STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 12, 2019

Opinion No. 19-03

Authority of Department of Revenue to Promulgate Rules Requiring Online Marketplace Facilitators to Collect Sales Tax

Question 1

Does an online marketplace facilitator "engage in the regular or systematic solicitation of a consumer market" when promoting the retail sale of tangible personal property by third-party sellers?

Opinion 1

Yes. An online marketplace facilitator, as defined for purposes of this opinion, engages in the regular, systematic solicitation of a consumer market in this State.

Question 2

If the answer to Question 1 is "yes," would such an online marketplace facilitator be considered a "dealer" for purposes of Tennessee Code Annotated Title 67, Chapter 6?

Opinion 2

An online marketplace facilitator that solicits sales from Tennessee customers would be considered a "dealer" under Tennessee law if it consummates the sales transactions with those consumers.

Question 3

Is the Department of Revenue currently empowered under Tennessee Code Annotated §§ 67-6-402 and 67-6-501 to promulgate rules requiring online marketplace facilitators to collect and remit sales tax on behalf of out-of-state dealers?

Opinion 3

The Department of Revenue currently is empowered to promulgate rules requiring online marketplace facilitators to collect and remit sales tax on behalf of out-of-state dealers, provided the facilitators themselves are not out-of-state dealers.

ANALYSIS

The Tennessee Retailers' Sales Tax Act levies a sales and use tax "[f]or the exercise of the privilege of engaging in the business of selling tangible personal property at retail in this state." Tenn. Code Ann. § 67-6-202(a). The tax "is levied on the sales price of each item or article of tangible personal property when sold at retail in this state." *Id.* "Every dealer making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state, . . . is liable for the tax imposed by this chapter." Tenn. Code Ann. § 67-6-501(a).

The Act broadly defines "dealer" to include, among others, every person who "[e]ngages in the regular or systematic solicitation of a consumer market in this state by the distribution of . . . advertising, or by means of . . . telephone, computer data base, cable, . . . or other communication system." Tenn. Code Ann. § 67-6-102(23)(J).

For purposes of this opinion, we assume that the "online marketplace facilitator" referred to by the Requestor not only advertises merchandise for sale but also consummates the sales transactions with the purchasers. Such a facilitator provides a marketplace or platform by which third-party vendors can solicit sales of tangible personal property, digital goods, and services. The facilitator usually operates an online platform containing a database or catalog of goods that allows consumers to search for specific products. The platform then accepts the consumer's purchase information and executes the sales transaction on behalf of the third-party vendor.

In performing this function, the online marketplace facilitator engages in the regular, "systematic solicitation of a consumer market in this state" by the distribution of advertising, a computer data base, or other communication system. The fact that the marketplace facilitator performs the sales transactions on behalf of third-party vendors does not remove the facilitator from the Act's definition of dealer. The marketplace facilitator itself solicits sales on behalf of its vendors, and it consummates these sales. These two activities qualify it as a "dealer" within the meaning of Tennessee law.[1]

The Commissioner of Revenue generally is empowered to promulgate rules and regulations for administration and enforcement of the tax laws. *See* Tenn. Code Ann. § 67-1-1439. And in particular, the Commissioner is accorded broad powers to adopt rules and regulations deemed necessary to administer the sales and use tax laws and to "prepare instructions to dealers by setting out to them suitable methods for applying the tax that may be necessary for the purpose of the enforcement of [Chapter 6] and the collection of the tax imposed thereby." *See* Tenn. Code Ann. § 67-6-402. This includes rules requiring dealers, including online marketplace facilitators, to

[1] In the separate and different context of the rental of accommodations, this Office opined that a website facilitator was not a dealer. *See* Tenn. Att'y Gen. Op. 15-78 (Dec. 1, 2015). The sales tax on lodging is restricted to "charges for any rooms, lodgings, or accommodations furnished to persons by any hotel, inn, . . . or any place in which rooms, lodgings or accommodations are furnished to persons for a consideration." Tenn. Code Ann. § 67-6-205(c)(1). Thus, the Act expressly limits liability for the tax to the hotel or other place of lodging. *See* Tenn. Code Ann. § 67-6-501(a) (imposing liability on dealer furnishing taxable service). In contrast, in the context of the sale of goods, the Act imposes liability for the tax on "[e]very dealer making sales . . . of tangible personal property," *id.*, and defines "dealer" more broadly to include those who regularly solicit a consumer market in this state." *See* Tenn. Code Ann. § 67-6-102(23)(J).

collect and remit sales tax on behalf of out-of-state dealers. This conclusion is consistent with section 67-6-402(b) because collection by an in-state facilitator dealing with and receiving payments from customers may often be the most practical means of ensuring payment of the tax. The conclusion also finds some support in an opinion of the Tennessee Court of Appeals, which acknowledges that the Department may hold an in-state dealer liable for the tax on sales made on behalf of an out-of-state vendor. *See Upper E. Tenn. Distrib. v. Johnson,* No. 03A01-9701-CH-00011, 1997 WL 243503, at *3 (Tenn. Ct. App. May 13, 1997), *perm. app. denied* (Tenn. Jan. 5, 1998).

The opinion that the Department is authorized to promulgate rules requiring online marketplace facilitators to collect and remit sales and use taxes presumes that the online marketplace facilitator is not itself an "out-of-state dealer." Tennessee Comp. R. & Regs. 1320-05-01-.129(2) currently requires out-of-state dealers "who engage in the regular or systematic solicitation of consumers in this state through any means and make sales that exceed $500,000 . . . during the previous twelve-month period" to collect and remit sales and use taxes to the Department. But for the time being, the Department is enjoined from collecting those sales and use taxes from out-of-state dealers until the General Assembly reviews the relevant court decision permitting such collection—i.e., *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)—and gives final approval to Rule 129. *See* 2017 Tenn. Pub. Acts. ch. 452, § 2. Unless and until the General Assembly approves Rule 129, the Department should not promulgate rules and regulations regarding out-of-state online marketplace facilitators and should limit the exercise of its rule-making authority to in-state online marketplace facilitators.

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