

House Substitute for SENATE BILL No. 266

By Committee on Taxation

5-21

1 AN ACT concerning taxation; relating to sales and compensating use
2 taxes; requiring collection and remittance by marketplace facilitators;
3 nexus; amending K.S.A. 79-3702 and repealing the existing section.
4

5 *Be it enacted by the Legislature of the State of Kansas:*

6 New Section 1. The provisions of sections 1 through 9, and
7 amendments thereto, shall be a part of and supplemental to the Kansas
8 retailers' sales tax act.

9 New Sec. 2. As used in this act:

10 (a) "Act" means sections 1 through 9, and amendments thereto.

11 (b) "Affiliated person" means a person that, with respect to another
12 person: (1) Has an ownership interest of more than 5%, whether direct or
13 indirect, in the other person; or (2) is related to the other person because a
14 third person, or group of third persons who are affiliated persons with
15 respect to each other, holds an ownership interest of more than 5%,
16 whether direct or indirect, in the related persons.

17 (c) "Cumulative gross receipts" means gross receipts as defined in
18 K.S.A. 79-3602, and amendments thereto, and includes the gross receipts
19 received by the marketplace facilitator from its own direct sales combined
20 with the gross receipts received from sales it facilitates for sellers or
21 marketplace sellers.

22 (d) "Department" means the Kansas department of revenue.

23 (e) (1) "Marketplace facilitator" means a person that, pursuant to an
24 agreement with a marketplace seller, facilitates sales by such marketplace
25 seller through a physical or electronic marketplace operated by the person,
26 and:

27 (A) Engages directly or indirectly, including through one or more
28 affiliated persons in any of the following:

29 (i) Transmitting or otherwise communicating the offer or acceptance
30 between a buyer and marketplace seller;

31 (ii) owning or operating the infrastructure, electronic or physical, or
32 technology that brings buyers and marketplace sellers together;

33 (iii) providing a virtual currency that buyers are allowed or required
34 to use to purchase products from the marketplace seller; or

35 (iv) software development or research and development activities
36 related to any of the activities described in this subsection, if such

1 activities are directly related to a physical or electronic marketplace
2 operated by the person or an affiliated person; and

3 (B) engages in any of the following activities with respect to the
4 marketplace seller's products:

- 5 (i) Payment processing services;
- 6 (ii) fulfillment, delivery or storage services;
- 7 (iii) listing products for sale;
- 8 (iv) setting prices;
- 9 (v) branding sales as those of the marketplace facilitator;
- 10 (vi) order taking;
- 11 (vii) advertising or promotion; or
- 12 (viii) providing customer service or accepting or assisting with
13 returns or exchanges.

14 (2) A "marketplace facilitator" does not include a person who:

15 (A) Provides internet advertising services, including listing products
16 for sale, so long as the person does not also engage in any of the activities
17 described in subsection (e)(1)(A) in addition to any of the activities
18 described in subsection (e)(1)(B); or

19 (B) with respect to rental of rooms, lodgings, accommodations,
20 homes, apartments, cabins, residential dwelling units or hotel rooms in a
21 hotel, as defined in K.S.A. 36-501, and amendments thereto, operates a
22 marketplace or a portion of a marketplace that enables consumers to rent
23 rooms, lodgings, accommodations, homes, apartments, cabins, residential
24 dwelling units or hotel rooms in a hotel, as defined in K.S.A. 36-501, and
25 amendments thereto, or acts as an accommodation broker as defined in
26 K.S.A. 12-1692, and amendments thereto.

27 (3) The exclusion in subsection (e)(2)(B) does not apply to a
28 marketplace facilitator or that portion of a marketplace facilitator that
29 facilitates the sale of the rental of rooms, lodgings, accommodations,
30 homes, apartments, cabins, residential dwelling units or hotel rooms in
31 hotels, as defined in K.S.A. 36-501, and amendments thereto, or acts as an
32 accommodation broker as defined in K.S.A. 12-1692, and amendments
33 thereto, who also engages in any of the activities described in subsection
34 (e)(1)(A) in addition to any of the activities described in subsection (e)(1)
35 (B).

36 (f) "Marketplace seller" means a seller that makes retail sales through
37 any physical or electronic marketplaces operated by a marketplace
38 facilitator regardless of whether the seller is required to be registered with
39 the department.

40 (g) "Sale" or "sales" shall have the same meaning as defined in
41 K.S.A. 79-3602(kk), and amendments thereto, whether or not such sales
42 qualify for a sales tax exemption.

