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S.B. 39*
135th General Assembly

Bill Analysis

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Version: As Reported by House Ways & Means

Primary Sponsor: Sen. Schaffer

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SUMMARY

Sales and use tax on delivery network services

- Allows a company that coordinates delivery of goods between customers and local businesses to obtain a waiver from the requirement that it collect and remit sales or use tax on the goods as if it was the seller.
- Subjects the delivery charges of a company that has obtained a waiver to sales or use tax, thus requiring such a company to collect and remit tax on its delivery services but not the cost of goods delivered.

Commercial activity tax situsing for motor vehicles

- Situs receipts to Ohio from the sale or lease of a motor vehicle by a dealer, for commercial activity tax (CAT) purposes, only if a certificate of title with an Ohio address is issued for that vehicle.
- Applies the situsing provision retrospectively and prospectively to all tax periods.

Limitations on property tax challenges

- Modifies the requirements governing when political subdivisions can file property tax complaints, counter-complaints, and appeals.

* This analysis was prepared before the report of the House Ways and Means Committee appeared in the House Journal. Note that the legislative history may be incomplete.

DETAILED ANALYSIS

Sales and use tax on delivery network services

The bill authorizes an optional waiver to change the way sales and use taxes are collected on transactions completed through online marketplaces that coordinate between customers and local businesses located within 75 miles of each other. Services that will be eligible to avail themselves of the bill's provisions typically offer consumers a way to order food or other goods for delivery from a local business like a grocery store or restaurant. The bill refers to these companies as "delivery network companies."¹

The key to understanding the bill's changes is to first focus on two general questions related to the sales and use taxation of online purchases:

- Who is the seller or vendor?
- What is the taxable price?

The seller or vendor

Ohio's use tax law refers to "sellers" and the sales tax law refers to "vendors," but the distinction is not necessary to understand the bill's changes, so this analysis will only refer to sellers. Current law treats most delivery network companies as the seller of the products delivered from local businesses.

That is because these companies generally qualify as what continuing law calls "marketplace facilitators" – businesses that operate physical or electronic marketplaces where retail sales are facilitated for third-party sellers. E-commerce platforms are well-known examples, because in addition to selling their own products, they may allow third parties to list and sell products as well.

For sales and use tax purposes, if a marketplace facilitator has a "substantial nexus" with Ohio, the marketplace facilitator is treated as the seller of all products sold on its marketplace. A marketplace facilitator has substantial nexus if it facilitates enough transactions with Ohio purchasers to subject itself to the state's legal jurisdiction. Continuing law presumes a substantial nexus for marketplace facilitators that annually facilitate \$100,000 in total sales or 200 individual sales in Ohio.

Because marketplace facilitators with a substantial nexus are treated as the seller for sales and use tax purposes, they are responsible for collecting sales and use tax on sales to Ohio consumers and remitting that tax to the state.² Due to the volume of transactions delivery network companies are generally involved with, they will likely easily meet the substantial nexus test if they serve Ohio customers.

The taxable price

In Ohio, sales of tangible personal property, i.e., physical items, are taxable unless specifically exempt by law, and sales of services are not taxable unless specifically made so by law. Delivery, as

¹ R.C. 5739.01(XXX).

² R.C. 5741.01; R.C. 5741.07 and 5741.071, not in the bill.

a standalone service, is not generally a taxable service. But, because of the way sales and use tax is calculated, combined with the law regarding marketplace facilitators, delivery services can be taxable under certain circumstances.

Sales and use taxes are calculated by applying the tax rate to the taxable purchase price of a taxable item or service. Delivery charges may or may not be included in taxable price, depending on who is providing and charging for the delivery and the products being delivered.

