STATE OF OKLAHOMA

2nd Session of the 56th Legislature (2018)

HOUSE BILL 2777 By: Osburn (Mike)

AS INTRODUCED

An Act relating to revenue and taxation; amending 68 O.S. 2011, Section 1352, as amended by Section 2, Chapter 311, O.S.L. 2016 (68 O.S. Supp. 2017, Section 1352), which relates to definitions used in the Oklahoma Sales Tax Code; modifying certain definition; expanding activity covered by certain definition; providing exceptions; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 68 O.S. 2011, Section 1352, as amended by Section 2, Chapter 311, O.S.L. 2016 (68 O.S. Supp. 2017, Section 1352), is amended to read as follows:

Section 1352. As used in the Oklahoma Sales Tax Code:

1. "Bundled transaction" means the retail sale of two or more products, except real property and services to real property, where the products are otherwise distinct and identifiable, and the products are sold for one nonitemized price. A "bundled transaction" does not include the sale of any products in which the sales price varies, or is negotiable, based on the selection by the

purchaser of the products included in the transaction. As used in this paragraph:

a. "distinct and identifiable products" does not include:

(1) packaging such as containers, boxes, sacks, bags, and bottles, or other materials such as wrapping, labels, tags, and instruction guides, that accompany the retail sale of the products and are incidental or immaterial to the retail sale thereof, including but not limited to, grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes,

(2) a product provided free of charge with the required purchase of another product. A product is provided free of charge if the sales price of the product purchased does not vary depending on the inclusion of the product provided free of charge, or

(3) items included in the definition of gross receipts or sales price, pursuant to this section,

b. "one nonitemized price" does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list,

A transaction that otherwise meets the definition of a bundled transaction shall not be considered a bundled transaction if it is:

(1) the retail sale of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service,

(2) the retail sale of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service,

(3) a transaction that includes taxable products and nontaxable products and the purchase price or sales price of the taxable products is de minimis. For purposes of this subdivision, "de minimis" means the seller's purchase price or sales price of taxable products is ten percent

(10%) or less of the total purchase price or sales price of the bundled products. Sellers shall use either the purchase price or the sales price of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the purchase price and sales price of the products to determine if the taxable products are de minimis. Sellers shall use the full term of a service contract to determine if the taxable products are de minimis, or

(4) the retail sale of exempt tangible personal property and taxable tangible personal property where:

(a) the transaction includes food and food ingredients, drugs, durable medical equipment, mobility enhancing equipment, over-the-counter drugs, prosthetic devices or medical supplies, and

(b) the seller's purchase price or sales price of the taxable tangible personal property is fifty percent (50%) or less of the total purchase price or sales price of the bundled tangible personal property. Sellers may not use a combination of the purchase price and sales price of the tangible personal property when making the fifty percent (50%) determination for a transaction;

2. "Business" means any activity engaged in or caused to be engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect;

3. "Commission" or "Tax Commission" means the Oklahoma Tax Commission;

4. "Computer" means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions;

5. "Computer software" means a set of coded instructions designed to cause a "computer" or automatic data processing equipment to perform a task;

6. "Consumer" or "user" means a person to whom a taxable sale of tangible personal property is made or to whom a taxable service is furnished. "Consumer" or "user" includes all contractors to whom a taxable sale of materials, supplies, equipment, or other tangible personal property is made or to whom a taxable service is furnished to be used or consumed in the performance of any contract;

7. "Contractor" means any person who performs any improvement upon real property and who, as a necessary and incidental part of performing such improvement, incorporates tangible personal property

belonging to or purchased by the person into the real property being improved;

8. "Drug" means a compound, substance or preparation, and any component of a compound, substance or preparation:

a. recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, and supplement to any of them,

b. intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease, or

c. intended to affect the structure or any function of the body;

9. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities;

10. "Established place of business" means the location at which any person regularly engages in, conducts, or operates a business in a continuous manner for any length of time, that is open to the public during the hours customary to such business, in which a stock of merchandise for resale is maintained, and which is not exempted by law from attachment, execution, or other species of forced sale barring any satisfaction of any delinquent tax liability accrued under the Oklahoma Sales Tax Code;

11. "Fair authority" means:

a. any county, municipality, school district, public trust or any other political subdivision of this state, or

b. any not-for-profit corporation acting pursuant to an agency, operating or management agreement which has been approved or authorized by the governing body of any of the entities specified in subparagraph a of this paragraph which conduct, operate or produce a fair commonly understood to be a county, district or state fair;

12. a. "Gross receipts", "gross proceeds" or "sales price" means the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

(1) the seller's cost of the property sold,

(2) the cost of materials used, labor or service cost,

(3) interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller,

(4) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges,

(5) delivery charges and installation charges, unless separately stated on the invoice, billing or similar document given to the purchaser, and

(6) credit for any trade-in.

b. Such term shall not include:

