

December 7, 2020

Tax Update

Treasury Publishes Amendment to Sales and Use Tax Regulations Concerning Marketplace Sellers, Marketplace Facilitators and Mail Sales

On October 16, 2020, the Puerto Rico Treasury Department (“Treasury”) published the final draft of the proposed amendments (“Proposed Amendments”) to Regulation No. 8049 (“Regulation”) issued under the Puerto Rico Internal Revenue Code of 2011, as amended (“Code”). Below we provide an overview of the Proposed Amendments concerning nexus for purposes of sales and use tax (“SUT”) on taxable sales by marketplace sellers and through marketplace facilitators, which, when applicable will essentially require retailers to act as resellers in connection with such sales. We also summarize provisions related to waivers, sourcing, mail-order sales (“Mail Sales”), import declarations and returns, exemptions, installment payments, and other SUT matters.

I. Nexus for purposes of SUT

The Proposed Amendments include provisions to the effect that a person shall be deemed to have substantial nexus with Puerto Rico for purposes of the SUT provisions when engaging in the execution of sale contracts in Puerto Rico, direct marketing by any means, including cybernetic portals, social media or other advertising distribution in Puerto Rico, and mail-order sales in a continued and recurrent basis and in the ordinary course of business.

For purposes of sales by Market Sellers and through Market Facilitators, as defined in Section II below, their activities shall be considered as continued, recurrent and in the ordinary course of business if the Market Seller or the Market Facilitator have a sales volume in excess of \$100,000 or if they engage in at least 200 transactions during the year or accounting period.

II. Marketplace sellers and facilitators

New Articles 4010.01(hhh)-1 and 4010.01(iii)-1 including the definition of Market Facilitators and Market Sellers are proposed. A Market Facilitator shall be any person, including a related person or entity, that facilitates the sale of tangible personal property (“TPP”), specific digital products (as defined in Section IV below), or taxable services, and which complies with the following:

1. Directly or indirectly engages in one of the following activities:
 - i. Publishes, makes available or promotes the sale of TPP, specific digital products, or taxable services in representation of a “Market Seller”, through a medium owned, operated or controlled by the Market Facilitator.



For more information on this Legal Update, please contact:

Carlos E. Serrano

cserrano@reichardescalera.com

787.777.8815

787.406.5257

Alba I. Joubert Pereira

ajoubert@reichardescalera.com

787.777.8825

787.432.8356

Ernesto J. Zayas García

ezayas@reichardescalera.com

787.777.8813

787.354.4757

ii. Facilitates the sale of products of a seller through a market, by the transmission or communication of an offer or acceptance of a sale of TPP, specific digital products, or taxable services between a Market Seller and a buyer, by means that may include a store, booth, catalog, internet site or any other means of similar nature.

iii. Possesses, leases, makes available or operates any electronic or physical infrastructure, or property, process, method, or intellectual property, that connects Market Sellers with buyers for the purposes of selling the TPP, specific digital products, or taxable services.

iv. Provides or facilitates a marketplace for the sale of TPP, specific digital products, or taxable services, independent of the ownership or control of such, and which are the object of retail.

v. Provides software or research and development activities for any of the above, directly related to the marketplace provided by the Market Facilitator.

vi. Provides or offers compliance of storage services for a Market Seller.

vii. Establishes the prices for the TPP, specific digital products, or taxable services on behalf of the Market Seller.

viii. Provides or offers customer service to Market Sellers or their clients, or accepts or assists in the receiving of orders, returns of exchanges.

2. Engages directly or indirectly in one of the following:

i. Charges the SUT on the TPP, specific digital products, or taxable services.

ii. Provides payment processing services.

iii. Bills, collects or receives sale, listing, reference, closing, and other charges or considerations for the facilitator of a sale.

iv. Collects payments on the sales and transmits them to the Market Seller pursuant to agreements with third parties or to the terms and conditions.

v. Provides virtual currency that buyers may use for purchasing TPP, specific digital products, or taxable services.

