

COUNCIL COMMUNICATION

Meeting Date: February 9, 2021	Agenda Item: 12C	Agenda Location: Action Items	Goal(s):	Legal Review: <i>JEM</i>	<input checked="" type="checkbox"/> 1 st Reading <input type="checkbox"/> 2 nd Reading
Subject: An ordinance amending various sections of Chapter 26 of the Thornton City Code pertaining to sales and use tax to explicitly cover sales through marketplace facilitators.					
Recommended by: Kim Newhart <i>KN</i>				Approved by: Kevin S. Woods <i>KW</i>	
Presenter(s): Doug Buchanan, Deputy Finance Director				Ordinance previously introduced by: _____	

SYNOPSIS:

This amendment would modify the City Code (Code) pertaining to sales and use tax, to more explicitly cover sales by “marketplace facilitators” who facilitate the sale of products and services from third-party sellers. Marketplace facilitators such as Amazon, Walmart, and Google have agreements with third-party sellers to collect payment from the purchaser for the goods or services purchased. Updating the Code will clarify that it is the responsibility of those facilitators to collect and remit sales tax to the City on those sales. The estimated revenue generated from marketplace sales in the City is approximated at \$750K-\$2M annually. The State of Colorado adopted marketplace facilitator language in late 2019 and since then, several other home rule cities in Colorado have also adopted these changes.

RECOMMENDATION:

Staff recommends Alternative No. 1, approval of the ordinance.

BUDGET/STAFF IMPLICATIONS:

Approval of the ordinance is expected to result in additional sales tax collections for the City.

ALTERNATIVES:

1. Approve the ordinance amending the Code pertaining to marketplace facilitators.
2. Do not approve the ordinance.

BACKGROUND (ANALYSIS/NEXT STEPS/HISTORY): (includes previous City Council action)

At the January 5, 2021 Planning Session, Council reviewed the amendment of the City’s Sales and Use Tax Code to explicitly include marketplace facilitators and expressed its support for this ordinance to be brought forward at a future City Council meeting.

In mid-2020, as part of a larger sales tax simplification effort, the Colorado Municipal League (CML), working with home rule municipal tax professionals, in conjunction with the business community and the Department of Revenue, developed a model ordinance related to marketplace facilitators, as part of a larger sales tax simplification effort.

INTRODUCED BY: _____

AN ORDINANCE AMENDING VARIOUS SECTIONS OF CHAPTER 26 OF THE THORNTON CITY CODE PERTAINING TO SALES AND USE TAX TO EXPLICITLY COVER SALES THROUGH MARKETPLACE FACILITATORS.

WHEREAS, the City is a home rule municipality, organized and existing under Article XX, Section 6 of the Colorado Constitution; and

WHEREAS, the City is authorized under Article XX, Section 6 of the Colorado Constitution to pass ordinances and regulate local affairs including ordinances for the administration and collection of sales and use tax; and

WHEREAS, the City intends to simplify the collections process of the City's existing sales and use tax by clarifying that marketplace facilitators are required to collect sales tax on sales that they have facilitated on their website; and

WHEREAS, the City intends for marketplace facilitators to collect taxes only on sales of taxable products and services already taxable under the existing City Code.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF THORNTON, COLORADO, AS FOLLOWS:

1. Subsections 26-388(a)(1) and 26-388(c) of the Thornton City Code are hereby amended by the addition of the words double-underlined and deletion of the words stricken below, to read as follows:

Sec. 26-388. - Definitions; distinctions between sales and use taxes; notices.

(a) Sales and use taxes defined; distinctions.

- (1) *Sales tax defined.* The city sales tax is levied on all sales, leases and rentals at retail on the basis of the purchase or sale price on purchases of tangible personal property and specific services taxable under this article. All sales and purchases of tangible personal property are subject to the tax, except as specifically exempted. Sales and purchases of services, as specifically set forth in Section 26-389, are subject to the tax. The tax is in reality imposed on the purchaser. The duty is imposed on the ~~seller~~retailer to collect and remit the tax to the city under the penalties for failure to do so as prescribed in this article.

(c) *Definitions.* The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

Marketplace means a physical or electronic forum, including, but not limited to, a store, a booth, an internet website, a catalog, or a dedicated sales software application, where tangible personal property, taxable products, or taxable services are offered for sale.

Marketplace facilitator means a person who:

- (1) Contracts with a marketplace seller or multichannel seller to facilitate for consideration, regardless of whether or not the consideration is deducted as fees from the transaction, the sale of the marketplace seller's tangible personal property, products, or services through the person's marketplace;
- (2) Engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between a purchaser and the marketplace seller or multichannel seller; and
- (3) Either directly or indirectly, through agreements or arrangements with third parties, collects payment from the purchaser on behalf of the seller.

A marketplace facilitator does not include a person that exclusively provides internet advertising services or lists products for sale, and that does not otherwise meet this definition.

Marketplace seller means a person, regardless of whether or not the person is engaged in business in the city, which has an agreement with a marketplace facilitator and offers for sale tangible personal property, products, or services through a marketplace owned, operated, or controlled by a marketplace facilitator.

Multichannel seller means a retailer that offers for sale tangible personal property, commodities, or services through a marketplace owned, operated, or controlled by a marketplace facilitator, and through other means.

