



STATE OF ARKANSAS  
**Department of Finance  
and Administration**

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May 15, 2020

**Via Mail**

[REDACTED]  
[REDACTED]  
[REDACTED]

Re: Opinion 20200301

[REDACTED]

Dear [REDACTED]

Your letter requesting a legal opinion from the Arkansas Department of Finance and Administration has been referred to me for response. The specific inquiry and facts that you have provided are as follows:

Our client, the above-mentioned taxpayer is requesting a legal opinion regarding the applicability and the extent of their obligation to collect and remit sales tax as it relates to the new Marketplace Facilitator laws that we enacted in July of 2019.

The taxpayer is a food delivery service like some of the more popular deliver[y] services such as [REDACTED]. However, our client does not charge the end customer for their deliver[y] service[. R]ather, they charge the restaurant a 20% commission for the exclusivity of being listed on their website. In a typical transaction, the consumer would order food from the company's website, [https://\[REDACTED\]/](https://[REDACTED]/) paying the cost of the food plus applicable sales tax, a contracted individual would then pick up the food and deliver the food to the requested location. Every two weeks, the restaurant is paid via ACH for the amount of food plus applicable sales tax. The commission received by [REDACTED] is charged separately in a separate transaction line. Historically, the sales tax obligation would be passed to the restaurant. [REDACTED] has also taken the position that the service is not taxable but is looking for guidance on this matter since they plan on surpassing sales tax filing requirement thresholds in 2020.

You further state that your client “plans on breaking 200 transactions and/or \$100,000 in revenue in 2020. Based on these factual assertions, your letter asks the following:

- 1.) Is [REDACTED] liable to pay sales tax on the commission charged to the restaurant?
- 2.) Under the new Marketplace Facilitator laws, is [REDACTED] or the restaurant liable for remitting the sales tax collected on the food?

- 3.) Is sales tax for the food calculated based on the location of the restaurant or the end consumer?
- 4.) Is sales tax for the commission charged to the restaurant based on the location of the restaurant or the end consumer?

Your request for an opinion requires analysis of enumerated services subject to tax, the requirements of marketplace facilitators, and Arkansas's sourcing rules.

## RESPONSES

The following conclusions are explained below: (1) [REDACTED] is not liable for collecting and remitting sales tax on the gross receipts derived from the commission it receives from the restaurants that are listed on its website; (2) [REDACTED] is liable for collecting and remitting sales tax on the gross receipts derived from sales of food that is ordered through its website; and (3) purchases through the website are sourced to the location of receipt by the purchaser.

### A. The 20% Commission

[REDACTED] is not liable for collecting and remitting sales tax on the gross receipts derived from the commission it receives from the restaurants that are listed on its website.

Sales and use tax is levied upon the gross proceeds or gross receipts derived from all sales of tangible personal property and certain enumerated services. Ark. Code Ann. §§ 26-52-301 (Supp. 2019) and 26-53-106 (Supp. 2019). However, the service of listing restaurants' food items on a website for purchase for delivery is not an enumerated service subject to sales tax. Also, because you list restaurants' food items on a website, it is not necessary to discuss the sales tax exemption that applies to the gross proceeds derived from sales of advertising space in tangible mediums such as newspapers, publications, billboards, and on public transit buses. *See* Ark. Code Ann. § 26-52-401(13) (Supp. 2019).

Therefore, the 20% commission that a restaurant pays to [REDACTED] for the exclusivity of be listed on its website is not subject to sales tax. For this reason, your final question is made moot.

### B. Food Purchased Through [REDACTED]

[REDACTED] is liable for collecting and remitting sales tax on the gross receipts derived from sales of food that is ordered through its website.

Sections 17 and 19 of Act 822 of the 92nd General Assembly of Arkansas ("Act 822") require certain remote sellers and marketplace facilitators to collect sales and use tax on the sale of tangible personal property, taxable services, digital code, or specified digital products. Sections 17 through 19 of Act 822 became effective on July 1, 2019. Pursuant to those sections:

A remote seller or a marketplace facilitator that sells or facilitates the sale of tangible personal property, taxable services, a digital code, or specified digital products for delivery into Arkansas shall collect and remit the applicable sales tax levied under this chapter or the applicable compensating use tax levied under the Arkansas Compensating Tax Act of 1949, § 26-53-101 et seq., if in the previous calendar year or in the current calendar year, the remote seller or the marketplace facilitator had aggregate sales of

tangible personal property, taxable services, digital codes, or specified digital products subject to Arkansas sales or use tax within this state or delivered to locations within this state exceeding:

- (1) One hundred thousand dollars (\$100,000); or
- (2) Two hundred (200) transactions.

*Id.* at § 19. A “marketplace facilitator” is a person that facilitates the sale of tangible personal property, taxable services, a digital code, a digital magazine, or specified digital products by:

- (A) Listing or advertising tangible personal property, taxable services, a digital code, a digital magazine, or specified digital products for sale in a forum; and
- (B) Either directly or indirectly through an agreement or arrangement with a third party, collecting payment from a purchaser and transmitting the payment to the person selling the tangible personal property, taxable services, a digital code, or specified digital products, regardless of whether the person receives compensation or other consideration in exchange for the person's services in collecting and transmitting the payment.

*Id.* at § 17. A “forum” is a physical place or electronic location where sales occur, and it includes, without limitation, a publicly accessible internet website. *Id.*

██████████ is a marketplace facilitator because it lists food—tangible personal property—for sale on a website—a forum—and it has an agreement with the restaurants listed to collect payment from those who purchase food through its website. Further, your letter states that ██████████ “has plans on breaking 200 transactions and/or \$100,000 in revenue in 2020.” If ██████████ surpasses as a marketplace facilitator two hundred transactions or one hundred thousand dollars in taxable sales in 2020, ██████████ will be required, beginning in 2020, to collect and remit sales tax on the gross receipts derived from purchases made on its website.

The Department is continuing to evaluate the impact of Act 822 and further guidance or clarifications may be the subject of Departmental rulemaking. The rulemaking process includes an opportunity for public comment and the Department would invite you to contribute to that process so that it might have valuable feedback from the business community pursuant to the Arkansas Administrative Procedures Act of Ark. Code Ann. § 25-15-201, *et seq.* (Repl. 2014). I also encourage you to visit the Department’s website for additional information about remote sellers and marketplace facilitators at <https://www.dfa.arkansas.gov/excise-tax/sales-and-usetax/remote-sellers/>. This site provides guidance on frequently asked questions, along with information about Arkansas’s simplified registration process for remote sellers.

### **C. Sourcing Transactions Through Website**

Purchases through the website are sourced to the location of receipt by the purchaser.

When the purchaser does not receive the tangible personal property or service at the business location of the seller, the sale is sourced to the location of receipt by the purchaser, including the location indicated by instructions for delivery to the purchaser, known to the seller. Arkansas Gross Receipts Rules GR-76(D)(1)(b). There are no special sourcing rules that apply to

purchases made through a marketplace facilitator because the existing sourcing rules address the sourcing of sales that would apply to purchases made through a marketplace facilitator.

Your letter states that a contracted individual picks up the food and delivers it to the requested location. For this reason, the sale is sourced to the location of the purchaser rather than the location of the restaurant.

Sincerely,

Chris McNeal, Attorney  
Revenue Legal Counsel