



SALT Alert!



SALT Alert! 2017-28: Pennsylvania Revenue Bill Signed Into Law

On October 30, 2017, Governor Tom Wolf approved House Bill 542 to (at least partially) fund the FY 2017-2018 budget. [House Bill 542](#) contains numerous tax changes. Certain of the significant changes affecting business taxpayers are discussed in detail below.

Revised Corporate Excise Net Loss Deduction Limitations

House Bill 542 amends the net loss deduction carryover for tax years beginning after December 31, 2017 to 35 percent of taxable income and for tax years beginning after December 31, 2018 and after to 40 percent of taxable income.

Remote Seller, Marketplace Facilitator, and Referrer Provisions

General Rules

House Bill 542 adopts provisions designed to encourage (under some duress) remote sellers (and others) to collect and remit sales and use tax. These provisions are fairly similar to those enacted in Washington State earlier this year. Specifically, remote sellers, marketplace facilitators or referrers that have taxable retail sales of tangible personal property within Pennsylvania or delivered to locations within Pennsylvania of at least \$10,000 during the immediately preceding twelve calendar month period are required to elect annually to either (1) collect and remit sales tax, or (2) comply with specified use tax notice and reporting requirements. These provisions generally apply to transactions that occur after March 31, 2018. However, for sales of digital products, these provisions generally apply for sales occurring after March 31, 2019.^[1]

The first annual election must be made on or before March 1, 2018. An affected party will make an election by March 1, 2018 to either collect tax or comply with the specified notice requirements and reports for all transactions occurring after March 31, 2018. For digital goods, it appears the collection or reporting requirements will commence for all transaction after March 31, 2019. After the first election, subsequent elections must be made on or before June 1st of each calendar year. The election will apply to the next succeeding fiscal year beginning July 1st. Note the first election made on or before March 1, 2018 is effective for the balance of FY 2018 (July 1, 2017 through June 30, 2018) and FY 2019 (July 1, 2018 through June 30,

^[1] House Bill 542, oddly, seems to imply that the first reports to purchasers, due on or before January 31, 2018, must include sales of digital goods. This is odd in that the provisions applicable to sellers of digital goods apply to transactions after March 31, 2019 for all other notice and reporting requirements.

2019). A remote seller, marketplace facilitator or a referrer who fails to make an election is deemed to have elected to comply with the notice and reporting requirements. An election to comply with the notice and reporting requirements can be changed to an election to collect and remit sales tax at any time during the fiscal year. The new election to collect will become effective 30 days after its filing and will be effective for the balance of the fiscal year in which the new election was filed **and** the next succeeding fiscal year.

Marketplace facilitators must make an election for (1) sales at retail through the marketplace facilitator's forum made by or on behalf of a marketplace seller that does not maintain a place of business in Pennsylvania, and (2) sales at retail made by a marketplace facilitator on its own behalf if the marketplace facilitator does not maintain a place of business in Pennsylvania. A referrer must make an election with respect to (1) sales at retail directly resulting from a referral of a purchaser to a marketplace seller that does not maintain a place of business in Pennsylvania, (2) sales at retail directly resulting from a referral of a purchaser to a remote seller, and (3) sales at retail of the referrer's own products if the referrer does not maintain a place of business in Pennsylvania. A referrer may make a different election for the first two categories of sales than it makes with respect to the third category of sales.

Key Definitions

Remote Seller/Marketplace Seller: A "remote seller" is a person (other than a marketplace facilitator, marketplace seller or referrer) that does not maintain a place of business in Pennsylvania and that sells taxable tangible personal property at retail through a forum. The term does not include an employee who in the ordinary course of employment renders services to his employer in exchange for wages and salaries. A "marketplace seller" is a person who has an agreement with a marketplace facilitator pursuant to which the marketplace facilitator facilitates sales for the person.

