

Sales Tax Reduction from Remote Sales



ISSUE MEMORANDUM 2019-xx

Introduction

Section 10-64-9 of the South Dakota Codified Laws requires a calculation of revenue generated under the obligation to collect and remit sales taxes by remote sellers in order to reduce the rate of taxes imposed on sales. The language of the statute, however, raises several questions regarding how the law is to be implemented. By using rules of interpretation provided by the South

Dakota Supreme Court, this Issue Memorandum provides an interpretation of the statute.

Background - Senate Bill 106 and House Bill 1182 (2016)

In 2016, the Legislature enacted Senate Bill 106, which requires out-of-state sellers with no physical presence in the state to collect and remit sales taxes on products and services that are delivered into the state. The bill contained an Emergency Clause and went into immediate effect when it was signed by the Governor. Approximately one month later, the state filed a declaratory judgment action against certain named sellers for failing to collect and remit sales taxes in accordance with the new law. Under the language of the bill, during any action for declaratory judgment, the law would not be enforced. Nonetheless, some out-of-state sellers voluntarily followed the law.

The lawsuit ultimately led to the Supreme Court of the United States, which overturned its precedent and found in favor of the state. Following the Court's decision, the Legislature held a special session to impose the obligation to collect and remit sales taxes on marketplace providers.¹

On October 31, 2018, the state and the out-of-state sellers entered into a settlement agreement and stipulation of dismissal, which ended the case. Under the terms of the agreement, the sellers began collecting sales taxes on January 1, 2019.

During the 2016 Legislative Session, the Legislature also considered House Bill 1182, which increased various taxes, including sales and use taxes, from 4% to 4.5%. The House amended House Bill 1182 to provide that:

If the state is able to enforce the obligation to collect and remit sales tax on remote sellers who deliver tangible personal property, products transferred electronically, or services directly to the citizens of South Dakota, the additional net revenue from such obligation shall be used to reduce the rate of certain taxes. The rate of tax imposed by §§ 10-45-2, 10-45-5, 10-45-5.3, 10-45-6, 10-45-6.1, 10-45-6.2, 10-45-8, 10-45-71, 10-46-2.1, 10-46-2.2, 10-46-58, 10-46-69, 10-46-69.1, 10-46-69.2, 10-46E-1, and 10-58-1 shall be reduced by one-tenth percent on July first following the calendar year for which each additional twenty million dollar increment of net revenue is collected and remitted by such remote sellers. However, the rate of tax imposed by §§ 10-45-2, 10-45-5, 10-45-5.3, 10-45-6, 10-45-6.1, 10-45-6.2, 10-45-8, 10-45-71,

¹ *Currently codified in SDCL chapter 10-65.* A "marketplace provider," as defined under the Act, is "any person that facilitates a sale for a marketplace seller through a marketplace by: (1) Offering for sale by the marketplace seller, by any means, tangible personal property, products transferred electronically, or services for delivery into this state; and (2) Directly, or indirectly through any agreement or arrangement with third parties, collecting payment from a purchaser and transmitting the payment to the marketplace seller, regardless of whether the person receives compensation or other consideration in exchange for facilitating the sale or providing any other service."

10-46-2.1, 10-46-2.2, 10-46-58, 10-46-69, 10-46-69.1, 10-46-69.2, 10-46E-1, and 10-58-1 may not be reduced below four percent pursuant to the provisions of this section.²

Analysis - Rules of Interpretation

To interpret the meaning of a statute, the South Dakota Supreme Court gives words “their plain meaning and effect, and read[s] statutes as a whole.”³ If the words have plain meaning and effect, the court “simply declare[s] their meaning and [does] not resort to construction.”⁴ The court assumes that the Legislature “never intends to use surplusage in its enactments, so where possible the law must be construed to give effect to all its provisions.”⁵

The language of SDCL 10-64-9 requires the reduction of specified sales taxes in increments of 0.1% for each “additional twenty million dollar increment of net revenue” that is collected and remitted by remote sellers. The term “additional” means “more than is usual or expected.”⁶ The term “net” includes those revenues that are “remaining after the deduction of all charges, outlay, or loss.”⁷ Given the plain meaning of these terms, the phrase includes any revenue that is more than otherwise expected under usual circumstances, less any expenditures.

Under the budget preparation and adoption process outlined in SDCL chapter 4-7, at the end of each fiscal year, the amount of any remaining general fund proceeds is determined. This amount is whatever the state did not spend in the preceding fiscal year, either because revenues were greater or expenditures were lower than expected. The amount constitutes “unobligated cash” under SDCL 4-7-32. The plain meaning of “additional net revenue” under SDCL 10-64-9 seems to point to the “unobligated cash” that is determined at the end of each fiscal year.