43 (h) "Seller" shall have the same meaning as defined in K.S.A. 79-

1 3602(mm), and amendments thereto, and includes marketplace facilitators,
2 whether making sales in the seller's own right or on behalf of marketplace
3 sellers.

4 (i) "Tax" means: (1) The sales tax imposed under K.S.A. 79-3603,
5 and amendments thereto; (2) the use tax imposed under K.S.A. 79-3703,
6 and amendments thereto; (3) the transient guest tax imposed under K.S.A.
7 12-1693 or 12-1697, and amendments thereto, or any applicable city or
8 county resolution or ordinance; or (4) the prepaid wireless 911 fee
9 imposed under K.S.A. 12-5371, and amendments thereto.

10 (j) "Transaction" means a sale of tangible personal property or a
11 service by a marketplace seller including, but not limited to, all such
12 marketplace seller's transactions for tangible personal property or a
13 service, however consummated, including transactions completed on a
14 website operated by: (1) The marketplace seller; (2) an affiliated person; or
15 (3) a contract party, including a marketplace facilitator.

16 (k) The meaning ascribed to words and phrases in K.S.A. 79-3602,
17 and amendments thereto, insofar as practicable, shall be applicable herein
18 unless otherwise provided.

19 New Sec. 3. (a) On and after July 1, 2020, any marketplace facilitator
20 that meets the criteria in subsection (b) or that has a physical presence in
21 this state, must collect and remit retail sales or use tax on all taxable retail
22 sales made or facilitated by the marketplace facilitator into this state
23 pursuant to this act. Marketplace facilitators must begin collecting state
24 and local retail sales or use taxes on taxable retail sales made or facilitated
25 by the marketplace facilitator sourced to this state beginning on the first
26 day of the next calendar month that is at least 30 days from the date that
27 the marketplace facilitator met the threshold described in subsection (b).
28 On and after July 1, 2021, any marketplace facilitator that is obligated to
29 collect the taxes imposed under this act, shall also collect and remit to the
30 department applicable prepaid wireless 911 fees imposed under K.S.A. 12-
31 5371, and amendments thereto.

32 (b) A marketplace facilitator is subject to subsection (a) if:

33 (1) (A) For the period beginning on January 1, 2020, through June 30,
34 2020, the marketplace facilitator had cumulative gross receipts from retail
35 sales sourced to this state of \$100,000 or more; or

36 (B) during the current or immediately preceding calendar year, the
37 marketplace facilitator had cumulative gross receipts from retail sales
38 sourced to this state of \$100,000 or more.

39 (2) (A) For any marketplace facilitator who satisfies the provisions of
40 subsection (b)(1)(A), such retailer shall not be required to collect and remit
41 any taxes from sales occurring prior to July 1, 2020.

42 (B) For any marketplace facilitator who satisfies the provisions of
43 subsection (b)(1)(B) for sales in the current calendar year for the first time,

1 such marketplace facilitator shall be required to collect and remit the tax
2 on the cumulative gross receipts from sales in the current calendar year by
3 the marketplace facilitator to customers in this state.

4 New Sec. 4. (a) In addition to other applicable recordkeeping
5 requirements, the department may require a marketplace facilitator to
6 provide or make available to the department any information the
7 department determines is reasonably necessary to enforce the provisions of
8 this act, the Kansas retailers' sales tax act and the Kansas compensating tax
9 act. Such information may include documentation of sales made by
10 marketplace sellers through the marketplace facilitator's physical or
11 electronic marketplace. The department may prescribe by rules and
12 regulations the form and manner for providing this information.

13 (b) A marketplace facilitator is relieved of liability under this act for
14 failure to collect the correct amount of tax to the extent that the
15 marketplace facilitator can show to the department's satisfaction that the
16 error was due to incorrect or insufficient information given to the
17 marketplace facilitator by the marketplace seller, unless the marketplace
18 facilitator and marketplace seller are affiliated persons. When the
19 marketplace facilitator is relieved of liability under this subsection, the
20 marketplace seller is solely liable for the amount of uncollected tax due.