Marketplace Facilitator: A "marketplace facilitator" is a person who facilitates the sale at retail of tangible personal property. A person facilitates a sale at retail if the person or an affiliated person: (1) lists or advertises tangible personal property for sale at retail in any forum; and (2) either directly, or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser and transmits the payment to the person selling the property. The term includes a person who may also be a vendor. An "affiliated person" is a person who, with respect to another person: (1) has a direct or indirect ownership interest of more than five percent in the other person; or (2) is related to the other person because a third person, or group of third persons who are affiliated with each other (as defined), holds a direct or indirect ownership interest of five percent or more in the related person.

Referrer: A "referrer" is a person, other than a person engaged in the business of printing or publishing a newspaper, who pursuant to an agreement or arrangement with a marketplace seller:

- Agrees to list or advertise for sale at retail one or more products of the marketplace seller or remote seller in a physical or electronic medium; and
- Receives consideration from the marketplace seller or remote seller from the sale offered in the listing or advertisement; and
- Transfers by telecommunications, internet link or other means, a purchaser to a marketplace seller, remote seller or affiliated person to complete a sale; and
- Does not collect a receipt from the purchaser for the sale.

A referrer does not include a person who: (1) provides internet advertising services; and (2) does not provide the marketplace seller's or remote seller's shipping terms or advertise whether a marketplace seller or remote seller collects a sales or use tax. The term "referrer" includes a person who may also be a vendor.

Making the Election to Collect and Remit Sales Tax

A remote seller, marketplace facilitator or referrer that elects to collect and remit must obtain a Pennsylvania Sales Tax License and will be subject to all the provisions of the sales and use tax law with respect to the collection and remittance of tax. For a period of five years, the Department of Revenue may abate or reduce any penalty or addition to tax imposed against a remote seller, marketplace facilitator or referrer electing to collect tax due to hardship or for good cause shown. Further, a marketplace facilitator or referrer is relieved of any liability if it establishes that the failure to collect the correct amount of tax was due to incorrect information given to the marketplace facilitator or referrer by a marketplace seller or remote seller. A class action suit may not be brought against a marketplace facilitator or referrer on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by a marketplace facilitator or referrer, regardless of whether such action is characterized as a tax refund claim. A purchaser's right to seek a refund from the Department of Revenue remains unchanged.

Election to Comply with Notice and Reporting Requirements

If a remote seller or marketplace facilitator elects to comply with the notice and reporting requirements, it must do the following:

1. **General Notice:** Post a conspicuous notice on its forum informing purchasers that (1) sales or use tax may be due in connection with the purchase and delivery of the tangible personal property; and (2) the state requires the purchaser to file a return if use tax is due in connection with the purchase and delivery.
2. **Transactional Notice:** Provide a written notice to each purchaser at the time of each sale at retail that includes:
 - A statement that sales tax is not being collected in connection with the purchase; **and**
 - A statement that the purchaser may be required to remit use tax directly to the Department of Revenue; **and**
 - Instructions for obtaining additional information from the Department of Revenue regarding whether and how to remit use tax to the Department.

This transactional notice must be prominently displayed on all invoices and order forms and on each sales receipt or similar document provided to the purchaser, whether in paper or electronic form. No statement that sales and use tax is not imposed on a transaction may be made unless the transaction is exempt from tax under the sales and use tax statute or other Pennsylvania law.

3. **Annual Report to Purchasers:** No later than January 31 of each year provide a written report to each purchaser required to receive a transactional notice during the immediately preceding calendar year that includes:
 - A statement that the remote seller or marketplace facilitator did not collect sales tax in connection with the purchaser's transactions with the remote seller or marketplace facilitator and that the purchaser may be required to remit use tax to the Department of Revenue; **and**
 - A list, by date, indicating the type and purchase price of each product purchased or leased by the purchaser from the remote seller or marketplace facilitator and delivered to a location within Pennsylvania; **and**
 - Instructions for obtaining additional information from the Department of Revenue regarding whether and how to remit use tax to the Department; **and**
 - A statement that the remote seller or marketplace facilitator is required to submit the name of the purchaser and the aggregate dollar amount of the purchaser's purchases from the remote seller or marketplace facilitator; **and**
 - Any additional information the Department of Revenue may reasonably require.

