

HOUSE BILL No. 2014

By Representative Johnson

6-3

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

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

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

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

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

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

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

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

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

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

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

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

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

36 (iv) software development or research and development activities

1 related to any of the activities described in this subsection, if such
2 activities are directly related to a physical or electronic marketplace
3 operated by the person or an affiliated person; and

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

6 (i) Payment processing services;

7 (ii) fulfillment, delivery or storage services;

8 (iii) listing products for sale;

9 (iv) setting prices;

10 (v) branding sales as those of the marketplace facilitator;

11 (vi) order taking;

12 (vii) advertising or promotion; or

13 (viii) providing customer service or accepting or assisting with
14 returns or exchanges.

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

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

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

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

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

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

1 (h) "Seller" shall have the same meaning as defined in K.S.A. 79-
2 3602(mm), and amendments thereto, and includes marketplace facilitators,
3 whether making sales in the seller's own right or on behalf of marketplace
4 sellers.

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

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

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

20 New Sec. 3. (a) On and after July 1, 2020, any marketplace facilitator
21 that meets the criteria in subsection (b) or that has a physical presence in
22 this state, must collect and remit retail sales or use tax on all taxable retail
23 sales made or facilitated by the marketplace facilitator into this state
24 pursuant to this act. Marketplace facilitators must begin collecting state
25 and local retail sales or use taxes on taxable retail sales made or facilitated
26 by the marketplace facilitator sourced to this state beginning on the first
27 day of the next calendar month that is at least 30 days from the date that
28 the marketplace facilitator met the threshold described in subsection (b).
29 On and after July 1, 2021, any marketplace facilitator that is obligated to
30 collect the taxes imposed under this act, shall also collect and remit to the
31 department applicable prepaid wireless 911 fees imposed under K.S.A. 12-
32 5371, and amendments thereto.

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

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

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

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

43 (B) For any marketplace facilitator who satisfies the provisions of

1 subsection (b)(1)(B) for sales in the current calendar year for the first time,
2 such marketplace facilitator shall be required to collect and remit the tax
3 on the cumulative gross receipts from sales in the current calendar year by
4 the marketplace facilitator to customers in this state.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 given or contracted to be paid or given, the actual cost of transportation
2 from the place where the article was purchased to the person using the
3 same in this state. If a cash discount is allowed and taken on the sale it
4 shall be deducted in arriving at the purchase price.

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

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

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

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

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

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

1 so regard them and may regard the dealers, distributors, supervisors,
2 employers, or persons as retailers for the purposes of this act.

3 (h) (1) "Retailer doing business in this state" or any like term, means:
4 (A) Any retailer maintaining in this state, permanently, temporarily,
5 directly or indirectly through a subsidiary, agent or representative, an
6 office, distribution house, sales house, warehouse or other place of
7 business;

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

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

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

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

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

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

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

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

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

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

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

43 (A) Any person, other than a common carrier acting in its capacity as

1 such, that has nexus with the state sufficient to require such person to
2 collect and remit taxes under the provisions of the constitution and laws of
3 the United States if such person were making taxable retail sales of
4 tangible personal property or services in this state:

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

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

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

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

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

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

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

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

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

1 with whom the retailer has an agreement stating that they did not engage in
2 any solicitation in the state on behalf of the retailer during the preceding
3 year, provided that such statements were provided and obtained in good
4 faith. This subparagraph shall take effect 90 days after the enactment of
5 this statute and shall apply to sales made and uses occurring on or after the
6 effective date of this subparagraph and without regard to the date the
7 retailer and the resident entered into the agreement described in this
8 subparagraph. The term "preceding 12 months" as used in this
9 subparagraph includes the 12 months commencing prior to the effective
10 date of this subparagraph.

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

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

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

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

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

27 (2) *"Cumulative gross receipts" means the same as defined in section*
28 *2, and amendments thereto.*

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

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

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

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