsibility for the tax on marketplace facilitators for all products sold through their marketplace, the legal obligation to remit the tax in this example remains with Company A, regardless of any contract provisions between Company A and the third party sellers.

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Third Party 1 – Sales on Own Website and Via a Marketplace: Assume Third Party 1 is a South Carolina seller (whether an individual or a company) that makes sales of his products on his own website. He also lists his products for sale on a marketplace (Company A). Third Party 1 is only responsible for reporting and remitting South Carolina sales and use tax on sales he made via his own website. Company A, the marketplace facilitator, is responsible for reporting and remitting sales and use tax on sales of Third Party 1's products sold via the marketplace.

Third Party 2 – Sales Only Via a Marketplace: Assume Third Party 2 is a remote seller (whether an individual or a company). Sales of Third Party 2's products in, or into, South Carolina are only made through a marketplace facilitator (Company A.) Third Party 2 is not making any retail sales in, or into, South Carolina under South Carolina law and is not a retailer. Third Party 2 is not required to obtain a retail license or collect sales and use tax. Company A, the marketplace facilitator, is responsible for reporting and remitting sales and use tax on sales of Third Party 2's products sold via the marketplace.

EXAMPLE 2 - Online Food Ordering, Payment, and Delivery Retailer

Facts:

Company X is a national online meal ordering, payment, and delivery company. It contracts with a variety of South Carolina restaurants to sell their meals through its website and mobile app. Customers use Company X's website or mobile app to view menu items from various restaurants and to order and pay for meals. Company X's employees or independent contractors pick up and deliver the meals to customers. Company X collects the customer's payment for the entire order through its website, including the cost of the meal, a delivery fee, and a service charge. Company X remits the sales price of the meal to the restaurant, less its commission on the sale, and retains the delivery fee and service charge paid. In addition to the meals sold via Company X's marketplace, these restaurants sell meals themselves at their retail locations.

Assume in this example that Customer A orders a BBQ meal and sweet tea through Company X's mobile app. Customer A pays the full cost of the meal (\$15), a delivery fee (\$4) and a service charge (\$1) to Company X via its mobile app. Customer B visits the same restaurant and purchases take-out meals for \$50.

Explanation of Sales and Use Tax Responsibilities:

Company X – A Marketplace Facilitator. Since Company X is a marketplace facilitator (i.e., it advertises the meals of various restaurants for sale on its marketplace and collects or processes payments for such meals), it is responsible for obtaining a retail license, filing a sales and use tax return, and remitting the sales and use tax with respect to all meals sold through its marketplace.

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The price of the meal sold, delivery fee, and service charge are included in “gross proceeds of sales”⁶ (for sales tax) or “sales price”⁷ (for use tax). As such, Company X must remit sales and use tax based on the entire amount paid by Customer A (\$20 in this example) since this meal was sold through Company X’s marketplace.

Note: Since the sales and use tax law specifically imposes the responsibility for the tax on marketplace facilitators for all products sold through their marketplace, the legal obligation to remit the tax in this example remains with Company X, regardless of any contract provisions between Company X and the restaurant.

Restaurant - Third Party. Company X has no sales and use tax responsibility for the sale of the take-out meals sold directly by the restaurant to Customer B (\$50 in this example). While the restaurant is not responsible for the remittance of the sales and use tax on any meal sold through the marketplace operated by Company X (\$20 in this example), it is responsible for the sales and use tax of meals sold by the restaurant to customers at its retail location. The restaurant is, therefore, a retailer and is required to obtain a retail license and remit sales and use tax with respect to sales made by it at its retail location (\$50 sale to Customer B in this example).⁸

⁶ “Gross proceeds of sales” is defined in Code Section 12-36-90. Generally, “gross proceeds of sales” is the value proceeding or accruing from the sale, lease, or rental of tangible personal property and, therefore, is the total amount charged in conjunction with the sale or rental of tangible personal property, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

⁷ “Sales price” is defined in Code Section 12-36-130. Generally, “sales price” is the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses.

⁸ See Code Section 12-36-2570(B) for information required on each monthly sales and use tax return.