The report must be mailed by first-class mail in an envelope prominently marked with words indicating “important tax information” is enclosed to the purchaser’s billing address, if known, or to the purchaser’s shipping address, if the billing address is unknown. If the billing and shipping address are unknown, the report must be sent electronically to the purchaser’s last known e-mail address with the subject heading indicating that important tax information is being provided.

4. Annual Report to Department: No later than January 31 of each year, an officer of a remote seller or marketplace facilitator must submit a report electronically to the Department of Revenue that shall include with respect to each purchaser required to receive a **written notice** during the immediately preceding tax year:

- The purchaser’s name; **and**
- The purchaser’s billing address and, if different, the purchaser’s last known mailing address; **and**
- The address within Pennsylvania to which the products were delivered to the purchaser; **and**
- The aggregate dollar amount of the purchaser’s purchases from the remote seller or marketplace facilitator; **and**
- The name and address of the remote seller, marketplace facilitator or marketplace seller that made the sales to the purchaser.

The notice shall include a statement, under penalty of perjury, by the officer that the remote seller or marketplace facilitator made reasonable efforts to comply with the notice and reporting requirements.

If a referrer elects to comply with the notice and reporting requirements, it must do the following:

1. General Notice: Post a conspicuous notice on its platform that informs purchasers intending to purchase tangible personal property for delivery to a location within Pennsylvania that:

- Sales or use tax may be due in connection with the purchase and delivery of the tangible personal property; **and**
- The person to which the purchaser is being referred may or may not collect and remit sales tax to the Department of Revenue in connection with the transaction; **and**
- Pennsylvania requires the purchaser to file a return if use tax is due in connection with the purchase and delivery and not collected by the seller; **and**
- Instructions for obtaining additional information from the Department of Revenue regarding whether and how to remit use tax to the Department; **and**
- If the person to whom the purchaser is being referred does not collect sales tax on a subsequent purchase by the purchaser, the person may be required to provide information to the purchaser and the Department of Revenue about the purchaser’s potential sales or use tax liability.

This notice must be prominently displayed and may include pop-up boxes or notification by other means that appears when the referrer transfers a purchaser to another person to complete the sale.

2. Reports to Remote Sellers: No later than January 31 of each year provide a written report to each remote seller to whom the referrer transferred a potential Pennsylvania purchaser during the immediately preceding calendar year that includes:

- A statement that sales or use tax may be imposed by the state on the transaction; **and**
- A statement that the remote seller may be required to make an election under Section 213.1(A) to collect and remit sales tax or to comply with notice and reporting requirements; **and**
- Instructions for obtaining additional information regarding sales and use tax from the Department of Revenue.

3. Reports to the Department: No later than January 31 of each year an officer of a referrer shall submit a report electronically to the Department of Revenue that shall include a list of remote sellers to whom the referrer provided a written notice. The notice shall include a statement, under penalty of perjury, by the officer that the referrer made reasonable efforts to comply with the notice and reporting requirements.

Liability and Penalties

A remote seller, marketplace facilitator or referrer that has elected or is deemed to have elected to comply with notice and reporting requirements and fails to comply with the requirements shall be subject to a penalty in the amount of \$20,000 or 20 percent of total Pennsylvania sales during the previous twelve months, whichever is less. The penalty shall be assessed separately for each violation, but may only be assessed once in a calendar year.

Other Sales and Use Tax Changes

Separately stated charges for help desk or call center support related to canned software are not subject to sales and use tax effective immediately (i.e., October 30, 2017). Also, the wrapping supply exclusion from sales and use tax is expanded to kegs used to contain malt or brewed beverages. This is also effective immediately

Tax Appeals Changes

House Bill 542 shortens the period to appeal an assessment to the Board of Appeals from 90 days to 60 days from the mailing date of the notice of assessment. The bill also shortens the period to appeal a decision and order of the Board of Appeals to the Board of Finance and Revenue from 90 days to 60 days from the mailing date of the decision and order. Both of these changes become effective December 29, 2017. It is not clear whether the 90-day or 60-day appeal period would apply to a taxpayer that receives an assessment or a Decision and Order of the Board of Appeals before December 29, 2017.

Please contact [Howard Sklaroff](#) at (267) 256-2891 with questions.