If the seller is charging for preparation and delivery, the delivery charges are considered part of the price. So, if the item or service is taxable, and the seller provides and charges for delivery, the tax will be calculated based on the combined price of the item or service and the delivery charge. A seller's delivery charges on a nontaxable item, e.g., food, will not make the item taxable, nor will the delivery charge be taxed. If there are taxable and nontaxable items subject to the same delivery charge, the charge may be apportioned among the items so only part of the delivery charge is subject to tax. In contrast, if the customer is paying someone other than the seller for delivery, those delivery charges are not part of the price for the item or service purchased from the seller under any circumstance. As a result, the tax calculated for the purchase from the seller will not include tax on the third-party delivery charges.³

Seller and price: current law summarized

The two key points of current sales and use tax law detailed above may be summarized as follows:

- Delivery network companies with a substantial nexus are treated as the seller of an item for sales and use tax purposes, due to the state's requirements for marketplace facilitators;
- When the seller of an item also charges for its delivery, the delivery charge is part of the taxable price of the item.

As a result, under current law, when a delivery network company, qualifying as a marketplace facilitator, coordinates between a customer, local merchant, and delivery person to deliver a taxable item, the company is treated as the seller and the delivery charge may be taxable as part of the price of the item.

Waiver to separate the seller of the item and delivery service

The bill allows delivery network companies to opt-out of being classified as a seller by obtaining a waiver, despite meeting the requirements of a marketplace facilitator. The bill then treats delivery charges from the companies that obtain a waiver as a separate taxable sale.

Under the bill, a delivery network company may request the waiver from the Tax Commissioner to be excused from being treated as the seller of goods sold by sellers on the company's marketplace. To do so, the company must be current on all taxes, fees, and charges administered by the Commissioner that are not subject to a bona fide dispute. The company also must not have requested that a previously granted waiver be canceled, or had such a waiver revoked, within the 12 months preceding the request, or failed to file a required sales or use tax return.

³ R.C. 5739.01; Ohio Administrative Code 5703-9-52.

A waiver that is not affirmatively granted or denied within 30 days of its submission is automatically granted. Waivers are effective on the first day of the first month that begins at least 30 days after the waiver is granted, and remains valid until the first day of the first month that begins at least 60 days after the waiver is revoked by the Commissioner or cancelled by the company.

A delivery network company that receives a waiver must notify each local business operating on the company's marketplace that the business, and not the company, will be considered the seller with respect to the product the business sells on the company's marketplace. As a result, the local business becomes responsible for collecting and remitting sales or use tax on taxable products sold on the marketplace.

The Commissioner may divulge any information related to the status of a waiver requested by a local business operating on the marketplace, and may adopt any rule necessary to administer the waiver.⁴

Taxability of delivery network services

With the option for a delivery network company to not be treated as the seller of local products sold through its platform even though it is a marketplace facilitator, continuing law's provisions for the inclusion or exclusion of delivery charges from price apply differently. If a delivery network company is treated as the seller because it does not obtain a waiver charges for its services, those services will be included in the price of the goods delivered because the law treats the company as the seller for sales and use tax purposes. If the delivery network company obtains the bill's waiver, the goods will be taxed according to their price, irrespective of the delivery charge, and that tax will be collected by the local business and remitted to the state by the merchant providing the goods.

For companies that obtain a waiver, the bill specifically defines delivery network services as a taxable service. So, a delivery network company without a waiver authorized by the bill must collect and remit tax on its delivery charges as part of the taxable price, which also includes the price of taxable goods sold. In contrast, a company with the waiver must collect and remit tax on all its delivery charges as a separate taxable service, regardless of whether the delivered goods are taxable, but it need not collect and remit taxes on the price of those goods.⁵

Commercial activity tax situsing for motor vehicles

The commercial activity tax (CAT) is imposed on businesses for the privilege of doing business in Ohio, and generally amounts to 0.26% of gross receipts from a business' Ohio sales. In determining whether a sale takes place in Ohio, and is therefore subject to CAT, a determination referred to in tax terms as "situsing," is not always straightforward and continuing law contains specific provisions to help with the determination.

