

Minnesota Department of Revenue

Revenue Notice # 22-02: Tobacco Products Tax – Delivery Seller Collection Responsibility – Revocation and Replacement of Revenue Notice # 20-03.

Introduction

This Revenue Notice revokes and replaces Revenue Notice 20-03. Effective March 28, 2021, Congress made the federal Prevent All Cigarette Trafficking Act (PACT Act) applicable to all “electronic nicotine delivery system” products, which are commonly known as vapor products. The PACT Act requires that retailers making delivery sales of certain tobacco products pay state excise taxes and meet other state payment obligations. In addition, Minnesota enacted legislation, effective after December 31, 2021, that clarifies and expands the obligations of retailers to collect and pay use tax on delivery sales of products subject to use tax under *Minnesota Statutes*, Chapter 297F (“tobacco products”). A “delivery sale” is a sale of tobacco products where: 1) the consumer is not in the presence of the retailer and submits the order via the phone, internet, or other means of communication; or 2) the products are delivered by mail or other delivery service. Retailers that make delivery sales are “tobacco delivery sellers.”

Department Position

Minnesota Statutes, section 297F.05, subdivision 4b, states that tobacco delivery sellers “must, for any delivery sale, collect and pay to the state any use tax imposed by [*Minnesota Statutes*, section 297F.05].” This provision is referred to in this Revenue Notice as the “Ensure-Payment Provision.”

In addition, among other PACT Act obligations, 15 *United States Code*, section 376(a)(3) requires tobacco delivery sellers of PACT Act products to comply with “all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, including laws imposing . . . excise taxes . . . and . . . other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco”

Under Minnesota’s Ensure-Payment Provision, all tobacco delivery sellers must collect and pay any use tax imposed on products under *Minnesota Statutes*, Chapter 297F. For out-of-state tobacco delivery sellers that make delivery sales to Minnesota consumers and have no physical presence in Minnesota, the Department is applying sales thresholds to the collection and payment requirements that are consistent with the U.S. Supreme Court’s decision in *South Dakota v. Wayfair, Inc., et al.*, 138 S.Ct. 2080 (2018) (“*Wayfair*”). This application of *Wayfair* sales thresholds is for administrative purposes.

Applying *Wayfair* thresholds, a tobacco delivery seller with no physical presence in Minnesota is subject to the Ensure-Payment Provision and has nexus with Minnesota if, during the prior 12-month period, the tobacco delivery seller made:

- (1) 200 or more delivery sales of tobacco products from outside Minnesota to destinations

in Minnesota by common carrier or otherwise; or

- (2) Delivery sales of tobacco products totaling more than \$100,000 from outside Minnesota to destinations in Minnesota by common carrier or otherwise.

An out-of-state tobacco delivery seller with no physical presence in Minnesota:

- (1) Must determine on a monthly basis whether it meets either of the *Wayfair* thresholds within the last 12-month period;
- (2) Must, if it meets either *Wayfair* threshold within the last 12-month period, begin collecting and remitting tax on the first day of a calendar month occurring no later than 60 days after such tobacco delivery seller meets either of the *Wayfair* thresholds;
- (3) Must file a return and pay, on or before the 18th day of the following calendar month, all taxes it collected under the Ensure-Payment Provision.
- (4) Must continue to collect and remit tax until at least the last day of the 12th calendar month following the calendar month in which such tobacco delivery seller began collecting and remitting tax under paragraph (2);
- (5) May cease such activities after the 12-month period described in paragraph (4), if such tobacco delivery seller no longer meets either of the *Wayfair* thresholds and satisfies the requirements of paragraph (6); and
- (6) May cease collection and remittance of tax under paragraph (5) only after notifying the Department that such tobacco delivery seller no longer meets either of the *Wayfair* thresholds. If the tobacco delivery seller subsequently requalifies under either of the *Wayfair* thresholds, the tobacco delivery seller shall again comply with the requirements of paragraphs (1), (2), (3), and (4).

When a tobacco delivery seller is not obligated to collect and remit use tax because it does not meet either *Wayfair* threshold, others, including a consumer that purchased tobacco products from an out-of-state tobacco delivery seller, may be liable for use tax.

Regardless of *Wayfair* thresholds, all tobacco delivery sellers must register with the Department prior to making any delivery sales to Minnesota consumers.

Effective for all delivery sales occurring after December 31, 2021.

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