“Additional net revenue” is further defined in connection with the “obligation to collect and remit sales tax on remote sellers.” While not stated specifically in the language of the statute, this obligation likely refers to the obligation imposed under Senate Bill 106, which became effective upon the Governor’s signature on March 22, 2016.⁸ The obligation that is referenced was imposed on that date.

The opening phrase of the statute places a further limitation on the calculation of “additional net revenue,” however, with the words “if the state is able to enforce.” This limitation presumes that the state is not able to enforce the obligation, but that at any time at which the state may enforce it, the calculation must occur. Although the obligation began when Senate Bill 106 became effective on March 22, 2016, the state was not “able to enforce” the obligation until January 1, 2019, under the terms of the stipulation of dismissal. Therefore, the calculation must consider only those revenues that were “additional” from the obligation on remote sellers starting with calendar year 2019. Additionally, the amount to be calculated must be “net” revenue, meaning the amount that remains after deducting all other expenditures. Therefore, the amount may be calculated only from the unobligated funds determined at the end of each fiscal year.

² The language of the amendment is codified at SDCL 10-64-9.

³ See *State v. Bowers*, 2018 S.D. 50, ¶ 16, 915 N.W.2d 161, 166.

⁴ See *State v. Bariteau*, 2016 S.D. 57, ¶ 15, 884 N.W.2d 169, 175.

⁵ See *State ex rel. Dept. of Transp. v. Clark*, 2011 S.D. 20, ¶ 10, 798 N.W.2d 160, 164.

⁶ See “additional,” MERRIAM-WEBSTER DICTIONARY, 2019, available at <https://www.merriam-webster.com/dictionary/additional> (last visited Nov. 18, 2019).

⁷ See “net,” MERRIAM-WEBSTER DICTIONARY, 2019, available at <https://www.merriam-webster.com/dictionary/net> (last visited Nov. 18, 2019).

⁸ The language of HB1182 uses the term “remote sellers,” while the language of SB106 uses the term “out-of-state sellers.” This Memorandum assumes the terms were intended to be interchangeable.



Further, the obligation is imposed on “any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state.”⁹ Neither the language of Senate Bill 106 nor the language of the amendment to House Bill 1182 differentiates between sellers who complied with the obligation on January 1, 2019, and those sellers who voluntarily complied with the obligation after Senate Bill 106 was enacted. Therefore, as written, the law considers the calculation of all revenue generated under the obligation imposed by Senate Bill 106. Although many remote sellers voluntarily complied with the obligation prior to January 1, 2019, they are still “obligated” under the language of Senate Bill 106. However, the limitation placed on the calculation under the amendment to House Bill 1182 does not permit the calculation of any revenue from those sellers who voluntarily complied prior to January 1.

The later-enacted law from the 2018 Special Session imposed the same obligation to collect and remit sales taxes on marketplace providers. However, the term “remote seller” under the amendment to House Bill 1182 does not explicitly include “marketplace providers,” and the definition of “marketplace providers” does not explicitly include them within “remote sellers.” Therefore, the calculation under the amendment to House Bill 1182, as written, does not contemplate the inclusion of revenue generated by marketplace providers.

As written, section 10-64-9 requires the calculation of revenues generated under Senate Bill 106 on all remote sellers, excluding marketplace providers, starting with revenues generated since January 1, 2019. The amount is calculated on a calendar-year basis, and may only consider unobligated funds.

Calculation under SDCL 10-64-9

The language of section 10-64-9 is silent as to who determines whether a threshold increment of \$20 million is reached to trigger a .1% reduction in the sales tax rate. The language is equally silent as to how the public would be notified when an increment is reached and the tax rates are reduced. Based on the preceding interpretation, an exact calculation cannot be completed at this time because:

- There is no data segregating remote seller revenue from marketplace provider revenue;¹⁰
- Unobligated cash at the end of the fiscal year cannot be linked to a specific source of revenue;¹¹
- The statute is ambiguous as to whether the unobligated cash from one fiscal year should be counted toward the threshold for the following fiscal year; and
- Unobligated cash is calculated on a fiscal year basis, while the statute requires “additional net revenue” to be calculated on a calendar year basis.

While an actual calculation cannot be made at this time, some information can be obtained related to the revenue generated under the obligation to collect and remit sales taxes by both remote sellers and marketplace providers. This information is provided for the Legislature’s consideration if it seeks to resolve any ambiguities within or make any changes to the language of section 10-64-9.

