

HOUSE BILL No. 2657

By Committee on Taxation

2-12

Proposed Amendments
2020 House Bill No. 2657
Prepared by: Office of Revisor of Statutes
Marketplace facilitators

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 10, and
7 amendments thereto, shall be 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 10, 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, through one or more affiliated
28 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) "Platform" means an electronic or physical medium, including a
41 website or catalog, operated by a referrer.~~

42 ~~(h) "Referral" means the transfer by a referrer of a potential customer
43 to a seller or marketplace seller that advertises or lists products for sale on~~

1 the referrer's platform.
2 (1) (1) "Referrer" means a person, other than a person engaging in the
3 business of printing a newspaper or publishing a newspaper, who contracts
4 or otherwise agrees with a seller or marketplace seller to list or advertise
5 for sale one or more items in any medium, including a website or catalog;
6 receives a commission, fee or other consideration from the seller for the
7 listing or advertisement; transfers, via telephone, internet link, or other
8 means, a purchaser to a seller, marketplace seller or an affiliated person to
9 complete the sale; and does not collect receipts from the purchasers for the
10 transaction.
11 (2) "Referrer" does not include a person that:
12 (A) Provides internet advertising services; and
13 (B) does not ever provide either the seller's or marketplace seller's
14 shipping terms or advertise whether the seller or marketplace seller
15 charges sales tax.
16 (j) "Sale" or "sales" shall have the same meaning as defined in K.S.A.
17 79-3602(kk), and amendments thereto, whether or not such sales qualify
18 for a sales tax exemption.
19 (k) "Seller" shall have the same meaning as defined in K.S.A. 79-
20 3602(mm), and amendments thereto, and includes marketplace facilitators,
21 whether making sales in the seller's own right or on behalf of marketplace
22 sellers.
23 (l) "Tax" means the sales tax imposed under K.S.A. 79-3603, and
24 amendments thereto, or the use tax imposed under K.S.A. 79-3703, and
25 amendments thereto.
26 (m) "Transaction" means a sale of tangible personal property or a
27 service by a marketplace seller including, but not limited to, all such
28 marketplace seller's transactions for tangible personal property or a
29 service, however consummated, including transactions completed on a
30 website operated by: (1) The marketplace seller; (2) an affiliated person; or
31 (3) a contract party, including a marketplace facilitator.
32 (n) The meaning ascribed to words and phrases in K.S.A. 79-3602,
33 and amendments thereto, insofar as practicable, shall be applicable herein
34 unless otherwise provided.
35 New Sec. 3. (a) On and after July 1, 2020, any marketplace facilitator
36 that meets the criteria in subsection (b) or that has a physical presence in
37 this state, must collect and remit retail sales or use tax on all taxable retail
38 sales made or facilitated by the marketplace facilitator into this state
39 pursuant to this act. Marketplace facilitators must begin collecting state
40 and local retail sales or use taxes on taxable retail sales made or facilitated
41 by the marketplace facilitator sourced to this state beginning on the first
42 day of the next calendar month that is at least 30 days from the date that
43 the marketplace facilitator met the threshold described in subsection (b).

1 (b) A marketplace facilitator is subject to subsection (a) if:
 2 (1) (A) For the period beginning on January 1, 2020, through June 30,
 3 2020, the marketplace facilitator had cumulative gross receipts from retail
 4 sales sourced to this state; or
 5 (B) during the current or immediately preceding calendar year, the
 6 marketplace facilitator had cumulative gross receipts from retail sales
 7 sourced to this state.

of \$100,000 or more

8 (2) (A) For any marketplace facilitator who satisfies the provisions of
 9 subsection (b)(1)(A), such retailer shall not be required to collect and remit
 10 any taxes from sales occurring prior to ~~June 30~~, 2020.

July 1

11 (B) For any marketplace facilitator who satisfies the provisions of
 12 subsection (b)(1)(B) for sales in the current calendar year for the first time,
 13 such marketplace facilitator shall be required to collect and remit the tax
 14 on the cumulative gross receipts from sales in the current calendar year by
 15 the marketplace facilitator to customers in this state.

