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Understanding Marketplace Facilitator Laws

A “marketplace facilitator” is an entity that contracts with third parties to facilitate the sale of goods or services on its platform. Marketplace facilitators enable these sales by using their platform to advertise, promote, or otherwise portray for sale a product or service on behalf of a third party **and** collect or process a payment for such good or service. Notable marketplace facilitator platforms include Amazon, eBay, and Etsy. It should be noted that simply posting an advertisement for a product or service alone does not make a platform a marketplace facilitator, nor does the sole act of processing or collecting a payment on behalf of a third party make a financial or other institution a marketplace facilitator. In order to be a marketplace facilitator, the entity must both advertise the product or service as well as collect or process the payment for that product or service.

Marketplace facilitator laws do not change which products or services are taxable in a state. The laws only change which party is responsible for collecting and remitting the sales and use tax that is due. When products are purchased in Georgia and the seller does not collect and remit the sales and use tax on behalf of the purchaser, that purchaser is then responsible for remitting the sales and use tax to the Georgia Department of Revenue. Marketplace facilitator legislation takes the responsibility away from the purchaser and places that responsibility with the more willing and capable facilitator.

Marketplace facilitator legislation and associated administrative rules have been in place across the country since 2016. In the 2018 *South Dakota v. Wayfair* case, the U.S. Supreme Court ruled that states could mandate out-of-state retailers to collect and remit sales tax on behalf of customers for in-state purchases. This decision enhanced the financial significance of marketplace facilitator laws to the states. Prior to the ruling, states could only require retailers with a physical or click-through nexus to collect and remit sales tax on behalf of their customers. The ruling allowed states to require retailers with an economic nexus in the state to collect and remit sales tax on behalf of their customers. The *South Dakota v. Wayfair* ruling established a \$100,000 in sales or 200 transactions per year economic nexus threshold.

In anticipation of a ruling in the *South Dakota v. Wayfair* case, HB 61 was passed during the 2018 Session. The bill established an economic nexus in Georgia at \$250,000 per year in sales or more than 200 transactions. Following the ruling, the Georgia economic nexus law was amended during the 2019 Legislative Session to match the \$100,000 threshold set in the *South Dakota v. Wayfair* decision. The inclusion of an economic nexus allows the state to require many large companies selling into Georgia to collect and remit sales and use tax on Georgia purchases, but it does not require out-of-state small businesses which do not meet the thresholds to collect and remit the tax. The marketplace facilitator

law would allow for platforms with an established nexus to be responsible for collecting and remitting on behalf of the small businesses utilizing their services.

Impact on Georgia

Marketplace facilitator legislation or rules have been passed in 37 of the 45 states with sales and use taxes, as well as in the District of Columbia. Georgia, Kansas, Louisiana, Michigan, Missouri, Mississippi, and Tennessee are the only states with sales and use taxes that have not passed marketplace facilitator legislation. The bulk of these laws were passed and implemented during the 2018 and 2019 Legislative Sessions.

Since the Great Recession, Georgia sales and use tax revenue growth has not kept pace with income tax growth. While it may not be the only cause of this lag, the new and growing market for online sales has almost certainly played a significant role. When consumers purchase products from small out-of-state retailers without nexus in Georgia that are utilizing platforms such as Amazon, Etsy, and eBay, the sellers are not responsible for nor are they collecting and remitting the sales and use tax on those purchases. In these cases, it is the consumer who is still responsible for remitting the tax due. Given the time that would be necessary to audit all out-of-state purchases, it does not make financial sense for the Department of Revenue to attempt to enforce the law of self-remitting sales and use taxes by typical consumers, so this revenue is lost.

Based on fiscal notes completed during the 2019 Legislative Session, a marketplace facilitator law effective July 1, 2019 would have generated over \$78 million for the state and over \$64 million for local governments in FY 2020.

If you would like to discuss this topic further please contact Brian Groome at either (404) 656-0134 or brian.groome@house.ga.gov.