(1) discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale,

(2) interest, financing, and carrying charges from credit extended on the sale of personal property or services, if the amount is separately stated on the invoice, bill of sale or similar document given to the purchaser, and

(3) any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale or similar document given to the purchaser.

c. Such term shall include consideration received by the seller from third parties if:

(1) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale,

(2) the seller has an obligation to pass the price reduction or discount through to the purchaser,

(3) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser, and

(4) one of the following criteria is met:

(a) the purchaser presents a coupon, certificate or other documentation to the seller to claim a price reduction or discount where the coupon, certificate or documentation is authorized, distributed or granted by a third party with the understanding that the third party will reimburse any seller to whom the coupon, certificate or documentation is presented,

(b) the purchaser identifies himself or herself to the seller as a member of a group or organization entitled to a price reduction or discount; provided, a "preferred customer" card that is available to any patron does not constitute membership in such a group, or

(c) the price reduction or discount is identified as a third-party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate or other documentation presented by the purchaser;

13. a. "Maintaining a place of business in this state" means and shall be presumed to include:

(1) (a) utilizing or maintaining in this state, directly or by subsidiary, an office, distribution house, sales house, warehouse, or other physical place of business, whether owned or operated by the vendor or any other person, other than a common carrier acting in its capacity as such, or

(b) having agents operating in this state, whether the place of business or agent is within this state temporarily or permanently or whether the person or agent is authorized to do business within this state, ~~and~~

(2) the presence of any person, other than a common carrier acting in its capacity as such, that has substantial nexus in this state and that:

(a) sells a similar line of products as the vendor and does so under the same or a similar business name,

(b) uses trademarks, service marks or trade names in this state that are the same or substantially similar to those used by the vendor,

(c) delivers, installs, assembles or performs maintenance services for the vendor,

(d) facilitates the vendor's delivery of property to customers in the state by allowing the vendor's customers to pick up property sold by the vendor at an office, distribution facility, warehouse, storage place or similar place of business maintained by the person in this state, or

(e) conducts any other activities in this state that are significantly associated with the vendor's ability to establish and maintain a market in this state for the vendor's sale, and

(3) (a) retailers or vendors entering into an agreement or agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an Internet-based link or an Internet website, or other, provided that both of the following conditions are met:

(i) the total cumulative sales price from all of the retailer's sales, within the preceding twelve (12) months, of tangible personal property to purchasers in this state that are referred pursuant to all of those agreements with a person or persons in this state is in excess of Ten Thousand Dollars ($10,000.00), and

(ii) the retailer or vendor, within the preceding twelve (12) months, has total cumulative sales of tangible personal property to purchasers in this state in excess of Five Hundred Thousand Dollars ($500,000.00),

(b) an agreement under which a retailer purchases advertisements from a person or persons in this state, to be delivered on television, radio, in print, on the Internet, or by any other medium, is not an agreement as described in subdivision (a) of this division, unless the advertisement revenue paid to the person or persons in this state consists of commissions or other consideration that is based upon sales of tangible personal property,

(c) notwithstanding subdivision (b) of this division, an agreement under which a retailer engages a person in this state to place an advertisement on an Internet website operated by that person, or operated by another person in this state, is not an agreement described in subdivision (a) of this division, unless the person entering the agreement with the retailer also directly or indirectly solicits potential customers in this state through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state.

b. The presumptions in divisions (1) and (2) of subparagraph a of this paragraph may be rebutted by demonstrating that the person's activities in this state are not significantly associated with the vendor's ability to establish and maintain a market in this state for the vendor's sales.

c. The presumption in division (3) shall not apply if the retailer or vendor can demonstrate that the person in this state with whom the retailer has an agreement did not engage in referrals in the state on behalf of the retailer that would satisfy the requirements of the commerce clause of the United States Constitution.

d. Any ruling, agreement or contract, whether written or oral, express or implied, between a person and executive branch of this state, or any other state agency or department, stating, agreeing or ruling that the person is not "maintaining a place of business in this state" or is not required to collect sales and use tax in this state despite the presence of a warehouse, distribution center or fulfillment center in this state that is owned or operated by the vendor or an affiliated person of the vendor shall be null and void unless it is specifically approved by a majority vote of each house of the Oklahoma Legislature;

14. "Manufacturing" means and includes the activity of converting or conditioning tangible personal property by changing the form, composition, or quality of character of some existing material or materials, including natural resources, by procedures commonly regarded by the average person as manufacturing, compounding, processing or assembling, into a material or materials with a different form or use. "Manufacturing" does not include extractive industrial activities such as mining, quarrying, logging, and drilling for oil, gas and water, nor oil and gas field processes, such as natural pressure reduction, mechanical separation, heating, cooling, dehydration and compression;

