

HOUSE BILL No. 4541

May 2, 2019, Introduced by Reps. Tate, Webber, Afendoulis and Yancey and referred to the Committee on Tax Policy.

A bill to amend 1937 PA 94, entitled
"Use tax act,"
(MCL 205.91 to 205.111) by adding section 5c.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 SEC. 5C. (1) NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS
2 ACT, A MARKETPLACE FACILITATOR THAT SELLS OR FACILITATES THE SALE
3 OF TANGIBLE PERSONAL PROPERTY OR SERVICES SUBJECT TO THE TAX UNDER
4 THIS ACT FOR DELIVERY INTO THIS STATE IS PRESUMED TO HAVE NEXUS IN
5 THIS STATE, IS SUBJECT TO THE TAX UNDER THIS ACT, SHALL COLLECT AND
6 REMIT APPLICABLE USE TAX, AND SHALL FOLLOW ALL APPLICABLE
7 PROCEDURES AND REQUIREMENTS OF THIS ACT, IF THE MARKETPLACE
8 FACILITATOR MAKES OR FACILITATES SALES OF TANGIBLE PERSONAL
9 PROPERTY OR TAXABLE SERVICES, ON ITS OWN BEHALF OR ON BEHALF OF 1
10 OR MORE MARKETPLACE SELLERS, OR BOTH, FOR DELIVERY INTO THIS STATE

1 EXCEEDING \$100,000.00 OR IN 200 OR MORE SEPARATE TRANSACTIONS IN
2 THE PREVIOUS CALENDAR YEAR OR THE CURRENT CALENDAR YEAR.

3 (2) A MARKETPLACE FACILITATOR THAT IS PRESUMED TO HAVE NEXUS
4 WITH THIS STATE UNDER SUBSECTION (1) IS REQUIRED TO COLLECT AND
5 REMIT THE TAX DUE UNDER THIS ACT ON ALL TAXABLE SALES MADE BY THE
6 MARKETPLACE FACILITATOR OR FACILITATED FOR MARKETPLACE SELLERS TO A
7 PURCHASER IN THIS STATE REGARDLESS OF WHETHER THE MARKETPLACE
8 SELLER FOR WHOM SALES ARE FACILITATED HAS REGISTERED OR IS REQUIRED
9 TO REGISTER UNDER SECTION 5 OR WOULD HAVE BEEN REQUIRED TO COLLECT
10 OR REMIT USE TAX HAD THE SALE NOT BEEN FACILITATED BY THE
11 MARKETPLACE FACILITATOR. NOTHING IN THIS SECTION SHALL BE CONSTRUED
12 TO INTERFERE WITH THE ABILITY OF A MARKETPLACE FACILITATOR AND A
13 MARKETPLACE SELLER TO ENTER INTO AGREEMENTS WITH EACH OTHER
14 REGARDING THE FULFILLMENT OF THE REQUIREMENTS OF THIS ACT.

15 (3) THE DEPARTMENT MAY GRANT A WAIVER FROM THE REQUIREMENTS OF
16 THIS SECTION IF EITHER OF THE FOLLOWING REQUIREMENTS IS MET:

17 (A) A MARKETPLACE FACILITATOR DEMONSTRATES, TO THE
18 SATISFACTION OF THE DEPARTMENT, THAT SUBSTANTIALLY ALL OF ITS
19 MARKETPLACE SELLERS ARE REGISTERED WITH THE DEPARTMENT UNDER
20 SECTION 5 OR HAVE A CURRENT AND VALID SALES TAX LICENSE UNDER
21 SECTION 3 OF THE GENERAL SALES TAX ACT, 1933 PA 167, MCL 205.53.

22 (B) A MARKETPLACE SELLER HAS SUFFICIENT NEXUS WITH THIS STATE
23 TO REQUIRE REGISTRATION UNDER SECTION 5 OR LICENSURE UNDER SECTION
24 3 OF THE GENERAL SALES TAX ACT, 1933 PA 167, MCL 205.53, AND THE
25 DEPARTMENT DETERMINES THAT COLLECTION OF USE TAX BY THE MARKETPLACE
26 SELLER WITH REGARD TO TRANSACTIONS FACILITATED BY THE MARKETPLACE
27 FACILITATOR WOULD RESULT IN THE APPROPRIATE AND EFFICIENT