A Market Seller is defined as a seller who engages in retail sales through any physical or electronic market, which is property of, operated or controlled by a Market Facilitator.

Examples on the application of these rules have been added to Article 4020.05-3, including examples for transactions occurring wholly within Puerto Rico with food delivery services by third parties considered as Market Facilitators.

New Articles 6043.03-2 and 6043.04-2 were also added for the imposition of penalties to Market Facilitators for violations to the SUT provisions under the Code and for failure to deposit with Treasury the SUT withheld. No penalty shall be imposed under Section 6043.03(a) of the Code, however, as long as the Market Facilitator completes its registration with Treasury and obtains its Merchant Registration Certificate on or before December 31, 2020.

III. SUT Collection Waiver and Eligible Reseller Certificate

A new Article 4020.05-4 is included with the Proposed Amendments providing Market Sellers the opportunity to request for an “SUT Collection Waiver” for sales made through a Market Facilitators. The SUT Collection Waiver shall only apply on sales made through Market Facilitators registered with Treasury.

Article 4010.01(xx)-1 is also amended providing that for purposes of determination of whether a reseller can be considered an “Eligible Reseller” and thus not subject to SUT on its purchases, sales made by a Market Seller holding an SUT Collection Waiver, through a Market Facilitator, shall be considered non-taxable. Specific rules are provided for purposes of the 3-year 80% threshold test on exports and/or exempt sales for Market Sellers holding the SUT Collection Waiver for less than 1 year and for those holding it for more than 1 year but less than 3 years.

IV. Sourcing rules for Specific Digital Products

Consistent with several jurisdictions imposing what has been termed a “Netflix Tax”, a new Article 4010.01(gg)-2 is added to address digital audiovisual items. Article 4010.01(gg)-2 provides that digital audiovisual items transferred electronically, digital audio, or other digital products, provided that, a digital code confers the buyer a right to obtain the product, shall all be treated as a “Specific Digital Product”. For purposes of the sale of Specific Digital Products the source shall be that of the physical address of the buyer, without consideration of the location of the servers or any other factor.

V. Mail-Order Sales and Voluntary Withholding Agent Election

The definition of Mail Sales within Article 4020.08-1 of the Regulation is proposed to be amended in order to provide that the term shall also include all sales of TPP, specific digital products, or taxable services, made by a Market Seller through a Market Facilitator who is engaged in at least one of the activities detailed in Article 4010.01(hhh)-1. Additionally, particular rules are provided for i) persons engaged in Mail Sales and whose only contact with Puerto Rico is the residence of the buyer or that the buyer is engaged in trade or business in Puerto Rico (“ETB-PR”), ii) persons engaged in Mail Sales and taxable sales within Puerto Rico, and iii) for transactions made as of January 1, 2020 through Market Facilitators.

Persons engaged in the Mail Sales business, whose only contact with Puerto Rico is the buyer’s residence or an ETB-PR buyer, are included within the definition of non-withholding agent under Article 4060.01-1(h)(2) of the Regulation. Article 4020.05-1, will provide that persons engaged in Mail Sales as described above, may voluntarily elect to be considered a withholding agent by filing a written request to Treasury and entering into a final agreement with the Secretary.

All Mail Sales realized after December 31, 2019 through Market Facilitators engaged in one of the activities detailed under Article 4010.01(hhh)-1 shall be considered taxable and the Market Facilitator shall be considered a withholding agent. Therefore, businesses such as restaurants having used third party delivery services may have to re-classify their transactions since January 1, 2020.

VI. Import Declarations, Monthly Import Taxes and SUT Returns, and Notifications

The Proposed Amendments include changes to the provisions regarding the “Import Declarations” needed to be filed in order take possession of the imported TPP, to the effect that when introduced by means other than maritime, the Import Declaration shall be filed after taking position of the TPP up to the due date for depositing the SUT. Said Import Declaration shall include the municipal portion of

the SUT (“m-SUT”), in which case no other declaration shall be filed regarding the m-SUT.