21 (c) Except as otherwise provided in this section, a marketplace seller
22 obligated to collect the taxes imposed under this act is not required to
23 collect such taxes on all taxable retail sales through a marketplace operated
24 by a marketplace facilitator if the marketplace seller entered into an
25 agreement with the marketplace facilitator indicating that the marketplace
26 facilitator is registered with the department and will collect all applicable
27 taxes due under this act, the Kansas retailers' sales tax act or the Kansas
28 compensating tax act on all taxable retail sales made on behalf of the
29 marketplace seller through the marketplace operated by the marketplace
30 facilitator. This subsection does not relieve a marketplace seller from
31 liability for uncollected taxes due under this act, the Kansas retailers' sales
32 tax act or the Kansas compensating tax act resulting from a marketplace
33 facilitator's failure to collect the proper amount of tax due when the error
34 was due to incorrect or insufficient information given to the marketplace
35 facilitator by the marketplace seller.

36 (d) No class action may be brought against a marketplace facilitator
37 in any court of this state on behalf of purchasers arising from or in any
38 way related to an overpayment of tax or applicable taxes and fees collected
39 by the marketplace facilitator, regardless of whether that claim is
40 characterized as a tax refund claim. Nothing in this subsection affects a
41 purchaser's right to seek a refund from the department as provided by the
42 Kansas retailers' sales tax act.

43 (e) The department shall solely audit the marketplace facilitator for

1 sales made by the marketplace seller but facilitated by the marketplace
2 facilitator. The department shall not audit marketplace sellers for sales
3 facilitated by a marketplace facilitator except to the extent the marketplace
4 facilitator seeks relief under subsection (b) or (c).

5 New Sec. 5. (a) Except as otherwise provided in this act, taxes
6 imposed under the Kansas retailers' sales tax act or the Kansas
7 compensating tax act and payable by a consumer directly to the
8 department are due, on returns prescribed by the department, as prescribed
9 by those acts.

10 (b) Nothing in this act affects the obligation of any purchaser from
11 this state to remit tax as to any applicable taxable transaction in which the
12 seller does not collect and remit tax.

13 New Sec. 6. (a) A marketplace facilitator that is subject to section 3,
14 and amendments thereto, and is complying with the requirements of the
15 Kansas retailers' sales tax act or the Kansas compensating tax act may only
16 seek a recovery of retail sales and use taxes, penalties or interest from the
17 department by following the recovery procedures established under the
18 Kansas retailers' sales tax act. However, no claim may be granted on the
19 basis that the taxpayer lacked a physical presence in this state and
20 complied with the tax collection provisions of the Kansas retailers' sales
21 tax act or the Kansas compensating tax act voluntarily.

22 (b) Neither the state nor any marketplace facilitator who collects and
23 remits tax under section 3, and amendments thereto, is liable to a
24 purchaser that claims that the tax has been over-collected because a
25 provision of this act is later deemed unlawful.

26 New Sec. 7. Except as otherwise provided in this act, the provisions
27 of K.S.A. 79-3601 through 79-3696, and amendments thereto, relating to
28 enforcement, collection and administration, insofar as practicable, shall
29 have full force and effect with respect to taxes imposed under the
30 provisions of this act.

31 New Sec. 8. The secretary of revenue shall adopt such rules and
32 regulations as deemed necessary for the administration of this act.

33 New Sec. 9. If any provision of this act or the application thereof to
34 any person or circumstance is held invalid, the invalidity shall not affect
35 other provisions or applications of the act that can be given effect without
36 the invalid provision or application, and to this end, the provisions of this
37 act are severable.

38 Sec. 10. K.S.A. 79-3702 is hereby amended to read as follows: 79-
39 3702. For the purposes of this act: (a) "Purchase price" means the
40 consideration paid or given or contracted to be paid or given by any person
41 to the seller of an article of tangible personal property for the article
42 purchased. The term shall include, in addition to the consideration paid or
43 given or contracted to be paid or given, the actual cost of transportation

1 from the place where the article was purchased to the person using the
2 same in this state. If a cash discount is allowed and taken on the sale it
3 shall be deducted in arriving at the purchase price.

4 (b) The meaning ascribed to words and phrases in K.S.A. 79-3602,
5 and amendments thereto, insofar as is practicable, shall be applicable
6 herein unless otherwise provided. The provisions of K.S.A. 79-3601-~~to~~
7 *through* 79-3625, ~~inclusive~~, 79-3650, ~~K.S.A.~~ 79-3693 and 79-3694, and
8 amendments thereto, relating to enforcement, collection and
9 administration, insofar as practicable, shall have full force and effect with
10 respect to taxes imposed under the provisions of this act.

11 (c) "Use" means the exercise within this state by any person of any
12 right or power over tangible personal property incident to the ownership of
13 that property, except that it shall not include processing, or the sale of the
14 property in the regular course of business, and except storage as
15 hereinafter defined.

