

TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 20-13

Revenue rulings are not binding on the Department. This ruling is based on the particular facts and circumstances presented and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.

SUBJECT

The application of Tennessee sales and use tax to a marketplace facilitator.

SCOPE

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue Rulings are advisory in nature and are not binding on the Department.

FACTS

The Taxpayer operates an online forum that connects retailers (the "Sellers") of certain foods and beverages subject to the Tennessee sales and use tax (the "Products") with potential customers. The Taxpayer conducts business through the use of independent contractor delivery persons for certain orders in several states, including Tennessee. Sellers contract with the Taxpayer to be included and participate in the Taxpayer's online forum, which provides Sellers access to the consumers who use the online forum. All Sellers utilizing the Taxpayer's forum maintain brick-and-mortar retail locations within Tennessee. Sellers with a physical presence in Tennessee register with the Department to collect and remit Tennessee sales and use tax and, by accepting the funds from the Taxpayer, acknowledge that they collected and remitted the same on all taxable Tennessee sales, including those made through the Taxpayer's online forum.

In a typical transaction, a customer will access the Taxpayer's online forum via their personal computer or the Taxpayer's mobile application. From there, the customer may browse the various Product offerings of the Tennessee Sellers. When a customer wishes to purchase a particular Product or Products, payment is made through the Taxpayer's online forum. The Taxpayer collects the customer's payment, which includes any applicable taxes on the full amount paid by the customer for the purchased Products. At the time of payment, the customer may elect either to pick up the Products from the Tennessee Seller's business location, or to have the Products delivered to them. The online forum then transmits the customer's order to the relevant Tennessee Seller for fulfillment. When a customer chooses to have his/her Product delivered, either an employee of the Tennessee Seller performs delivery, or the Taxpayer effects delivery from the Tennessee Seller's business location through a third-party independent contractor. The Taxpayer charges the Tennessee Seller a commission on each order facilitated on its online forum.

As part of its services, the Taxpayer processes payment and transmits the funds and any sales tax paid by the customer to the Tennessee Seller, less the Taxpayer's commission. If the Tennessee Seller's

employee performed delivery, the Taxpayer also transmits a delivery charge to the Tennessee Seller. The Tennessee Sellers contractually agree with the Taxpayer that they— not the Taxpayer—will remit the requisite Tennessee sales tax imposed on the full price of the Tennessee sales to the Tennessee Department of Revenue. The Taxpayer provides Tennessee Sellers with a monthly statement indicating the amount of tax passed to them by the Taxpayer and required to be remitted to the state. Specifically, that statement provides:

[The “Taxpayer”] collected \$X.XX in taxes for the orders outlined above and sent it directly to you. As part of your normal periodic tax return filing, it is your responsibility to pay \$X.XX to the proper taxing authority for such orders. Upon receipt of the \$X.XX in taxes shown in this statement, you hereby attest and confirm that you are properly registered with and will report and remit such amounts to the proper taxing authority on the appropriate periodic tax return. If these amounts are not reported and remitted by you for any reason, you will notify [the Taxpayer] thereof.

RULINGS

1. Is the Taxpayer a “delivery network company” as defined in TENN. CODE ANN. § 67-6-102(26) (Supp. 2020) such that it is not required to collect and remit Tennessee sales and use tax on sales made on its online forum to Tennessee consumers?

Ruling: The Taxpayer would be considered a “delivery network company,” as defined in TENN. CODE ANN. § 67-6-102(26) (Supp. 2020), not required to collect and remit Tennessee sales and use tax for sales of taxable Products made on its online forum if it does not have common ownership or control of the Sellers with whom it contracts, and the deliveries it facilitates occur within fifty miles of the Sellers.

2. If the Taxpayer supplies to the Commissioner of the Tennessee Department of Revenue (the “Department”) the entity/business name, physical address, and FEIN of all the Sellers on its online forum, is that information sufficient to demonstrate substantially all of the Tennessee sellers are registered and collecting and remitting Tennessee sales and use tax such that the Taxpayer is not required to collect and remit sales and use tax for sales on its forum?

Ruling: If the Taxpayer is a marketplace facilitator but is not considered a delivery network company and desires a waiver from the requirement that a marketplace facilitator collect or remit sales and use tax for sales made through its online forum, it must request from the Department and submit an application for Request for Sales and Use Tax Collection Waiver Marketplace Facilitator or Marketplace Seller. The form asks that a marketplace facilitator stating that substantially all of the marketplace sellers on its marketplace are registered in Tennessee for sales and use tax purposes attach a list of the marketplace sellers’ names, addresses, and Tennessee sales tax registration numbers or provide an explanation for any marketplace seller’s Tennessee sales tax registration number not included on the list.

