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Indicates New Matter

COMMITTEE REPORT

March 27, 2019

**S. 214**

Introduced by Senators Kimpson, Sheheen, Gregory, Campsen and Scott

S. Printed 3/27/19--H.

Read the first time March 19, 2019.

**THE COMMITTEE ON WAYS AND MEANS**

To whom was referred a Bill (S. 214) to amend the Code of Laws of South Carolina, 1976, by adding Section 12‑36‑71 so as to define “marketplace facilitator”; to amend Sections 12, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass:

G. MURRELL SMITH, JR. for Committee.

**STATEMENT OF ESTIMATED FISCAL IMPACT**

**Explanation of Fiscal Impact**

**Updated for Additional Agency Response**

**Introduced on January 8, 2019**

**State Revenue**

This bill reinforces current sales tax terminology for retailers, sellers, and gross proceeds of sale and coincides with South Carolina longstanding sales tax policy that requires retailers including marketplace facilitators to remit sale and use tax on all retail sales of tangible personal property not otherwise excluded or exempted. Since this language does not represent a change in South Carolina’s longstanding sales tax policy, we do not anticipate that enactment of this bill will result in any revenue that is not currently due to the state. However, at least one retailer has a different interpretation and is not remitting sales and use tax in compliance with state law.

At the present time, DOR has initiated litigation due to significant audit findings over non-compliance with this longstanding practice. If, as anticipated, DOR prevails in the litigation, the retailer not currently in compliance with state law, is expected to remit uncollected taxes from prior years and comply prospectively, assuming no other issues are raised. It is assumed that any other such retailer would also comply with state law and the court opinion. On the other hand, if DOR’s position is not upheld by the courts, then this legislation could replace an adverse finding, clarify the state’s policy going forward, and result in collecting the same revenue supported by the current expectation.

The amount of this disputed revenue is undetermined. Any estimate would depend on knowing the exact amount of sales and noncompliance by one or more retailers and since these details are not publicly known, an estimate cannot be easily determined. As a point of reference, the current litigation is based on an audit finding by DOR, which estimated uncollected state and local sales taxes for one three-month period be to approximately $12,000,000. Extrapolating this finding for a full year would result in annual amount of $48,000,000. Although a more precise estimate depends upon data not publicly available, other data such as the number of and sales by other retailers who are also not complying with the longstanding tax policy, and conversely, sales by those retailers who may have started otherwise complying with state law before the adoption of this act are unknown. This fiscal impact statement has been updated based on additional information provided by DOR.

**Local Revenue**

A portion of any revenue collected by DOR, for example local option, capital projects, and local transportation sales taxes, would be attributable to local governments.

**State Revenue**

This bill reinforces current sales tax terminology for retailers, sellers, and gross proceeds of sale and coincides with South Carolina longstanding sales tax policy that requires retailers including marketplace facilitators to remit sale and use tax on all retail sales of tangible personal property not otherwise excluded or exempted. Since this language does not represent a change in South Carolina’s longstanding sales tax policy, we do not anticipate that the State will realize any appreciable increase in sales and use tax revenue from the enactment of this bill.

Frank A. Rainwater, Executive Director

Revenue and Fiscal Affairs Office

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 12‑36‑71 SO AS TO DEFINE “MARKETPLACE FACILITATOR”; TO AMEND SECTIONS 12‑36‑70, 12‑36‑90, AND 12‑36‑130, ALL RELATING TO SALES TAX DEFINITIONS, SO AS TO FURTHER INFORM MARKETPLACE FACILITATORS OF THEIR REQUIREMENTS; AND TO AMEND SECTION 12‑36‑1340, RELATING TO THE COLLECTION OF SALES TAX BY RETAILERS, SO AS TO FURTHER INFORM MARKETPLACE FACILITATORS OF THEIR REQUIREMENTS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. The General Assembly finds:

(1) the South Carolina Sales and Use Tax Act requires any person engaged in business as a retailer to remit the sales and use tax on all retail sales of tangible personal property not otherwise excluded or exempted from the tax. This requirement applies to all retail sales of tangible personal property by the retailer, whether the tangible personal property is owned by the retailer or another person. Retailers selling tangible personal property at retail on consignment, by auction, or in any other manner must remit the sales and use tax on such retail sales;

(2) the Internet marketplaces where a person sells tangible personal property at retail by listing or advertising, or allowing the listing or advertising of, another person’s products on an online marketplace and collects or processes the payment from the customer are retailers required to remit the sales and use tax on such retail sales under the provisions of South Carolina sales and use tax law;

(3) with the changing economy and ever expanding role of the Internet in the retail market, the longstanding requirement in the sales and use tax law that a retailer remit the tax on retail sales of tangible personal property owned by another person must apply to all retailers, including both Internet retailers and brick and mortar retailers;

(4) retailers selling another person’s tangible personal property on the Internet must clearly understand and be informed of their requirements to remit the sales and use tax in the same manner as retailers selling another person’s tangible personal property in a brick and mortar store; and

(5) this act shall not be construed as a statement concerning the applicability of the South Carolina Sales and Use Tax Act to any sales and use tax liability in matters currently in litigation or being audited.

SECTION 2. Article 1, Chapter 36, Title 12 of the 1976 Code is amended by adding:

“Section 12‑36‑71. (A)(1) ‘Marketplace facilitator’ means any person engaged in the business of facilitating a retail sale of tangible personal property by:

(a) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur; and

(b) collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party.

(2) If a person meets the criteria set forth in item (1), then that person is a marketplace facilitator regardless of whether the person receives compensation or other consideration in exchange for his services.

(B) A marketplace may be physical or electronic and includes, but is not limited to, any space, store, booth, catalog, website, television or radio broadcast, or similar place, medium, or forum.

(C) For purposes of subsection (A), a marketplace facilitator includes any related entities assisting the marketplace facilitator in sales, storage, distribution, payment collection, or in any other manner, with respect to the marketplace.

(D) When a marketplace facilitator is comprised of multiple entities, the entity that lists or advertises, or allows the listing or advertising of, the products sold at retail in the marketplace is the entity responsible for remitting the sales and use tax to the State.”

SECTION 3. Section 12‑36‑70 of the 1976 Code is amended by adding a new item before the last undesignated paragraph to read:

“(3) operating as a marketplace facilitator, as defined in Section 12‑36‑71.”

SECTION 4. Section 12‑36‑90(1)(a) of the 1976 Code is amended to read:

“(a) the proceeds from the sale of property sold on consignment by the taxpayer, including property sold through a marketplace by a marketplace facilitator;”

SECTION 5. Section 12‑36‑130(1) of the 1976 Code is amended by adding a new subitem to read:

“(c) the proceeds from the sale of property sold on consignment by the taxpayer, including property sold through a marketplace by a marketplace facilitator.”

SECTION 6. Section 12‑36‑1340 of the 1976 Code is amended to read:

“Section 12‑36‑1340. Each seller making retail sales of tangible personal property for storage, use, or other consumption in this State shall collect and remit the tax in accordance with this chapter and shall obtain from the department a retail license as provided in this chapter, if the retail seller:

(1) maintains a place of business;

(2) qualifies to do business;

(3) solicits and receives purchases or orders by an agent, ~~or salesman~~ an independent contractor, a representative, an Internet website, or any other means; ~~or~~

(4) distributes catalogs, or other advertising matter, and by reason of that distribution receives and accepts orders from residents within the State;

(5) operates as a marketplace facilitator; or

(6) meets constitutional standards for economic nexus with South Carolina for purposes of the sales and use tax.”

SECTION 7. This act takes effect upon approval by the Governor.

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