



TaxNewsFlash

United States



No. 2020-591
September 21, 2020

KPMG report: Remote seller, marketplace facilitator update (Colorado, Illinois, Mississippi, Tennessee)

U.S. state and local governments continue to respond to the U.S. Supreme Court's 2018 decision in "South Dakota v. Wayfair, Inc." and in particular with respect to sales tax obligations for remote sales and transactions involving marketplace facilitators.

In *Wayfair*, the U.S. Supreme Court overruled the physical presence nexus standard of *Quill* and *National Bellas Hess* with respect to state and local taxation of remote sales. Soon after the Supreme Court issued its decision in *Wayfair*, various states began issuing administrative guidance or statements or began the legislative process to respond to the decision in the *Wayfair* case, and these actions continue into the present.

Colorado

A regulation interprets the marketplace facilitator statutes and defines certain terms that are not defined in the marketplace facilitator statute. For example, under the statute, a "marketplace seller" means a person that offers for sale tangible personal property, commodities, and services through a marketplace owned, operated or controlled by a marketplace facilitator. The regulation provides that the term "controlled by a marketplace facilitator" means "the marketplace facilitator engages in certain activities in connection with the marketplace that demonstrate control over the marketplace—such as selecting the board of directors or the officers of the person that owns or operates the marketplace, or exercising authority over major business decisions of the marketplace—without owning the marketplace or engaging in the day-to-day operations of the marketplace."

The regulation also clarifies that a marketplace facilitator is required to obtain a single sales tax license for the collection of sales taxes on both direct and facilitated sales. However, if a marketplace facilitator has formed separate legal entities with separate federal employer identification numbers for direct sales and facilitated sales, it must obtain a separate sales tax license for each legal entity even if both entities make or facilitate sales through the same marketplace. The regulation also includes additional information on refund claims, protest rights, and recordkeeping requirements for marketplace facilitators and sellers.

Illinois

The Department of Revenue adopted regulations to implement recent legislation and to address the tax obligations of marketplace facilitators, effective January 1, 2021.

Under earlier legislation and rules (effective January 1, 2020), a marketplace facilitator exceeding the state's economic nexus threshold is required to collect Illinois use tax (6.25% statewide) on sales it facilitates on behalf of a marketplace seller. Under current rules, a marketplace facilitator is not responsible for collecting tax on a transaction it facilitates if the transaction is subject to the "retailers' occupation tax" (ROT) (i.e., the marketplace seller has traditional, non-economic nexus) instead of the use tax. If a marketplace transaction is subject to ROT, the seller is responsible for collecting and remitting the amounts of the state and local ROT. The marketplace facilitator can agree to collect the taxes due on such ROT transactions and then transmit the collected amounts to the seller for remittance to the state. If a remote sale (including a marketplace sale) is fulfilled from inventory in the possession of the retailer in Illinois, the sale is considered an ROT transaction and not a use tax transaction, meaning collection of the state and local ROT is the seller's responsibility unless the marketplace agrees to collect these taxes for the seller.

Under the new rules (effective January 1, 2021), marketplace facilitators are generally required to collect state and local ROT at the rate in effect for the destination location for all facilitated sales, even if the marketplace seller is Illinois-based. For a marketplace facilitator's direct sales, if the marketplace facilitator does not have a physical presence in Illinois, the sale is sourced based on the destination (the same as for facilitated sales). However, direct sales that are fulfilled from inventory located in Illinois or if the selling activity takes place in Illinois, the applicable state and local ROT is based on the "business of selling" rules.

Out-of-state retailers without a physical presence in Illinois will collect ROT based on the destination of sales they make into the state. In contrast, an out-of-state seller that maintains a physical presence in Illinois is required to collect ROT due at the origin location if the sale is filled from Illinois inventory or the business of selling takes place in the state. The Illinois Department of Revenue has also issued a [flowchart](#) [PDF 188 KB] describing the responsibilities of marketplace facilitators and remote sellers after January 1, 2021.

Mississippi

The Department of Revenue issued a [notice](#) [PDF 184 KB] addressing food delivery services companies. Under recently enacted legislation, the sale of food made through third-party delivery services was removed from the definition of a "retail sale." As such, effective July 1, 2020, sales tax does not apply to sales of food made by third-party delivery services via the delivery service's app or website. The restaurant will be required to charge the applicable state and local taxes on the selling price of the food.

The Department noted that "food delivery service companies that keep their own inventory of items for sale or perform a combination of third-party deliveries and direct sales of items to customers are required to register to collect and remit sales tax on sales to their customers from their own inventory." Food delivery service companies making direct sales will be required to collect sales tax on delivery charges, as well as on sales of food.

Tennessee

The Department of Revenue issued a "frequently asked question" ([FAQ](#)) providing that marketplace sellers are to call the Department to request an application for waiver if they have a contractual agreement with the marketplace facilitator whereby the seller is required to collect the Tennessee sales and use tax.

Read a [September 2020 report](#) prepared by KPMG LLP

The information contained in TaxNewsFlash is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230, as the content of this document is issued for general informational purposes only, is intended to enhance the reader's knowledge on the matters addressed therein, and is not intended to be applied to any specific reader's particular set of facts. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

KPMG International is a Swiss cooperative that serves as a coordinating entity for a network of independent member firms. KPMG International provides no audit or other client services. Such services are provided solely by member firms in their respective geographic areas. KPMG International and its member firms are legally distinct and separate entities. They are not and nothing contained herein shall be construed to place these entities in the relationship of parents, subsidiaries, agents, partners, or joint venturers. No member firm has any authority (actual, apparent, implied or otherwise) to obligate or bind KPMG International or any member firm in any manner whatsoever.

Direct comments, including requests for subscriptions, to [Washington National Tax](#). For more information, contact KPMG's Federal Tax Legislative and Regulatory Services Group at + 1 202.533.4366, 1801 K Street NW, Washington, DC 20006-1301.

To unsubscribe from TaxNewsFlash-United States, reply to [Washington National Tax](#).

[Privacy](#) | [Legal](#)