ANALYSIS

Under the Retailer's Sales Tax Act,¹ retail sales in Tennessee of tangible personal property and specifically enumerated services are subject to the sales tax, unless an exemption applies. "Retail sale" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent."²

TENN. CODE ANN. § 67-6-102(84)(A) (Supp. 2020) defines "sale" in pertinent part to mean "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration." In addition to the transfer of tangible personal property, the term "sale" also includes the "furnishing of any of the things or services" taxable under the Retailers' Sales Tax Act.³

Tennessee's sales tax liability is imposed on the dealer. "Dealer" is defined under TENN. CODE ANN. § 67-6-102(23)(C) to include any person who offers for sale at retail, or who has in such person's possession for sale at retail," tangible personal property in this state. TENN. CODE ANN. § 67-6-501(a) (Supp. 2020) adds that every such person "making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state, or furnishing any of the things or services taxable under this chapter" is liable for the collection and remittance of sales and use tax."⁴

The Tennessee General Assembly enacted into law effective October 1, 2020, a sales tax provision requiring a marketplace facilitator to collect and remit sales and use tax on sales made through its marketplace if it made or facilitated total sales to consumers in this state of more than \$100,000 during the previous twelve month period.⁵ Effective October 1, 2020, the definition of sale includes, any sale "made or facilitated by a marketplace facilitator,"⁶ and the definition of dealer includes a person that "acts as a marketplace facilitator."⁷ Moreover TENN. CODE ANN. § 67-6-501(f) specifically states that a marketplace facilitator is responsible for collecting and remitting sales and use tax:

When a marketplace seller uses a marketplace facilitator to facilitate sales of tangible personal property or any of the things or services taxable under this chapter, the marketplace facilitator is liable for the taxes imposed by this chapter on the sales price of the tangible personal property or the things or services taxable under this chapter regardless of whether the marketplace seller has a sales tax certificate of registration

¹ Tennessee Retailers' Sales Tax Act (codified at TENN. CODE ANN. §§ 67-6-101 to -907 (2018 & Supp. 2020)).

² TENN. CODE ANN. § 67-6-102(82) (Supp. 2020).

³ TENN. CODE ANN. § 67-6-102(84)(C).

⁴ TENN. CODE ANN. § 67-6-501(a) (Supp. 2020).

⁵ 2020 Tenn. Public Acts Ch. 646; 2020 Tenn. Public Acts Ch. 759, § 7.

⁶ TENN. CODE ANN. § 67-6-102(84)(L).

⁷ TENN. CODE ANN. § 67-6-102(23)(N).

or would have been required to collect sales or use taxes had the sale not been facilitated by the marketplace facilitator.⁸

2020 Tenn. Public Acts Ch. 646, § 8 added a threshold to TENN. CODE ANN. § 67-6-501(f) requiring marketplace facilitators to collect and remit sales and use tax if they have more than \$500,000 in total sales into Tennessee in the previous twelve-month period. However, before the law became effective, through 2020 Tenn. Public Acts Ch. 759, § 7 (2020), the Tennessee legislature lowered the \$500,000 threshold to \$100,000 such that effective October 1, 2020, a marketplace facilitator must register in Tennessee to collect and remit sales tax if it made or facilitated total sales to consumers in this state of more than \$100,000 during the previous twelve-month period.⁹

1. DELIVERY NETWORK COMPANY

A marketplace facilitator is defined as a person who for consideration facilitates sales subject to sales and use tax through a physical or electronic marketplace that collects payment from the purchaser and transmits payment to the seller.¹⁰ The definition of marketplace facilitator, however, contains several exclusions.¹¹ One such exclusion is for delivery network companies; however, a delivery network company may elect to be deemed a marketplace facilitator such that it would be required to collect and remit sales and use tax.¹²

Effective October 1, 2020, TENN. CODE ANN. § 67-6-102(26) defines delivery network company as a “business entity that maintains an internet website or mobile application used to facilitate delivery services for the sale of local products.” For this purpose, delivery services include the pickup of local products from a local merchant and delivery to a customer but do not include “any delivery requiring over fifty (50) miles of travel from the local merchant to the customer.”¹³ A local merchant includes a business such as a restaurant, kitchen, or grocery store “that is not under common ownership or control with the delivery network company.”¹⁴

The Taxpayer, here, would be excluded from the definition of marketplace facilitator and considered a delivery network company because it maintains an internet website and mobile application that facilitates delivery services of a local products so long as the deliveries that it facilitates are within fifty miles of the Sellers and the Sellers are not under common ownership or control with the Taxpayer.¹⁵

⁸ TENN. CODE ANN. § 67-6-501(f) (Supp. 2020).