Article 4041.01-1(a)(4) is amended to establish that TPP introduced to foreign trade zones (“FTZ”) shall be considered as introduced in Puerto Rico when it loses its FTZ status and/or is understood to be within the customs territory of the US and the related documentation if filed, at which time, the merchant shall file the corresponding Import Declaration.

Article 4041.02-1(b) is amended to provide that all merchants importing TPP subject to tax, including postal service and air service systems, shall file a monthly import taxes return (“MITR”) no later than the 10th day of the next month. However, a person who is not a merchant shall not have the obligation to file a MITR even if he is otherwise subject to filing Import Declaration for that particular month. Additionally, although the filing of the MITR shall not be a prerequisite for the lifting of the imported TPP, it shall also include the m-SUT and a detail of the SUT paid for each locality. Accordingly, no additional tax return shall be filed for purposes of the m-SUT.

The Secretary may waive the filing of MITRs to persons who had already paid the full tax amount when filing the Import Declaration.

The Proposed Amendments include provisions for the filing of monthly SUT returns by Market Facilitators and Market Sellers. Market Facilitators will have to separately report its market sales from the sales third parties made through its marketplace. In the case where a Market Seller holding a Collection Waiver where said Market Facilitator was mentioned, the Market Facilitator shall include with its monthly SUT return a detail if the sales made through its marketplace by said Market Seller. Similarly, Market Sellers shall report their own sales on a monthly report and, in the case that they hold a Collection Waiver, Market Sellers shall also include the sales made through a Market Facilitator.

A new Article 4041.03-1 is proposed providing that merchants engaged in Mail Sales who are classified as non-withholding agents shall be subject to complying with certain notifications instead of filing Import Declarations, MITRs and monthly SUT returns, unless the merchant voluntarily elected to be treated as a withholding agent.

VII. Drop Shipments

As an exemption to the general rule requiring the payment of the use tax to Treasury on imported taxable items before taking possession of the item, the Proposed Amendments provide that if the person receives the TPP through drop shipment by any means (except maritime transport), such person shall instead be subject to paying a sales tax to the seller.

VIII. Consolidated Merchant

A new “Consolidated Merchant” registration certificate type is proposed for merchants who are members of a controlled group or group of related entities, none of which have a locality in Puerto Rico or if only one of the entities has a locality in Puerto Rico. The Consolidated Merchant election may be made in order to be treated as a sole merchant if: 1) all entities are engaged in the same activity or 2) the individual activities of each entity constitute a component that, when integrated with the others’, comprise a sole activity. A Consolidated Merchant shall only file one Import Declaration, one MITR and one Monthly SUT Return, and withhold the SUT as a sole merchant.

IX. Municipal SUT Collection and Remittance

A new Article 6080.14(a)(2)-1 was added through the Proposed Amendments clarifying that no municipality within the Government of Puerto Rico shall collect the 1% municipal SUT (“m-SUT”) imposed on imported and taxable TPP. The Secretary shall collect it and remit to the corresponding municipality, determined by the information provided by merchants on the MITR. However, the municipality must have already executed an SUT uniform collection agreement with the Secretary before the m-SUT can be deposited to the municipality.

Additionally, the Proposed Amendments to Article 4060.01-1(d) of the Regulation expressly states that the municipalities shall accept all forms issued by Treasury for the administration of the SUT, including the Merchant Registration Certificate, and that they shall not issue any type of municipal merchant registration certificate.

Written comments and suggestions to the Proposed Amendments may be sent by e-mail to: comentariosreqlamentoivu@hacienda.pr.gov, or by mail to the following address:

Office of Legal Affairs
Treasury Department
P.O. Box 9024140
San Juan, Puerto Rico 00902-4140

This communication is for information purposes only and does not constitute legal advice. This communication may be based on authorities that are subject to change and is not a substitute for professional advice or services. You should consult a qualified professional advisor before taking any action based on the information herein. This communication does not create an attorney-client relationship between Reichard & Escalera and the recipient.

[Unsubscribe.](#)