15. "Manufacturing operation" means the designing, manufacturing, compounding, processing, assembling, warehousing, or preparing of articles for sale as tangible personal property. A manufacturing operation begins at the point where the materials enter the manufacturing site and ends at the point where a finished product leaves the manufacturing site. "Manufacturing operation"

does not include administration, sales, distribution, transportation, site construction, or site maintenance. Extractive activities and field processes shall not be deemed to be a part of a manufacturing operation even when performed by a person otherwise engaged in manufacturing;

16. "Manufacturing site" means a location where a manufacturing operation is conducted, including a location consisting of one or more buildings or structures in an area owned, leased, or controlled by a manufacturer;

17. "Over-the-counter drug" means a drug that contains a label that identifies the product as a drug as required by 21 C.F.R., Section 201.66. The over-the-counter-drug label includes:

a. a "Drug Facts" panel, or

b. a statement of the "active ingredient(s)" with a list of those ingredients contained in the compound, substance or preparation;

18. "Person" means any individual, company, partnership, joint venture, joint agreement, association, mutual or otherwise, limited liability company, corporation, estate, trust, business trust, receiver or trustee appointed by any state or federal court or otherwise, syndicate, this state, any county, city, municipality, school district, any other political subdivision of the state, or any group or combination acting as a unit, in the plural or singular number;

19. "Prescription" means an order, formula or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed "practitioner" as defined in Section 1357.6 of this title;

20. "Prewritten computer software" means "computer software", including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. Prewritten software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. Where a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute prewritten computer software;

21. "Repairman" means any person who performs any repair service upon tangible personal property of the consumer, whether or not the repairman, as a necessary and incidental part of performing the service, incorporates tangible personal property belonging to or purchased by the repairman into the tangible personal property being repaired;

22. "Sale" means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:

a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,

b. the disposition for consumption or use in any business or by any person of all goods, wares, merchandise, or property which has been purchased for resale, manufacturing, or further processing,

c. the sale, gift, exchange, or other disposition of admission, dues, or fees to clubs, places of amusement, or recreational or athletic events or for the privilege of having access to or the use of amusement, recreational, athletic or entertainment facilities,

d. the furnishing or rendering of services taxable under the Oklahoma Sales Tax Code, and

e. any use of motor fuel or diesel fuel by a supplier, as defined in Section 500.3 of this title, upon which sales tax has not previously been paid, for purposes other than to propel motor vehicles over the public highways of this state. Motor fuel or diesel fuel purchased outside the state and used for purposes other than to propel motor vehicles over the public highways of this state shall not constitute a sale within the meaning of this paragraph;

23. "Sale for resale" means:

a. a sale of tangible personal property to any purchaser who is purchasing tangible personal property for the purpose of reselling it within the geographical limits of the United States of America or its territories or possessions, in the normal course of business either in the form or condition in which it is purchased or as an attachment to or integral part of other tangible personal property,

b. a sale of tangible personal property to a purchaser for the sole purpose of the renting or leasing, within the geographical limits of the United States of America or its territories or possessions, of the tangible personal property to another person by the purchaser, but not if incidental to the renting or leasing of real estate,

c. a sale of tangible goods and products within this state if, simultaneously with the sale, the vendor issues an export bill of lading, or other documentation that the point of delivery of such goods for use and consumption is in a foreign country and not within the territorial confines of the United States. If the vendor is not in the business of shipping the tangible goods and products that are purchased from the vendor, the buyer or purchaser of the tangible goods and products is responsible for providing an export bill of lading or other documentation to the vendor from whom the tangible goods and products were purchased showing that the point of delivery of such goods for use and consumption is a foreign country and not within the territorial confines of the United States, or

d. a sales of any carrier access services, right of access services, telecommunications services to be resold, or telecommunications used in the subsequent provision of, use as a component part of, or integrated into, end-to-end telecommunications service;

24. "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. "Tangible personal property" includes electricity, water, gas, steam and prewritten computer software. This definition shall be applicable only for purposes of the Oklahoma Sales Tax Code;

25. "Taxpayer" means any person liable to pay a tax imposed by the Oklahoma Sales Tax Code;

26. "Tax period" or "taxable period" means the calendar period or the taxpayer's fiscal period for which a taxpayer has obtained a permit from the Tax Commission to use a fiscal period in lieu of a calendar period;

27. "Tax remitter" means any person required to collect, report, or remit the tax imposed by the Oklahoma Sales Tax Code. A tax remitter who fails, for any reason, to collect, report, or remit the tax shall be considered a taxpayer for purposes of assessment, collection, and enforcement of the tax imposed by the Oklahoma Sales Tax Code; and

28. "Vendor" means:

a. any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code,

b. any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code,

c. any person who solicits business by employees, independent contractors, agents, or other representatives in this state, and thereby makes sales to persons within this state of tangible personal property or services, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code, or

d. any person, pursuant to an agreement with the person with an ownership interest in or title to tangible personal property, who has been entrusted with the possession of any such property and has the power to designate who is to obtain title, to physically transfer possession of, or otherwise make sales of the property.

SECTION 2. This act shall become effective November 1, 2018.

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