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

SC REVENUE RULING #18- x [DRAFT - 8/10/18 – “DOC. 1”]

- SUBJECT:** Online Marketplaces – Physical and Economic Nexus
(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:** SC Revenue Advisory Bulletin #01-7 and all previous documents and oral directives in conflict herewith.
- MODIFIES:** SC Revenue Ruling #14-4 and all previous documents and oral directives in conflict herewith.
- REFERENCE:** Chapter 36 of Title 12, S.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 It is the Department’s position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.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 operating an online marketplace of the requirements of the South Carolina sales and use tax law in light of the U.S. Supreme Court’s decision in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018).

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 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.

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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 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, the online marketplace must obtain a retail license and remit the South Carolina sales and use tax on all taxable products sold into South Carolina on its website, whether the product is owned by the online marketplace or the product is 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.

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.

Note: 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 via an online 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. See SC Revenue Ruling #18 - DOC #2, “Persons Using Another Person’s Online Marketplace to Sell Their Products – Registration and Tax Collection Guidance” for this guidance.

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SALES AND USE TAX REMITTANCE REQUIREMENTS FOR AN ONLINE MARKETPLACE

As a result of the *Wayfair* decision, the determination as to when an online marketplace must begin remitting the sales and use tax on retail sales into South Carolina depends on whether the online marketplace has physical nexus or economic nexus with South Carolina.

Physical Nexus: An online marketplace has physical nexus with South Carolina if it maintains within South Carolina, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within South Carolina under the authority of the retailer or its subsidiary, regardless of whether the business or agent is located here permanently or temporarily or whether the retailer or subsidiary is admitted to do business within South Carolina.

1. Online Marketplaces with Physical Nexus in South Carolina

Online marketplaces with physical nexus with South Carolina are responsible for remitting the sales and use tax for all taxable sales made into South Carolina beginning on the date physical nexus was, or is, established, including all taxable sales of tangible personal property owned by another person and sold via the online marketplace. These online marketplaces must obtain a retail license from the Department that is effective the first day physical nexus is established.

Note: An online marketplace with a distribution facility in South Carolina established and meeting the requirements of Code Section 12-36-2691 is not considered to have established physical nexus with South Carolina until January 1, 2016.

2. Failure to Timely Register and Remit Tax

Online marketplaces who have physical and economic nexus with South Carolina as noted above, but who do not timely obtain a retail license from the Department are subject to sales and use tax assessment, penalties, and interest for all taxable sales made into South Carolina beginning on the date the online marketplace was required to obtain a retail license.¹

Economic Nexus: An online marketplace without physical nexus has economic nexus with South Carolina if in the previous calendar year or the current calendar year the online

¹ The Department has developed a voluntary compliance procedure for taxpayers who may have nexus with South Carolina but are not registered or licensed with the Department to collect or remit South Carolina taxes. See SC Revenue Procedure #09-2, "Voluntary Disclosure of Nexus."

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marketplace's gross proceeds of sales² of tangible personal property³ into South Carolina exceeds \$250,000.

The \$250,000 economic nexus standard includes:

- ◆ the total gross proceeds of all taxable retail sales, exempt retail sales, and wholesale sales of tangible personal property; and,
- ◆ the total gross proceeds of all sales of tangible personal property by the online marketplace, including all sales of tangible personal property owned by another person.

The calculation, however, does not include the gross proceeds of sales of tangible personal property owned by the online marketplace, but sold by another person.

Example: Assume an online marketplace annually makes \$200,000 in sales of its own products into South Carolina. In addition, the online marketplace lists and advertises the products owned by another person on its website and collects or processes approximately \$75,000 in annual customer payments from these sales into South Carolina. The online marketplace meets the nexus standards for South Carolina (\$200,000 + \$75,000 = \$275,000). The \$75,000 in annual sales into South Carolina of products owned by another person are sales of the online marketplace and are included in the calculation of the nexus standard of the online marketplace. The online marketplace is required to obtain a retail license and remit the sales and use tax to the Department.⁴

In response to the *Wayfair* decision, the Department issued SC Revenue Ruling #18-XX, "Retailers Without a Physical Presence ("Remote Sellers") – Economic Nexus" to provide registration and sales and use tax remittance guidelines for remote sellers, including online marketplaces meeting certain minimum contacts ("economic nexus") with South Carolina. The Department will begin collecting sales and use tax from such online marketplaces beginning October 1, 2018, unless a later date is otherwise provided, in accordance with SC Revenue Ruling #18-XX.

The following summarizes the application of the guidance set forth in SC Revenue Ruling #18-XX to online marketplaces:

A. Guidelines for Timely Registration and Remittance of Tax

1. Economic Nexus in Calendar year 2017 or from January 1, 2018 through August 31, 2018

² "Gross proceeds of sales" is defined in Code Section 12-36-90. For purposes of this advisory opinion, "gross proceeds of sales" applies to sales tax transactions and use tax transactions.

³ "Tangible personal property" is defined in Code Section 12-36-60.

⁴ This example assumes the online marketplace does not have physical nexus with South Carolina.

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Online marketplaces having economic nexus with South Carolina in calendar year 2017, or from January 1, 2018 through August 31, 2018, are responsible for remitting the sales and use tax for all taxable sales, including taxable sales of tangible personal property owned by another person but sold via the online marketplace, made into South Carolina on and after **October 1, 2018**. These online marketplaces must obtain a retail license from the Department by October 1, 2018. Sales and use tax, penalties, and interest will not be assessed against these online marketplaces for taxable sales made into South Carolina before October 1, 2018.

2. Economic Nexus Established on or after September 1, 2018

Online marketplaces who establish economic nexus with South Carolina on or after September 1, 2018, are responsible for remitting the sales and use tax for all taxable sales, including taxable sales of tangible personal property owned by another person but sold via the online marketplace, made into South Carolina beginning the **first day of the second calendar month after economic nexus is established**.⁵ These online marketplaces must obtain a retail license from the Department by the first day of the second calendar month after economic nexus is established. Sales and use tax, penalties, and interest will not be assessed against these online marketplaces for taxable sales made into South Carolina before the first day of the second calendar month after economic nexus is established.

Example: Assume an online marketplace establishes economic nexus in South Carolina by December 10, 2018 (*i.e.*, it exceeds \$250,000 in gross proceeds of sales in South Carolina). The online marketplace must: (1) obtain a retail license by February 1, 2019, (the first day of the second calendar month after economic nexus is established) and (2) remit the sales and use tax for all taxable sales made into South Carolina on or after February 1, 2019.

B. Failure to Timely Register and Remit Tax

Online marketplaces who have economic nexus with South Carolina as noted above, but who do not timely obtain a retail license from the Department are subject to sales and use tax assessment, penalties, and interest for all taxable sales made into South Carolina beginning on the date the online marketplaces were required to obtain a retail license.

⁵ This is approximately 30 days from the end of the month in which economic nexus is established.