

**ORDINANCE NO. 9
SERIES 2020**

**AN ORDINANCE AMENDING TITLE 4, CHAPTER 3 OF THE VAIL TOWN
CODE TO DEFINE ECONOMIC NEXUS AND UPDATE METHODS FOR
COLLECTION AND REMITTANCE OF SALES TAX**

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

WHEREAS, pursuant to Article XX, Section 6 of the Colorado Constitution, the right to enact, administer and enforce sales taxes is clearly within the constitutional grant of power to the Town and is necessary to raise revenue with which to conduct the affairs and render the services performed by the Town;

WHEREAS, pursuant to such authority, the Town has adopted and enacted a Sales Tax Code (the "Code"), under which Town sales tax is levied on all sales and purchases of tangible personal property or taxable services at retail unless prohibited, as applicable to the provision of this Ordinance, under the Constitution or laws of the United States;

WHEREAS, the United States Supreme Court in *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018), overturned prior precedent and held 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 ("Remote Sales");

WHEREAS, based upon such decision, the retailer's obligation to collect tax on Remote Sales is no longer based on the retailer's physical presence in the jurisdiction by the Constitution or law of the United States, and the Code needs to be amended to clearly reflect such obligation consistent with said decision;

WHEREAS, the delivery of tangible personal property, products, or services into the Town relies on and burdens local transportation systems, emergency and police services, waste disposal, utilities and other infrastructure and services;

WHEREAS, the failure to tax Remote Sales creates incentives 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 from competitors with a physical presence in the State and its municipalities;

WHEREAS, it is appropriate for Colorado municipalities to adopt uniform definitions within their sales tax codes to encompass marketplace facilitators, marketplace sellers, and multichannel sellers that do not have a physical presence in the Town, but that still have a taxable connection with the Town;

WHEREAS, the goal of adopting this ordinance is to join in on the simplification efforts of all the self-collecting home rule municipalities in Colorado;

WHEREAS, this ordinance provides a safe harbor to those who transact limited sales within the Town;

WHEREAS, absent this amendment, the continued failure of retailers to voluntarily apply and remit sales tax owed on Remote Sales exposes the Town to unremitted taxes and permits an inequitable exception that prevents market participants from competing on an even playing field;

WHEREAS, the Town adopts this ordinance with the intent to address tax administration, and, in connection with, establish economic nexus for retailers or vendors without physical presence in the State and require the retailer or vendor to collect and remit sales tax for all sales made within the marketplace as permitted in 2018 by the U.S. Supreme Court; and

WHEREAS, the State's adoption of economic nexus for state sales tax and state-collected municipal sales tax did not require voter approval under the Taxpayer's Bill of Rights ("TABOR"), Article X, § 20 of the Colorado Constitution, and, similarly, updating the Town's methods to allow collection and remittance of sales tax to the full extent permitted by law does not require voter approval under TABOR.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF VAIL, COLORADO, THAT:

Section 1. Section 4-3-1-2 of the Vail Town Code is amended by the revision to or addition of the following defined terms, which shall appear in alphabetical order:

ECONOMIC NEXUS: The connection between the town and a person not having a physical nexus in the State of Colorado, which connection is established when the person or marketplace facilitator makes retail sales into the town, and:

A. In the previous calendar year, the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended; or

B. In the current calendar year, 90 days has passed following the month in which the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended.

This definition does not apply to any person who is doing business in this state but otherwise applies to any other person.

ENGAGED IN BUSINESS IN THE TOWN: Performing or providing services or selling, leasing, renting, delivering or installing tangible personal property for storage, use or

consumption within the Town. Engaged in business in the town includes, but is not limited to, any one of the following activities by a person:

A. Directly, indirectly, or by a subsidiary maintains a building, store, office, salesroom, warehouse, or other place of business within the taxing jurisdiction;

B. Sends one or more employees, agents or commissioned salespersons into the taxing jurisdiction to solicit business or to install, assemble, repair, service, or assist in the use of its products, or for demonstration or other reasons;

C. Maintains one or more employees, agents or commissioned salespersons on duty at a location within the taxing jurisdiction;

D. Owns, leases, rents or otherwise exercises control over real or personal property within the taxing jurisdiction; or

E. Retailer or vendor in the state of Colorado that makes more than one delivery into the taxing jurisdiction within a twelve (12) month period.

F. Makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth herein.

MARKETPLACE: 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: A person who:

A. 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;

B. 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

C. Either directly or indirectly, through agreements or arrangements with third parties, collects payment from the purchaser on behalf of the seller.

This definition 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: A person, regardless of whether or not the person is engaged in business in the town, 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: 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: Any person selling, leasing, renting, or granting a license to use tangible personal property or services at retail. Retailer shall include, but is not limited to, any:

A. Auctioneer;

B. 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;

C. 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;

D. Retailer-contractor, when acting in the capacity of a seller of building supplies, construction materials, and other tangible personal property;

E. Marketplace facilitator, marketplace seller, or multichannel seller.

Section 2. Section 4-3-3-1 of the Vail Town Code is amended by the addition of the following new subsection J:

4-3-3-1: PROPERTY AND SERVICES TAXED:

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J. Marketplace Sales:

1. A marketplace facilitator engaged in business in the town 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 town, 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.

2. A marketplace facilitator shall assume all the duties, responsibilities, and liabilities of a vendor under this chapter. Marketplace facilitators shall be liable for the taxes collected from marketplace sellers or multichannel sellers. The town 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.

3. The liabilities, obligations, and rights set forth under this subsection J are in addition to any duties and responsibilities of the marketplace facilitator has under this chapter if it also offers for sale tangible personal property, products, or services through other means.

4. 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 chapter if the marketplace seller can show that such sale was facilitated by a marketplace facilitator:

a. 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 chapter; or

b. 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 chapter made in or through the marketplace facilitator's marketplace.

5. 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.

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

Section 3. No obligation to collect the sales and use tax required by this Ordinance may be applied retroactively. Responsibilities, duties and liabilities described in Section 2 of a marketplace facilitator, marketplace seller, or multichannel seller begin upon the earlier of when they became licensed to collect the Town's sales tax or when they became legally obligated to collect the Town's sales tax

Section 4. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance; and the Town Council hereby declares it would have passed this ordinance, and each part, section, subsection, sentence, clause or phrase thereof, regardless of the fact that any one or more parts, sections, subsections, sentences, clauses or phrases be declared invalid.

Section 5. The amendment of any provision of the Vail Town Code in this ordinance shall not affect any right which has accrued, any duty imposed, any violation that occurred prior to the effective date hereof, any prosecution commenced, nor any other action or proceeding as commenced under or by virtue of the provision amended. The amendment of any provision hereby shall not revive any provision or ordinance previously repealed or superseded unless expressly stated herein.

Section 6. All bylaws, orders, resolutions and ordinances, or parts thereof, inconsistent herewith are repealed to the extent only of such inconsistency. This repealer shall not be construed to revise any bylaw, order, resolution or ordinance, or part thereof, theretofore repealed.

Section 7. This ordinance shall become effective on the first day of the month that is at least thirty (30) days after date of its adoption.

INTRODUCED, READ ON FIRST READING, APPROVED, AND ORDERED PUBLISHED ONCE IN FULL ON FIRST READING this 4th day of August, 2020 and a public hearing for second reading of this Ordinance is set for the 18th day of August, 2020, in the Council Chambers of the Vail Municipal Building, Vail, Colorado.

Dave Chapin, Mayor

ATTEST:

Tammy Nagel, Town Clerk

READ AND APPROVED ON SECOND READING AND ORDERED PUBLISHED this 18th day of August, 2020.

Dave Chapin, Mayor

ATTEST:

Tammy Nagel, Town Clerk