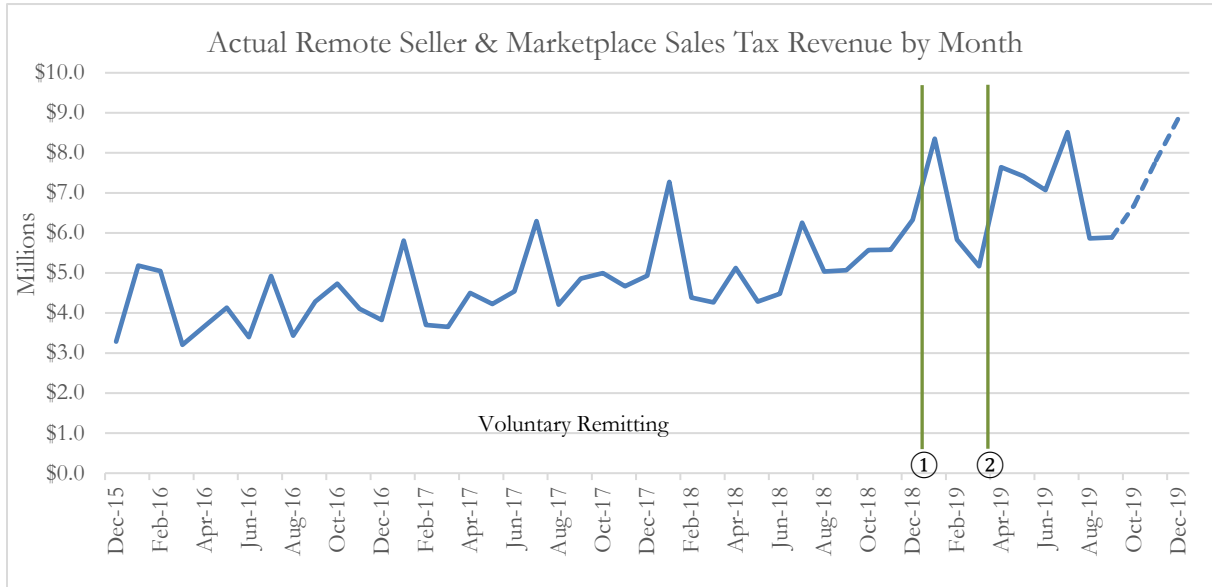
⁹ S.B. 106 § 1 (2016) (*codified at SDCL 10-64-2*).

¹⁰ The Department of Revenue provides a combined report of revenues from remote sellers and marketplace providers.

¹¹ An assumption could be made regarding the surplus in revenue at the end of the fiscal year being applied towards the sales tax percent of total general fund revenues.



Figure 1. Actual Remote Seller and Marketplace Sales Tax Revenue by Month



- ① State able to enforce collection, December 2018
- ② Remote sellers start remitting, March 2019

Figure 1 provides the actual monthly revenue from remote sellers and marketplace providers. Remote sellers were voluntarily remitting sales tax prior to December 2018, while marketplace providers did not start remitting until March 2019. The dashed line indicates the forecasted months for calendar year 2019.

Table 1. Sales Tax Collections from Remote Sellers and Marketplaces by Calendar Year

Actual Remote Seller & Marketplace Sales Tax Revenue by Calendar Year					Estimated
	2016	2017	2018	2019-YTD*	2019**
Sales Tax Collected	\$ 49,945,710	\$ 56,387,513	\$ 63,655,771	\$ 61,753,456	\$ 85,108,139
Dollar Change		\$ 6,441,803	\$ 7,268,258		\$ 21,452,368
Percent Change		12.9%	12.9%		33.7%

*2019-YTD includes January through September revenues.

**Marketplaces first began remitting sales tax in March 2019.

Source: Department of Revenue: state sales tax reported by remote sellers.

Table 1 provides the sales tax collections from remote sellers and marketplace providers by calendar year. The table provides the yearly change in dollars and percent. The state has collected \$61,753,456 in remote seller and marketplace sales tax through September 2019, which amounts to a yearly increase of \$7,268,258. The estimated calendar year 2019 total is \$85,108,139.



Conclusion

This Issue Memorandum interprets the language of the amendment to House Bill 1162 as written. The language is silent regarding who makes the determination of whether each increment of \$20 million is reached for purposes of triggering the required reduction in sales tax rates. Additionally, the language does not include any formal process by which the public is notified of any change in tax rates. To resolve any ambiguities in the language of the amendment, and to provide public notice of any change to tax rates, the Legislature may consider amending the law.

DRAFT

This issue memorandum was written by Wenzel Cummings, Code Counsel, and Jeff Mehlhaff, Senior Fiscal & Program Analyst, on November 18, 2019 for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