Under current law, gross receipts from the sale of tangible personal property (TPP), including motor vehicles, are sitused to Ohio if the purchaser receives the property in Ohio. In cases where the property is delivered by motor carrier or other means of transportation, the place where the

⁴ R.C. 5741.072.

⁵ R.C. 5739.01(B)(13).

property is ultimately received after all the transportation is completed is considered the place where the purchaser receives the property, and thus the place where the gross receipts are situated.

A related provision expands on this “ultimate destination rule” to extend it to property that is accepted in Ohio but then taken directly out of the state by the purchaser. So, even though not transported by motor carrier or other means of transportation, if property is accepted in Ohio and immediately taken out of the state, the receipts are situated as though the vehicle was transported by motor carrier to a destination outside the state.⁶

The bill specifically addresses the situsing of gross receipts from the sale or lease of a motor vehicle by a motor vehicle dealer, removing those transactions from the general TPP situsing provisions described above. Under the bill, those gross receipts can only be situated to Ohio if the motor vehicle is issued a certificate of title showing the owner’s or lessee’s Ohio address.⁷ This change applies prospectively and retrospectively to all CAT tax periods.⁸

Limitations on property tax challenges

The bill modifies a recent law that imposed limits on the filing of property tax complaints by parties other than property owners. Among other changes, H.B. 126 of the 134th General Assembly limited the situations in which political subdivisions can file property tax complaints or appeal the decisions of a board of revision (BOR) regarding those complaints.

Filing of property tax complaints

Sale requirement

Under current law, as enacted in H.B. 126, political subdivisions may only file a property tax complaint with respect to property the subdivision does not own if (a) the property was sold in an arm’s length transaction before the tax year for which the complaint is filed and (b) that sale price was at least 10% and \$500,000 more than the auditor’s current valuation. The \$500,000 threshold increases each year for inflation, beginning in tax year 2023. These limits also apply to third party property owners in the county who do not own or lease the property in question (“third party complainants”).

The bill further narrows this sale requirement, by specifying that the property sale must have occurred within the two years preceding the year for which the complaint is filed. Current law requires that the property was sold before that year, but does not expressly include any limit on when that sale occurred.⁹

Property owner public comment

Existing law also requires that, before filing a complaint, a subdivision must adopt a resolution authorizing the complaint, notify the property owner of the proposed resolution, and adopt the resolution at a public meeting. The bill additionally requires the subdivision, at the public

⁶ R.C. 5751.033(E).

⁷ R.C. 5751.033(M).

⁸ Section 4.

⁹ R.C. 5715.19(A)(6)(a).

meeting, to permit the property's owner or their representative to provide public comments on the resolution.¹⁰

Counter-complaints

Under continuing law, if a property tax complaint alleges a change in value of at least \$50,000 in fair market value (\$17,500 in taxable value), a school district may join the case by filing a counter-complaint. The bill provides that a school district may only file such a counter-complaint if the original complaint was filed by the owner or lessee of the property. Essentially, the bill prohibits school districts from filing counter-complaints when the original complaint is filed by another political subdivision or by a third party complainant.¹¹

Appeals of BOR decisions

The bill expands an existing law, also enacted in H.B. 126, that prohibits political subdivisions from appealing BOR decisions on property they do not own to the Board of Tax Appeals (BTA). Under the bill, these appeal limitations also apply to third party complainants. In addition, the bill expressly prohibits a subdivision from appealing a BOR decision regarding a complaint filed by a third party complainant.¹²

Application

The bill's new filing limits apply to complaints, counter-complaints, and appeals filed on or after the bill's 90-day effective date.¹³

HISTORY

Action	Date
Introduced	01-31-23
Reported, S. Ways & Means	05-30-23
Passed Senate (32-0)	05-31-23
Reported, H. Ways & Means	--

ANSB0039RH-135/sb

¹⁰ R.C. 5715.19(A)(7) and (8).

¹¹ R.C. 5715.19(B).

¹² R.C. 5717.01.

¹³ Section 3.