

# Sales and Use Taxes: Kansas and Missouri Move to Impose Collection Obligations on Marketplace Facilitators

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Recent legislation has brought Kansas and Missouri up-to-date with the nation by instituting new tax collection requirements for out-of-state retailers lacking a physical presence in their state. While these taxes were approved by the U.S. Supreme Court in *South Dakota v. Wayfair, Inc.* in 2018, the states had very different methods of pursuing such retailers. During the 2020-21 legislative sessions, both states' legislatures acted.

## HISTORY

The Kansas Department of Revenue (KDOR) had administratively adopted an aggressive approach against such out-of-state retailers, issuing a notice in 2019 requiring out-of-state retailers to register and begin collecting Kansas use tax for the first dollar of sales into Kansas by such retailers. The KDOR approach ignored the sales volume thresholds that were a requirement of the South Dakota statute that the *Wayfair* court approved and also ignored the Kansas Attorney General opinion in September 2019 which found the lack of a sales volume threshold rendered the KDOR approach unconstitutional. Marketplace facilitators such as Amazon were requested to voluntarily register in Kansas. Meanwhile in Missouri, the Missouri Department of Revenue (MDOR) largely ignored the entire issue, instead awaiting legislative action.

## KANSAS

In Kansas, the legislature adopted a law imposing a collection and pay-over requirement on marketplace facilitators (a two-part definition that also applies in Missouri, see below, (1) they facilitate retail sales by marketplace sellers and (2) they directly or indirectly collect and transmit payments from purchasers to marketplace sellers) due to economic nexus for out-of-state sellers and how to collect the sales tax. The

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legislation passed by overriding the Governor's veto and requires such marketplace facilitators for marketplace sellers to collect and pay-over sales taxes on sales into Kansas.

A marketplace facilitator can be removed from the collection obligation on behalf of large sellers (those having more than \$1M in annual sales) or upon the KDOR being satisfied that the marketplace sellers using a marketplace facilitator, are already collecting and paying over taxes to the KDOR. A \$100,000 annual threshold applies to each collecting entity whether a marketplace facilitator or the seller directly but once exceeded in a calendar year, the collection and pay-over requirement applies immediately in that calendar year. Class action suits against marketplace facilitators that collect and pay-over excessive tax from purchasers are barred, but customers can pursue refund claims in Kansas under the existing refund statute. Customers remain liable for use tax should a marketplace facilitator or marketplace seller fail to collect and pay-over sales tax under this new provision.

## Offsets in Kansas to the Added Taxes Collected Due to the Above

There are other provisions of the bill, projected to reduce revenues to KDOR, primarily in the income tax area:

- Extending the carryforward period for net operating losses from 10 years to indefinitely.
- Extending the corporate tax return filing date to a date one month after the federal return is due.
- Global Intangible Low Taxed Income inclusions adopted as part of federal income tax law are not to be followed in Kansas.
- Business interest deduction limitations imposed at the federal level (not to exceed 30% of adjusted taxable income plus business interest income, see IRC § 163(j)) are not to be followed in Kansas; Increased standard deductions for individuals in Kansas by \$500 each, to \$3,500 for singles and \$8,000 for marrieds filing jointly.
- Kansans who file a federal return with a standard deduction can elect to file a Kansas return using itemized deductions.
- FDIC insurance premiums disallowed as federal income tax deductions by IRC § 162(r) for certain financial institutions with assets exceeding \$10 billion are allowed as deductions in Kansas.
- Business meal disallowances as part of the TCJA are allowed in Kansas.
- Enhanced expensing for tangible personal property and computer software are allowed in Kansas.

SB 50 (2020-21) vetoed by Governor Laura Kelly (April 16, 2021) overridden by Kansas legislature (May 3, 2021) (generally effective January 1, 2021, sales tax provisions effective July 1, 2021).

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## MISSOURI

In Missouri, the legislature finally passed a *Wayfair* sales and use tax collection statute, effective on January 1, 2023, late in the recently completed session. Governor Mike Parson signed the legislation into law on June 30, 2021. The Missouri law defines marketplace facilitators in the same two-part manner as in the Kansas legislation, and such marketplace facilitators are to collect and remit use tax on sales to Missouri residents with the sales deemed to occur at the location to which items are shipped or delivered, or where possession is taken by the purchaser.

These requirements are applicable only to marketplace facilitators whose gross receipts for sales into Missouri exceed \$100,000 on a rolling twelve-month period, at the end of each calendar quarter and will be applicable once the \$100,000 threshold is exceeded, as of the beginning of the second calendar quarter after the threshold is exceeded, and shall continue to do apply as long as the marketplace facilitator is engaged in business in Missouri or maintains substantial nexus with Missouri.

The same \$100,000 threshold requirement would apply to sellers not using a marketplace facilitator. To promote efficiency, the MO DOR is to: (1) work with the governing board of the Streamlined Sales Tax Agreement (SSTA, an ongoing multi-state effort to adopt uniform legislation in the states to address this issue) to allow sellers to use the SSTA's certified service providers (third parties that perform a seller's sales and use tax functions) and its central registration system or the MO DOR is to work with certified service providers independent of the SSTA governing board; and (2) maintain information for use by sellers to ease the collection and pay over burden (boundaries for taxing jurisdictions in Missouri and information on the sales and use tax treatment of products or services in Missouri). As in Kansas, class action suits against marketplace facilitators are barred and purchasers can still seek refunds of such over collected use tax under the existing refund statute. *Missouri SB 153 (2020-21)* (effective January 1, 2023).

### Offsets in Missouri to the Added Taxes Collected Due to the Above

Similar to Kansas, the offsets benefit individual income taxpayers:

- Reduced individual income tax rates that began in 2017 were expanded and will continue into calendar year 2024, reducing the highest marginal individual income tax rate to 4.8% in 2024, assuming the pre-existing revenue targets are met. Starting in 2025, further rate reductions of .01% will occur, apparently without any revenue target conditions.
- Deductions for federal income taxes paid and the add back for federal income tax refunds received are not to consider federal refunds attributed to tax credits that reduced federal tax liability due to economic payments due to the COVID-19 pandemic.
- A nonrefundable earned income tax credit is added for Missouri that mirrors the federal earned income tax credit in terms of computation but starts at 10% of the federal credit but may be increased to 20% of

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the federal credit if certain revenue thresholds are met.

SB 153 (2020-21) (effective January 1, 2023 but the changes described in the second bullet just above are effective immediately).

## CONCLUSION

Sellers doing business in Kansas or Missouri, either through a marketplace facilitator or without one, through mail orders, internet sales or using other methods that do not require a physical presence in the state of the purchaser need to start collecting and paying over the applicable sales or use taxes (or confirming that their marketplace facilitator is doing so) subject to the applicable thresholds and effective dates described above. Kansas consumers may not see any sales tax increases if sellers or marketplace facilitators have already been following the KDOR recommendations but Missouri consumers should see increased use taxes as a result of this legislation, but not until 2023.

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