16 New Sec. 4. (a) In addition to other applicable recordkeeping
 17 requirements, the department may require a marketplace facilitator ~~or~~
 18 ~~referrer~~ to provide or make available to the department any information the
 19 department determines is reasonably necessary to enforce the provisions of
 20 this act, the Kansas retailers' sales tax act and the Kansas compensating tax
 21 act. Such information may include documentation of sales made by
 22 marketplace sellers through the marketplace facilitator's physical or
 23 electronic marketplace. The department may prescribe by rules and
 24 regulations the form and manner for providing this information.

25 (b) A marketplace facilitator is relieved of liability under this act for
 26 failure to collect the correct amount of tax to the extent that the
 27 marketplace facilitator can show to the department's satisfaction that the
 28 error was due to incorrect or insufficient information given to the
 29 marketplace facilitator by the marketplace seller, unless the marketplace
 30 facilitator and marketplace seller are affiliated persons. When the
 31 marketplace facilitator is relieved of liability under this subsection, the
 32 marketplace seller is solely liable for the amount of uncollected tax due.

33 (c) Except as otherwise provided in this section, a marketplace seller
 34 obligated to collect the taxes imposed under this act is not required to
 35 collect such taxes on all taxable retail sales through a marketplace operated
 36 by a marketplace facilitator if the marketplace seller entered into an
 37 agreement with the marketplace facilitator indicating that the marketplace
 38 facilitator is registered with the department and will collect all applicable
 39 taxes due under this act, the Kansas retailers' sales tax act or the Kansas
 40 compensating tax act on all taxable retail sales made on behalf of the
 41 marketplace seller through the marketplace operated by the marketplace
 42 facilitator. This subsection does not relieve a marketplace seller from
 43 liability for uncollected taxes due under this act, the Kansas retailers' sales

1 tax act or the Kansas compensating tax act resulting from a marketplace
2 facilitator's failure to collect the proper amount of tax due when the error
3 was due to incorrect or insufficient information given to the marketplace
4 facilitator by the marketplace seller.

5 (d) No class action may be brought against a marketplace facilitator
6 in any court of this state on behalf of purchasers arising from or in any
7 way related to an overpayment of sales or use tax collected by the
8 marketplace facilitator ~~or referrer~~, regardless of whether that claim is
9 characterized as a tax refund claim. Nothing in this subsection affects a
10 purchaser's right to seek a refund from the department as provided by the
11 Kansas retailers' sales tax act.

or other applicable taxes and fees

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

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

17 (b) Nothing in this act affects the obligation of any purchaser from
18 this state to remit retail sales or use tax as to any applicable taxable
19 transaction in which the seller does not collect and remit retail sales or use
20 tax.

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

30 (b) Neither the state nor any marketplace facilitator who collects and
31 remits retail sales or use tax under section 3, and amendments thereto, is
32 liable to a purchaser that claims that the retail sales or use tax has been
33 over-collected because a provision of this act is later deemed unlawful.

34 New Sec. 7. (a) A marketplace seller, or a marketplace facilitator that
35 is obligated to collect the taxes imposed under this act, the Kansas
36 retailers' sales tax act or the Kansas compensating tax act must also collect
37 all other applicable taxes and fees in effect as of the effective date of this
38 section. For purposes of this section, "taxes and fees" means any monetary
39 exaction, regardless of its label, imposed on a buyer and that the
40 marketplace seller or marketplace facilitator is required to collect and pay
41 over to the department.

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42 (b) Beginning on and after July 1, ~~2020~~, the collection and remittance
43 obligations of a marketplace facilitator under this act also apply to any

1 other taxes and fees, as defined under this section, that are imposed on a
2 retail sale made or facilitated by the marketplace facilitator, whether in its
3 own right or as an agent of a marketplace seller, regardless of whether the
4 marketplace seller has a tax collection obligation.

5 New Sec. 8. Except as otherwise provided in this act, the provisions
6 of K.S.A. 79-3601 through 79-3696, and amendments thereto, relating to
7 enforcement, collection and administration, insofar as practicable, shall
8 have full force and effect with respect to taxes imposed under the
9 provisions of this act.

