



Commerce City

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Council Communication File Number: Ord 2498

Agenda Date: 5/1/2023

Version: 1

Status: Agenda Ready

In Control: City Council

File Type: Ordinance

FIRST READING OF AN ORDINANCE AMENDING THE COMMERCE CITY SALES AND USE TAX CODE, ARTICLE I OF CHAPTER 20 OF THE COMMERCE CITY REVISED MUNICIPAL CODE, REGARDING ECONOMIC NEXUS AND THE OBLIGATION OF REMOTE SELLERS TO COLLECT AND REMIT SALES TAX

Summary & Background

The United States Supreme Court in *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018), overturned prior precedent and ruled that a State is not prohibited by the Commerce Clause from requiring a retailer to collect sales tax based solely on the fact that such retailer does not have a physical presence in the State.

The longstanding test to determine the constitutional propriety of a state or local tax is whether the tax (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides. This ordinance primarily addresses the first prong of that test.

Following precedent from 1977, the Court in a 1992 case, *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, determined that a physical presence, such as a retail outlet, in a particular state was required to establish sufficient nexus to justify a tax on the business. The case was continuously criticized as incongruent with the modern economy, where customers more frequently purchase goods and services online. Commentators noted that “*Quill* created an inefficient ‘online sales tax loophole’ that gives out-of-state businesses an advantage.” *Wayfair, Inc.*, 138 S. Ct. 2080, 2092.

In Colorado, retailers must begin collecting Colorado state and local sales tax if their retail sales into Colorado during the previous or current calendar year exceed \$100,000. The City’s Sales and Use Tax Code needs to be amended to clearly reflect the changes resulting from the *Wayfair* case.

The proposed ordinance includes the necessary word changes to the City’s Sales and Use Tax Code required to clarify the taxpayer’s obligations under the new Economic Nexus standard.

The proposed ordinance addresses tax administration issues, defines economic nexus for retailers or vendors without a physical presence in the State or City and requires a retailer or vendor to collect and remit sales tax for all sales made within online marketplaces.

The proposed ordinance also allows the City to do the following;

- adopt uniform definitions for marketplace facilitators, marketplace sellers, and multichannel sellers.
- provides a safe harbor to those businesses who transact limited sales within the City and do not meet the State's Economic Nexus threshold.
- allows the City to join in on the simplification efforts of all the self-collecting home rule municipalities in Colorado currently being promoted by CML.

Not adopting the Economic Nexus standard embedded in the proposed ordinance does the following;

- creates an incentive for businesses to avoid a physical presence in the State and its respective communities, resulting in fewer jobs and increasing the share of taxes to those consumers who buy local from competitors with a physical presence in the State and its municipalities.
- will result in unremitted sales taxes which are legally due.
- permits an inequitable exception that prevents market participants from competing on an even playing field. Non-collecting retailers will have an unfair advantage over retailers who collect our City tax.

Staff Responsible (Department Head): Theresa Wilson, Interim Finance Director

Staff Presenting: Ken Keeley, Tax Manager

Financial Impact: N/A

Funding Source: N/A

Staff Recommendation: The adoption of the proposed ordinance.

Suggested Motion: I move to adopt Ordinance 2498 on first reading.