1 COLLECTION OF TAX UNDER THIS ACT.

2 (4) IF THE DEPARTMENT GRANTS A WAIVER UNDER SUBSECTION (3),
3 THE TAX LEVIED UNDER THIS ACT ON SALES THAT ARE FACILITATED BY A
4 MARKETPLACE FACILITATOR FOR A MARKETPLACE SELLER MUST BE COLLECTED
5 FROM THE MARKETPLACE SELLER. THE DEPARTMENT SHALL PROMULGATE RULES
6 THAT ESTABLISH THE CRITERIA FOR OBTAINING A WAIVER UNDER SUBSECTION
7 (3), THE PROCESS AND PROCEDURE FOR A MARKETPLACE FACILITATOR OR A
8 MARKETPLACE SELLER TO APPLY FOR A WAIVER, AND THE PROCESS FOR
9 NOTIFYING AN AFFECTED MARKETPLACE FACILITATOR AND MARKETPLACE
10 SELLER OF A WAIVER OBTAINED UNDER SUBSECTION (3).

11 (5) A MARKETPLACE FACILITATOR SHALL REPORT THE SALES IT
12 FACILITATES SEPARATELY FROM THE SALES MADE DIRECTLY BY THE
13 MARKETPLACE FACILITATOR, OR AFFILIATES OF THE MARKETPLACE
14 FACILITATOR, TO PURCHASERS IN THIS STATE BY FILING A SEPARATE
15 MARKETPLACE FACILITATOR RETURN ON A FORM PRESCRIBED BY THE
16 DEPARTMENT.

17 (6) A CLASS ACTION SHALL NOT BE BROUGHT AGAINST A MARKETPLACE
18 FACILITATOR IN ANY COURT OF THIS STATE ON BEHALF OF PURCHASERS
19 ARISING FROM OR IN ANY WAY RELATED TO AN OVERPAYMENT OF USE TAX
20 COLLECTED ON SALES FACILITATED BY THE MARKETPLACE FACILITATOR,
21 REGARDLESS OF WHETHER THAT CLAIM IS CHARACTERIZED AS A TAX REFUND
22 CLAIM. NOTHING IN THIS SUBSECTION AFFECTS A PURCHASER'S RIGHT TO
23 SEEK A REFUND AS PROVIDED UNDER THIS ACT.

24 (7) NOTHING IN THIS SECTION AFFECTS THE OBLIGATION OF A
25 PURCHASER TO REMIT TAX UNDER THIS ACT, FOR A TAXABLE TRANSACTION ON
26 WHICH A MARKETPLACE FACILITATOR OR SELLER DOES NOT COLLECT AND
27 REMIT TAX UNDER THIS ACT OR SALES TAX UNDER THE GENERAL SALES TAX

1 ACT, 1933 PA 167, 205.51 TO 205.78.

2 (8) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION, IF A
3 MARKETPLACE FACILITATOR IS PRESUMED TO HAVE NEXUS WITH THIS STATE
4 UNDER SUBSECTION (1), THE DEPARTMENT SHALL SOLELY AUDIT THE
5 MARKETPLACE FACILITATOR FOR SALES MADE BY MARKETPLACE SELLERS THAT
6 WERE FACILITATED BY THE MARKETPLACE FACILITATOR. THE DEPARTMENT
7 SHALL NOT AUDIT A MARKETPLACE SELLER FOR SALES FACILITATED BY A
8 MARKETPLACE FACILITATOR UNLESS A WAIVER IS GRANTED UNDER SUBSECTION
9 (3) AND THE TAX LEVIED UNDER THIS ACT MUST BE COLLECTED FROM THE
10 MARKETPLACE SELLER UNDER SUBSECTION (4) OR TO THE EXTENT THAT THE
11 MARKETPLACE FACILITATOR SEEKS RELIEF UNDER SUBSECTION (9).

12 (9) A MARKETPLACE FACILITATOR IS RELIEVED OF LIABILITY UNDER
13 THIS SECTION FOR FAILURE TO COLLECT AND REMIT THE CORRECT AMOUNT OF
14 TAX TO THE EXTENT THAT THE FAILURE WAS DUE TO INCORRECT OR
15 INSUFFICIENT INFORMATION GIVEN TO THE MARKETPLACE FACILITATOR BY
16 THE MARKETPLACE SELLER. THE RELIEF UNDER THIS SUBSECTION DOES NOT
17 APPLY IF THE MARKETPLACE SELLER IS AN AFFILIATE OF THE MARKETPLACE
18 FACILITATOR.