10 New Sec. 9. The secretary of revenue shall adopt such rules and
11 regulations as deemed necessary for the administration of this act.

12 New Sec. 10. If any provision of this act or the application thereof to
13 any person or circumstance is held invalid, the invalidity shall not affect
14 other provisions or applications of the act that can be given effect without
15 the invalid provision or application, and to this end, the provisions of this
16 act are severable.

17 Sec. 11. K.S.A. 79-3702 is hereby amended to read as follows: 79-
18 3702. For the purposes of this act: (a) "Purchase price" means the
19 consideration paid or given or contracted to be paid or given by any person
20 to the seller of an article of tangible personal property for the article
21 purchased. The term shall include, in addition to the consideration paid or
22 given or contracted to be paid or given, the actual cost of transportation
23 from the place where the article was purchased to the person using the
24 same in this state. If a cash discount is allowed and taken on the sale it
25 shall be deducted in arriving at the purchase price.

26 (b) The meaning ascribed to words and phrases in K.S.A. 79-3602,
27 and amendments thereto, insofar as is practicable, shall be applicable
28 herein unless otherwise provided. The provisions of K.S.A. 79-3601 ~~to~~
29 ~~through 79-3625, inclusive, 79-3650, K.S.A. 79-3693 and 79-3694,~~ and
30 amendments thereto, relating to enforcement, collection and
31 administration, insofar as practicable, shall have full force and effect with
32 respect to taxes imposed under the provisions of this act.

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

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

42 (e) "Storage" and "use" do not include the keeping, retaining or
43 exercising of any right or power over tangible personal property shipped or

1 brought into this state for the purpose of subsequently transporting it
2 outside the state for use thereafter solely outside the state, or for the
3 purpose of being processed, fabricated, or manufactured into, attached to
4 or incorporated into, other tangible personal property to be transported
5 outside the state and thereafter used solely outside the state.

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

13 (g) "Retailer" means every person engaged in the business of selling
14 tangible personal property for use within the meaning of this act, except
15 that, when in the opinion of the director it is necessary for the efficient
16 administration of this act to regard any salesperson, representatives,
17 truckers, peddlers or canvassers as the agents of the dealers, distributors,
18 supervisors, employers or persons under whom they operate or from whom
19 they obtain the tangible personal property sold by them, irrespective of
20 whether they are making sales on their own behalf or on behalf of such
21 dealers, distributors, supervisors, employers, or persons, the director may
22 so regard them and may regard the dealers, distributors, supervisors,
23 employers, or persons as retailers for the purposes of this act.

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

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

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

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

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

42 (F) any retailer who has any other contact with this state that would
43 allow this state to require the retailer to collect and remit tax under the

1 provisions of the constitution and laws of the United States; ~~and~~

2 (G) (i) for any retailer that does not satisfy any of the requirements

3 contained in subparagraphs (A) through (F), such retailer shall be a

4 retailer doing business in this state, if:

5 (a) For the period beginning on January 1, 2020, through June 30,

6 2020, the retailer had ~~cumulative gross receipts from sales by the retailer~~

7 to customers in this state; or

8 (b) during the current or immediately preceding calendar year, the

9 retailer had ~~cumulative gross receipts from sales by the retailer to~~

10 customers in this state.

11 (ii) (a) For any retailer who satisfies the provisions of subparagraph

12 (G)(i), such retailer shall not be required to collect and remit any taxes

13 from sales occurring prior to July 1, 2020.

14 (b) For any retailer who satisfies the provisions of subparagraph

15 (G)(i)(b) for sales in the current calendar year for the first time, such

16 retailer shall be required to collect and remit the tax on ~~the cumulative~~

17 gross receipts from sales in the current calendar year by the retailer to

18 customers in this state.