16 (d) "Storage" means any keeping or retaining in this state for any
17 purpose except sale in the regular course of business or subsequent use
18 solely outside this state of tangible personal property purchased from a
19 retailer.

20 (e) "Storage" and "use" do not include the keeping, retaining or
21 exercising of any right or power over tangible personal property shipped or
22 brought into this state for the purpose of subsequently transporting it
23 outside the state for use thereafter solely outside the state, or for the
24 purpose of being processed, fabricated, or manufactured into, attached to
25 or incorporated into, other tangible personal property to be transported
26 outside the state and thereafter used solely outside the state.

27 (f) "Property used in processing" means: (1) Any tangible personal
28 property which, when used in fabrication, compounding, manufacturing or
29 germination, becomes an integral part of the new article resulting from
30 such fabrication, compounding, manufacturing, or germination, and
31 intended to be sold ultimately at retail; and (2) fuel which is consumed in
32 creating power, heat, or steam for processing or for generating electric
33 current.

34 (g) "Retailer" means every person engaged in the business of selling
35 tangible personal property for use within the meaning of this act, except
36 that, when in the opinion of the director it is necessary for the efficient
37 administration of this act to regard any salesperson, representatives,
38 truckers, peddlers or canvassers as the agents of the dealers, distributors,
39 supervisors, employers or persons under whom they operate or from whom
40 they obtain the tangible personal property sold by them, irrespective of
41 whether they are making sales on their own behalf or on behalf of such
42 dealers, distributors, supervisors, employers, or persons, the director may
43 so regard them and may regard the dealers, distributors, supervisors,

1 employers, or persons as retailers for the purposes of this act.

2 (h) (1) "Retailer doing business in this state" or any like term, means:

3 (A) Any retailer maintaining in this state, permanently, temporarily,
4 directly or indirectly through a subsidiary, agent or representative, an
5 office, distribution house, sales house, warehouse or other place of
6 business;

7 (B) any retailer utilizing an employee, independent contractor, agent,
8 representative, salesperson, canvasser, solicitor or other person operating
9 in this state either permanently or temporarily, for the purpose of selling,
10 delivering, installing, assembling, servicing, repairing, soliciting sales or
11 the taking of orders for tangible personal property;

12 (C) any retailer, including a contractor, repair person or other service
13 provider, who enters this state to perform services that are enumerated in
14 K.S.A. 79-3603, and amendments thereto, and who is required to secure a
15 retailer's sales tax registration certificate before performing those services;

16 (D) any retailer deriving rental receipts from a lease of tangible
17 personal property situated in this state;

18 (E) any person regularly maintaining a stock of tangible personal
19 property in this state for sale in the normal course of business; ~~and~~

20 (F) any retailer who has any other contact with this state that would
21 allow this state to require the retailer to collect and remit tax under the
22 provisions of the constitution and laws of the United States; *or*

23 (G) (i) *for any retailer that does not satisfy any of the requirements*
24 *contained in subparagraphs (A) through (F), such retailer shall be a*
25 *retailer doing business in this state, if:*

26 (a) *For the period beginning on January 1, 2020, through June 30,*
27 *2020, the retailer had in excess of \$100,000 of cumulative gross receipts*
28 *from sales by the retailer to customers in this state; or*

29 (b) *during the current or immediately preceding calendar year, the*
30 *retailer had in excess of \$100,000 of cumulative gross receipts from sales*
31 *by the retailer to customers in this state.*

32 (ii) (a) *For any retailer who satisfies the provisions of subparagraph*
33 *(G)(i), such retailer shall not be required to collect and remit any taxes*
34 *from sales occurring prior to July 1, 2020.*

35 (b) *For any retailer who satisfies the provisions of subparagraph*
36 *(G)(i)(b) for sales in the current calendar year for the first time, such*
37 *retailer shall be required to collect and remit the tax on any sales in excess*
38 *of \$100,000 of the cumulative gross receipts from sales in the current*
39 *calendar year by the retailer to customers in this state.*

40 (2) A retailer shall be presumed to be doing business in this state if
41 any of the following occur:

42 (A) Any person, other than a common carrier acting in its capacity as
43 such, that has nexus with the state sufficient to require such person to

1 collect and remit taxes under the provisions of the constitution and laws of
2 the United States if such person were making taxable retail sales of
3 tangible personal property or services in this state:

4 (i) Sells the same or a substantially similar line of products as the
5 retailer and does so under the same or a substantially similar business
6 name;

