

**ORDINANCE NO. #19**

**SERIES OF 2023**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF ASPEN, COLORADO, AMENDING TITLE 23 OF THE ASPEN MUNICIPAL CODE TO AMEND AND ADD DEFINITIONS AND INCLUDE NEW PROVISIONS TO INCLUDE AND FACILITATE TAXATION ON REMOTE SALES INTO THE CITY.**

**WHEREAS**, the City of Aspen, Colorado, (the “City”), is a home rule municipality, organized and existing under Article XX, Section 6 of the Colorado Constitution; and

**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 City and is necessary to raise revenue with which to conduct the affairs and render the services performed by the City; and

**WHEREAS**, pursuant to such authority, the City has adopted and enacted a Taxation Code (the “Code”), under which City 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; and

**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”); and

**WHEREAS**, based upon the *South Dakota v. Wayfair* case, the City of Aspen seeks to amend the City’s Code to impose sales and use tax on sales regardless of whether the sale or service is made at the retailer’s location in the City or delivered to the customer at a location within the City; and ,

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

**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; and



The term *Engaged in Business in the City* shall be amended to add an additional subsection (e) and (f) shall read as follows:

*Engaged in Business in the City* means performing or providing services or selling, leasing, renting, delivering or installing tangible personal property, products, or services for storage, use or consumption, within the City. This term 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 sales persons 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 sales persons 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) is a retailer or vendor in the state of Colorado that makes more than one delivery into the taxing jurisdiction within a twelve month period; or (f) makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth in 23.04.010.

The term *Retailer* shall be amended to define both the term *Retailer* and *Vendor* and add an additional section (e), and shall be amended to read as follows:

*Retailer or Vendor* means any person selling, leasing, renting, or granting a license to use tangible personal property or services at retail. The terms “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 23.04.010 of the Aspen Municipal Code is hereby amended to include the following new definitions:

*Economic Nexus* means the connection between the City 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 City, 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 Colorado Revised Statutes (“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.

*Marketplace* means 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* means a person who:

(a) (1) 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;

(2) 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

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

(b) “Marketplace Facilitator” does not include:

(1) a marketplace facilitator, marketplace seller or multichannel seller that offers or facilitates the advertising, booking, or collection of sales and fees for short-term rentals subject to the permit requirements of Chapter 26.530 of the City of Aspen Municipal Code;

(2) A person that exclusively provides internet advertising services or lists products for sale, and that does not otherwise meet this definition.

*Marketplace Seller* means a person, regardless of whether or not the person is engaged in business in the city, 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* means 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.

**Section 3:** Section 23.32.120 of the Code is hereby repealed and replaced with the following:

### **23.32.120 - Marketplace Sales**

(a) Requirements of Marketplace Facilitators:

(1) A marketplace facilitator engaged in business in the city 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 city, 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 retailer or vendor. *j*. Marketplace facilitators shall be liable for the taxes collected from marketplace sellers or multichannel sellers. The City 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 section are in addition to any duties and responsibilities of the marketplace facilitator has under this title 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 article 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 article; 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 article 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.

(b) This section does not apply to marketplace facilitators that provide short-term rental booking services and collect short-term rental sales and fees. Short-term rental taxes shall be collected and remitted by the person or business issued an STR Permit pursuant to Chapter 23.54 of this Code.

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

**Section 4:** No obligation to collect the sales and use tax required by this article may be applied retroactively. Responsibilities, duties and liabilities described in Section 4 of a marketplace facilitator, marketplace seller, or multichannel seller begin upon the earlier of when they became licensed to collect the city's sales tax or when they became legally obligated to collect the city's sales tax under Section 3.

**Section 5:**

Any scrivener's errors contained in the code amendments herein, including but not limited to mislabeled subsections or titles, may be corrected administratively following adoption of the Ordinance.

**Section 6:**

This ordinance shall not affect any existing litigation and shall not operate as an abatement of any action or proceeding now pending under or by virtue of the resolutions or ordinances repealed or amended as herein provided, and the same shall be conducted and concluded under such prior resolutions or ordinances.

**Section 7:**

If any provision of this ordinance, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this ordinance, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.

**Section 8:** 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 AND READ**, as provided by law, by the City Council of the City of Aspen on the 14th day of November 2023.

ATTEST:



Nicole Henning, City Clerk



Torre, Mayor

**FINALLY**, adopted, passed and approved this 28th day of November 2023.

ATTEST:



Nicole Henning, City Clerk



Torre, Mayor

APPROVED AS TO FORM:



James R. True, City Attorney