Retailer or Vendor means any person selling, leasing, renting, or granting a license to use tangible personal property or services at retail. A ~~R~~etailer shall include, but is not limited to, any:

- (1) Auctioneer;
- (2) Salesperson, representative, peddler or canvasser, who makes sales as a direct or indirect agent of or obtains such property or services sold from a dealer, distributor, supervisor or employer;

(3) Charitable organization or governmental entity which makes sales of tangible personal property to the public, notwithstanding the fact that the merchandise sold may have been acquired by gift or donation or that the proceeds are to be used for charitable or governmental purposes-;

(4) Marketplace facilitator, marketplace seller, or multichannel seller.

2. Subsection 26-391(d)(1) of the Thornton City Code is hereby amended by the addition of the words double-underlined, to read as follows:

(d) *Vendor responsibility for collection of and remittance of tax.*

(1) Collection of tax. Every retailer or vendor engaged in business or selling at retail, as such are defined in this Code, shall, irrespective of the provisions of Section 26-387, be liable and responsible for the payment of taxes in the amount yielded by applying the rate imposed by Section 26-387(b) to all taxable sales made by such retailer or vendor of commodities or services as specified in Section 26-389. Marketplace facilitators shall be specifically responsible for collection of taxes as provided below in Subsection 391(t).

3. Section 26-391 of the Thornton City Code is hereby amended by the addition of the words double-underlined, to read as follows:

(t) Marketplace Sales

(1) Obligations

a. Every marketplace facilitator engaged in business in the city is required to collect and remit sales tax on all taxable sales made by the marketplace facilitator, or facilitated by it for marketplace sellers or multichannel sellers to customers in the city, whether or not the marketplace seller for whom sales are facilitated would have been required to collect sales tax had the sale not been facilitated by the marketplace facilitator.

b. A marketplace facilitator shall assume all the duties, responsibilities, and liabilities of a retailer or vendor under Section 26-388 of this Code. Marketplace facilitators shall be liable for the taxes collected from marketplace sellers or multichannel sellers. The city may recover any unpaid taxes, penalties, and interest from the marketplace facilitator that is responsible for collecting on behalf of marketplace sellers or multichannel sellers.

c. The liabilities, obligations, and rights set forth under this subsection (t) are in addition to any other duties and

responsibilities the marketplace facilitator has under this Code if it also offers for sale tangible personal property, products, or services through other means.

d. A marketplace seller, with respect to sales of tangible personal property, products, or services made in or through a marketplace facilitator's marketplace, does not have the liabilities, obligations, or rights of a retailer under this article if the marketplace seller can show that such sale was facilitated by a marketplace facilitator:

i. With whom the marketplace seller has a contract that explicitly provides that the marketplace facilitator will collect and remit sales tax on all sales subject to tax under this article; or

ii. From whom the marketplace seller requested and received in good faith a certification that the marketplace facilitator is registered to collect sales tax and will collect sales tax on all sales subject to tax under this article made in or through the marketplace facilitator's marketplace.

e. If a marketplace seller makes a sale that is not facilitated by a licensed marketplace facilitator in a marketplace, the marketplace seller is subject to all of the same licensing, collection, remittance, filing, and recordkeeping requirements as any other retailer.

(2) Auditing. With respect to any sale, the city shall solely audit the marketplace facilitator for sales made by marketplace sellers or multichannel sellers but facilitated by the marketplace. The city will not audit or otherwise assess tax against marketplace sellers or multichannel sellers for sales facilitated by a marketplace facilitator.

4. No obligation to collect the sales and use tax required by the amendments contained in this ordinance may be applied retroactively. Responsibilities, duties and liabilities of a marketplace facilitator, marketplace seller, or multichannel seller described in Subsection 26-391(t) of the Thornton City Code begin upon the earlier of when such seller became licensed to collect the City's sales tax or when they became legally obligated to collect the City's sales tax under Section 26-388 of the Thornton City Code.
5. If any portion of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the constitutionality or validity of the remaining portions of this ordinance. City Council hereby declares that it would have passed this ordinance and each part hereof irrespective of the fact that any one part be declared unconstitutional or invalid.
6. All other ordinances or portions thereof inconsistent or conflicting with this ordinance or any portions hereof are hereby repealed to the extent of such inconsistency or conflict.

7. The repeal or amendment of any provision of the Code by this ordinance shall not release, extinguish, alter, modify, or change in whole or in part any penalty, forfeiture, or liability, either civil or criminal, which shall have been incurred under such provision, and each provision shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings, and prosecutions for the enforcement of the penalty, forfeiture, or liability, as well as for the purpose of sustaining any judgment, decree, or order which can or may be rendered, entered, or made in such actions, suits, proceedings, or prosecutions.

8. This ordinance shall become effective on the first day of the month that is at least 30 days after date of its adoption.

INTRODUCED, READ, PASSED on first reading, ordered posted in full, and title ordered published by the City Council of the City of Thornton, Colorado, on _____, 2021.

PASSED AND ADOPTED on second and final reading on _____, 2021.

CITY OF THORNTON, COLORADO

Jan Kulmann, Mayor

ATTEST:

Kristen N. Rosenbaum, City Clerk

THIS ORDINANCE IS ON FILE IN THE CITY CLERK'S OFFICE FOR PUBLIC INSPECTION.

APPROVED AS TO LEGAL FORM:

John E. Mallonee, Interim City Attorney

PUBLICATION:

Posted at City Hall, Margaret W. Carpenter Recreation Center, and Thornton Active Adult Center after first and second readings.

Published on the City's official website after first reading on _____, 2021, and after second and final reading on _____, 2021.