7 (ii) maintains a distribution house, sales house, warehouse or similar
8 place of business in Kansas that delivers or facilitates the sale or delivery
9 of property sold by the retailer to consumers;

10 (iii) uses trademarks, service marks, or trade names in the state that
11 are the same or substantially similar to those used by the retailer;

12 (iv) delivers, installs, assembles or performs maintenance services for
13 the retailer's customers within the state;

14 (v) facilitates the retailer's delivery of property to customers in the
15 state by allowing the retailer's customers to pick up property sold by the
16 retailer at an office, distribution facility, warehouse, storage place or
17 similar place of business maintained by the person in the state;

18 (vi) has a franchisee or licensee operating under its trade name if the
19 franchisee or the licensee is required to collect the tax under the Kansas
20 retailers' sales tax act; or

21 (vii) conducts any other activities in the state that are significantly
22 associated with the retailer's ability to establish and maintain a market in
23 the state for the retailer's sales.

24 (B) Any affiliated person conducting activities in this state described
25 in subparagraph (A) or (C) has nexus with this state sufficient to require
26 such person to collect and remit taxes under the provisions of the
27 constitution and laws of the United States if such person were making
28 taxable retail sales of tangible personal property or services in this state.

29 (C) The retailer enters into an agreement with one or more residents
30 of this state under which the resident, for a commission or other
31 consideration, directly or indirectly ~~refers potential customers, whether by~~
32 ~~a link or an internet website~~ *sells tangible personal property or services*
33 *for or on behalf of the retailer*, by telemarketing, by an in-person oral
34 presentation, or otherwise, ~~to the retailer, if the cumulative gross receipts~~
35 ~~from sales by the retailer to customers in the state who are referred to the~~
36 ~~retailer by all residents with this type of an agreement with the retailer is in~~
37 ~~excess of \$10,000 during the preceding 12 months.~~ This presumption may
38 be rebutted by submitting proof that the residents with whom the retailer
39 has an agreement did not engage in any activity within the state that was
40 significantly associated with the retailer's ability to establish or maintain
41 the retailer's market in the state during the preceding 12 months. Such
42 proof may consist of sworn written statements from all of the residents
43 with whom the retailer has an agreement stating that they did not engage in

1 any solicitation in the state on behalf of the retailer during the preceding
2 year, provided that such statements were provided and obtained in good
3 faith. This subparagraph shall take effect 90 days after the enactment of
4 this statute and shall apply to sales made and uses occurring on or after the
5 effective date of this subparagraph and without regard to the date the
6 retailer and the resident entered into the agreement described in this
7 subparagraph. The term "preceding 12 months" as used in this
8 subparagraph includes the 12 months commencing prior to the effective
9 date of this subparagraph.

10 (D) The presumptions in subparagraphs (A) and (B) may be rebutted
11 by demonstrating that the activities of the person or affiliated person in the
12 state are not significantly associated with the retailer's ability to establish
13 or maintain a market in this state for the retailer's sales.

14 (E) *The retailer is subject to the provisions set forth in subsection (h)*
15 *(1)(G) for a retailer doing business in this state and has in excess of*
16 *\$100,000 of cumulative gross receipts from sales by the retailer to*
17 *customers in this state. Such retailer shall have nexus with this state*
18 *sufficient to require such retailer to collect and remit taxes.*

19 (3) The processing of orders electronically, by fax, telephone, the
20 internet or other electronic ordering process, does not relieve a retailer of
21 responsibility for collection of the tax from the purchaser if the retailer is
22 doing business in this state pursuant to this section.

23 (i) *As used in this section:*

24 (1) *"Affiliated person" means the same as defined in section 2, and*
25 *amendments thereto.*

26 (2) *"Cumulative gross receipts" means the same as defined in section*
27 *2, and amendments thereto.*

28 (3) *"Director" means the director of taxation.*

29 ~~(j) As used in this section, "affiliated person" means any person that~~
30 ~~is a member of the same "controlled group of corporations" as defined in~~
31 ~~section 1563(a) of the federal internal revenue code as the retailer or any~~
32 ~~other entity that, notwithstanding its form of organization, bears the same~~
33 ~~ownership relationship to the retailer as a corporation that is a member of~~
34 ~~the same "controlled group of corporations" as defined in section 1563(a)~~
35 ~~of the federal internal revenue code.~~

36 Sec. 11. K.S.A. 79-3702 is hereby repealed.

37 Sec. 12. This act shall take effect and be in force from and after its
38 publication in the statute book.