19 (10) A MARKETPLACE FACILITATOR IS RELIEVED OF LIABILITY UNDER
20 THIS SECTION IF THE MARKETPLACE FACILITATOR DEMONSTRATES, TO THE
21 SATISFACTION OF THE DEPARTMENT, THAT THE TAX LEVIED UNDER THIS ACT
22 ON A SALE FACILITATED BY THE MARKETPLACE FACILITATOR WAS PAID TO
23 THE DEPARTMENT BY THE MARKETPLACE SELLER.

24 (11) THIS SECTION APPLIES REGARDLESS OF WHETHER THE
25 MARKETPLACE FACILITATOR HAS A PHYSICAL PRESENCE IN THIS STATE.

26 (12) AS USED IN THIS SECTION:

27 (A) "AFFILIATE" MEANS AN AFFILIATED PERSON AS THAT TERM IS

1 DEFINED IN SECTION 5A.

2 (B) "MARKETPLACE FACILITATOR" MEANS A PERSON THAT MEETS THE
3 REQUIREMENTS OF SUBPARAGRAPH (i) , BUT DOES NOT INCLUDE A PERSON
4 DESCRIBED IN SUBPARAGRAPH (ii) OR (iii) :

5 (i) A PERSON IS A MARKETPLACE FACILITATOR IF THE PERSON DOES
6 ALL OF THE FOLLOWING:

7 (A) CONTRACTS WITH A MARKETPLACE SELLER TO FACILITATE FOR
8 CONSIDERATION, REGARDLESS OF WHETHER DEDUCTED AS FEES FROM THE
9 TRANSACTION, THE SALE OF THE MARKETPLACE SELLER'S PRODUCTS THROUGH
10 A PHYSICAL OR ELECTRONIC MARKETPLACE OPERATED BY THE PERSON.

11 (B) ENGAGES DIRECTLY OR INDIRECTLY, THROUGH 1 OR MORE
12 AFFILIATES, IN TRANSMITTING OR OTHERWISE COMMUNICATING THE OFFER
13 AND ACCEPTANCE BETWEEN A PURCHASER AND THE MARKETPLACE SELLER.

14 (C) EITHER DIRECTLY OR INDIRECTLY THROUGH AGREEMENTS OR
15 ARRANGEMENTS WITH THIRD PARTIES COLLECTS THE PAYMENT FROM A
16 PURCHASER AND TRANSMITS THE PAYMENT TO THE MARKETPLACE SELLER.

17 (ii) MARKETPLACE FACILITATOR DOES NOT INCLUDE A PERSON WHO
18 OPERATES A PLATFORM OR FORUM THAT PROVIDES INTERNET ADVERTISING
19 SERVICES, INCLUDING LISTING PRODUCTS FOR SALE, IF THE PERSON DOES
20 NOT ALSO ENGAGE DIRECTLY OR INDIRECTLY, THROUGH 1 OR MORE
21 AFFILIATES, IN THE ACTIVITIES DESCRIBED IN SUBPARAGRAPH (i) .

22 (iii) A PERSON IS NOT A MARKETPLACE FACILITATOR WITH RESPECT
23 TO THE SALE OF OR CHARGES FOR ROOMS, LODGINGS, OR ACCOMMODATIONS
24 DESCRIBED IN SECTION 3A IF THE ROOMS, LODGINGS, OR ACCOMMODATIONS
25 ARE PROVIDED BY A HOTEL KEEPER, MOTEL OPERATOR, OR OTHER PERSON
26 THAT IS REGISTERED UNDER SECTION 5 OR LICENSED UNDER SECTION 3 OF
27 THE GENERAL SALES TAX ACT, 1933 PA 167, MCL 205.53, AND THE HOTEL

1 KEEPER, MOTEL OPERATOR, OR OTHER PERSON PROVIDES THE ROOMS,
2 LODGINGS, OR ACCOMMODATIONS FOR OCCUPANCY UNDER A BRAND BELONGING
3 TO THE HOTEL KEEPER, MOTEL OPERATOR, OR OTHER PERSON.

4 (C) "MARKETPLACE SELLER" MEANS A PERSON THAT MAKES RETAIL
5 SALES THROUGH A PHYSICAL OR ELECTRONIC MARKETPLACE OPERATED BY A
6 MARKETPLACE FACILITATOR.

7 Enacting section 1. As provided in section 5 of 1846 RS 1, MCL
8 8.5, this amendatory act is severable.

9 Enacting section 2. This amendatory act takes effect 90 days
10 after the date it is enacted into law. An obligation to collect use
11 tax under this amendatory act does not apply retroactively.