⁹ TENN. CODE ANN. § 67-6-501(f)(1).

¹⁰ TENN. CODE ANN. § 67-6-102(56)(A).

¹¹ TENN. CODE ANN. § 67-6-102(56)(B).

¹² TENN. CODE ANN. § 67-6-102(56)(B)(iv).

¹³ TENN. CODE ANN. § 67-6-102(27).

¹⁴ TENN. CODE ANN. § 67-6-102(53).

¹⁵ See TENN. CODE ANN. § 67-6-1-102(27) and (53).

A delivery network company “facilitate[s] delivery services;” however, the definition of delivery network company does not define the term “facilitate,” nor is there a definition for the term elsewhere in the Tennessee sales and use tax statutes.¹⁶ The Tennessee Supreme Court has stated that when a statute does not define a term, it is proper to look to common usage to determine the term’s meaning.¹⁷ In common usage, the term “facilitate” means “to make easier” or “to help bring about.”¹⁸ This definition does not require that the business actually perform the delivery services; the only requirement is that the network delivery company makes delivery services easier.

The Taxpayer here makes delivery services easier by allowing customers to access its online forum regardless of whether the Taxpayer’s independent contractor or the Seller actually delivers the Products. The fact that customers here have the option to pick up at the Seller’s location does not change this determination. Accordingly, effective October 1, 2020, if the Taxpayer would otherwise be considered a marketplace facilitator, it would be a delivery network company not required to collect and remit Tennessee sales and use tax for sales of taxable Products made on its forum if it does not have common ownership or control of the Sellers with whom it contracts, and the deliveries it facilitates occur within fifty miles of the Sellers.

2. WAIVER

The marketplace facilitator law effective October 1, 2020, contains certain provisions that allow shifting of the burden for collecting and remitting sales and use tax on sales made through a marketplace facilitator’s online forum from the marketplace facilitator to a marketplace seller.¹⁹ Under one such waiver provision, the law authorizes the Department to waive the requirement that a marketplace facilitator that facilitates the requisite sales into Tennessee collect and remit sales and use tax if a marketplace facilitator requests a waiver and demonstrates to the satisfaction of the Commissioner, that substantially all of the marketplace sellers for whom it facilitates sales are registered Tennessee dealers.²⁰

If the Taxpayer, here, is a marketplace facilitator but is not a delivery network company because it has common ownership or control with the Sellers or facilitates deliveries to customers more than fifty miles away from the Sellers, and it desires to seek a waiver from Commissioner, it may request a waiver from the requirement that it collect and remit sales and use tax on the sales made through its online forum by demonstrating that substantially all of the marketplace sellers for whom it facilitates sales are registered dealers.²¹ To do this the Taxpayer should contact the Department and request an application for Request for Sales and Use Tax Collection Waiver Marketplace Facilitator or Marketplace Seller. If the Taxpayer completes the application because substantially all of the Sellers on its marketplace are registered in Tennessee for sales and use tax purposes, it must attach to the

¹⁶ TENN. CODE ANN. § 67-6-102(26).

¹⁷ See e.g. *Tennessee Farmers Assur. Co. v. Chumley*, 197 S.W.3d 767, 782-83 (Tenn. Ct. App. 2006); *Beare v. Tenn. Dep’t of Revenue*, 585 S.W.2d 906, 908 (Tenn. 1993).

¹⁸ MIRRIAM-WEBSTER’S COLLEGIATE DICTIONARY 447 (11TH ed. 2007).

¹⁹ TENN. CODE ANN. § 67-6-501(f).

²⁰ TENN. CODE ANN. § 67-6-501(f)(2).

²¹ See TENN. CODE ANN. §§ 67-6-102(27), -501(f)(2).

application a list of marketplace sellers' names, addresses, and Tennessee sales tax registration numbers or provide an explanation for any marketplace seller's Tennessee sales tax registration number not included on the list.

APPROVED: David Gerregano
Commissioner of Revenue

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