19 (2) A retailer shall be presumed to be doing business in this state if

20 any of the following occur:

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

22 such, that has nexus with the state sufficient to require such person to

23 collect and remit taxes under the provisions of the constitution and laws of

24 the United States if such person were making taxable retail sales of

25 tangible personal property or services in this state:

26 (i) Sells the same or a substantially similar line of products as the

27 retailer and does so under the same or a substantially similar business

28 name;

29 (ii) maintains a distribution house, sales house, warehouse or similar

30 place of business in Kansas that delivers or facilitates the sale or delivery

31 of property sold by the retailer to consumers;

32 (iii) uses trademarks, service marks, or trade names in the state that

33 are the same or substantially similar to those used by the retailer;

34 (iv) delivers, installs, assembles or performs maintenance services for

35 the retailer's customers within the state;

36 (v) facilitates the retailer's delivery of property to customers in the

37 state by allowing the retailer's customers to pick up property sold by the

38 retailer at an office, distribution facility, warehouse, storage place or

39 similar place of business maintained by the person in the state;

40 (vi) has a franchisee or licensee operating under its trade name if the

41 franchisee or the licensee is required to collect the tax under the Kansas

42 retailers' sales tax act; or

43 (vii) conducts any other activities in the state that are significantly

or

in excess of \$100,000 of

any sales in excess of \$100,000 of

1 associated with the retailer's ability to establish and maintain a market in
2 the state for the retailer's sales.

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

8 (C) The retailer enters into an agreement with one or more residents
9 of this state under which the resident, for a commission or other
10 consideration, directly or indirectly ~~refers potential customers, whether by~~
11 ~~a link or an internet website,~~ by telemarketing, by an in-person oral
12 presentation, or otherwise, ~~to the retailer, if the cumulative gross receipts~~
13 ~~from sales by the retailer to customers in the state who are referred to the~~
14 ~~retailer by all residents with this type of an agreement with the retailer is in~~
15 ~~excess of \$10,000 during the preceding 12 months.~~ This presumption may
16 be rebutted by submitting proof that the residents with whom the retailer
17 has an agreement did not engage in any activity within the state that was
18 significantly associated with the retailer's ability to establish or maintain
19 the retailer's market in the state during the preceding 12 months. Such
20 proof may consist of sworn written statements from all of the residents
21 with whom the retailer has an agreement stating that they did not engage in
22 any solicitation in the state on behalf of the retailer during the preceding
23 year, provided that such statements were provided and obtained in good
24 faith. This subparagraph shall take effect 90 days after the enactment of
25 this statute and shall apply to sales made and uses occurring on or after the
26 effective date of this subparagraph and without regard to the date the
27 retailer and the resident entered into the agreement described in this
28 subparagraph. The term "preceding 12 months" as used in this
29 subparagraph includes the 12 months commencing prior to the effective
30 date of this subparagraph.

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

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

39 (i) "Director" means the director of taxation.

40 (j) As used in this section, "affiliated person" means any person that
41 is a member of the same "controlled group of corporations" as defined in
42 section 1563(a) of the federal internal revenue code as the retailer or any
43 other entity that, notwithstanding its form of organization, bears the same

sells tangible personal property or services for or
 on behalf of the retailer

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

As used in this section:

(1) "Affiliated person" shall have the same meaning as
 provided in section 2, and amendments thereto.

(2) "Cumulative gross receipts" shall have the same
 meaning as provided in section 2, and amendments thereto.

(3)

1 ownership relationship to the retailer as a corporation that is a member of
2 the same "controlled group of corporations" as defined in section 1563(a)
3 of the federal internal revenue code "~~cumulative gross receipts" means~~
4 ~~gross receipts as defined in K.S.A. 79-3602, and amendments thereto, and~~
5 ~~includes the gross receipts received by the retailer from its own direct~~
6 ~~sales combined with the gross receipts from sales facilitated on~~
7 ~~behalf of the retailers by a marketplace facilitator or marketplace~~
8 ~~facilitators, as defined in section 2, and amendments thereto.~~

9 Sec. 12. K.S.A. 79-3702 is hereby repealed.

10 Sec. 13. This act shall take effect and be in force from and after its
11 publication in the statute book.