Lodging Services and Marketplace Facilitators

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The lodging industry has gone through major changes over the past few decades. There has been a major shift towards reserving lodging services via online platforms. In today's world, online travel companies (OTCs) have evolved to not just include hotel and motel rooms. Along with a diverse offering of travel-related services, these OTCs also offer short-term rentals of personal residences and vacation homes among other properties.

This bulletin is the Wyoming Department of Revenue's clarifying guidance for these types of lodging transactions.

Background & History

On April 3, 2014, the Wyoming Supreme Court upheld that OTCs selling lodging services in Wyoming are lodging vendors and any applicable taxes should be collected on the full amount charged to the customer in *Travelocity.com LP v. Wyoming Department of Revenue*, 329 P.3d 131 (2014).

On March 1, 2017, Wyoming Governor Matt Mead signed into law House Bill 0019/House Enrolled Act 41. This Act created W.S. 39-15-501 which required remote sellers without a physical location in Wyoming to collect Wyoming sales tax if the seller has more than $100,000 in Wyoming sales or 200 or more separate Wyoming transactions in a calendar year.

On June 21, 2018, the United States Supreme Court upheld that states may require remote sellers to collect sales tax, even if the seller does not have a physical presence in the taxing state in *South Dakota v. Wayfair, Inc.*,138 S. Ct. 2080 (2018).

On February 15, 2019, Wyoming Governor Mark Gordon signed into law House Bill 0069/House Enrolled Act 23. As an expansion of Wyoming remote seller language in 2017, this Act created W.S. 39-15-502 which outlines tax obligations of marketplace facilitators who do not have a physical presence in Wyoming, but connect sellers to Wyoming customers. The legislation impacted a variety of industries, including lodging services in Wyoming.

Marketplace Facilitators

The 2014 Wyoming Supreme Court decision in the *Travelocity* case provided direction for OTCs as lodging vendors going forward, but with additional legislation and the growth of technology, there has been confusion as to which company (the Wyoming hotel or the OTC) should be collecting and remitting the tax to the Wyoming Department of Revenue.

The Wyoming Department of Revenue considers the OTCs to be marketplace facilitators under W.S. 39-15-502. They provide a marketplace for buyers and sellers to meet. In general, the OTC's marketplace

is a website or online application. These venues allow buyers and sellers to connect and transact with one another. When these sales occur, the marketplace facilitator is the vendor in the transaction. Per W.S. 39-15-502(a), "a marketplace facilitator shall be considered the vendor for each sale that the facilitator facilitates on its marketplace for a marketplace seller".

As marketplace facilitators, the OTCs are responsible for all obligations imposed under W.S. 39-15-103 and W.S. 39-16-103 for primarily sales, use, and lodging taxes. Within this statutory language, W.S. 39-15-103(a)(i)(G) includes lodging services for transient guests.

A marketplace facilitator should collect and remit sales tax on all sales made on its own behalf and on behalf of all marketplace sellers [W.S. 39-15-502(b)]. In this scenario, the physical hotel is a marketplace seller. A marketplace seller offers its services through a marketplace facilitator [W.S. 39-15-502(g)(iii)].

Lodging Services at Hotel without an OTC

In the absence of an OTC, the entire lodging service for transient guests provided by the Wyoming hotel is subject to sales and lodging tax. The Wyoming hotel is responsible for reporting and remitting any applicable taxes.

Lodging Services via Travel Agent

There are instances where a travel agent reserves a room for a guest, but the traveler still pays the hotel directly. The Wyoming hotel will charge the guest for the total cost of the room (along with any fees and applicable taxes). The Wyoming hotel is responsible for reporting the entire cost of the room rental charged to the customer (including applicable taxes) to the Wyoming Department of Revenue. The hotel then sends a nontaxable commission back to the travel agent. The commission paid by the Wyoming hotel to the travel agent is not taxable because it is subsequent to the lodging service. This is commonly referred to as the "agency model".

Lodging Services Entirely via OTC

The controversy in this situation arises when variations of a "merchant model" are used. For this scenario, the parties involved in the reservation include an OTC, a Wyoming hotel, and a traveler.

The Wyoming hotel may set aside rooms to offer via an OTC. While there are slightly different models, the basic scenarios involve the OTC collecting all of the customer's payment for the lodging service, including any applicable taxes. At a later time, the OTC then sends the funds back to the hotel minus a commission (also referred to as a "service fee", "facilitation fee", or "markup"). This transfer is commonly associated with a bill from the Wyoming hotel to the OTC for agreed-upon room rates and applicable taxes.

Under Wyoming's marketplace facilitator statute in W.S. 39-15-502, when a traveler purchases a lodging service entirely through an OTC, the OTC is responsible for collecting and remitting all applicable taxes to the Wyoming Department of Revenue. The funds sent back to the Wyoming hotel are considered subsequent to the taxing event.

Lodging Services Reserved Partially via OTC and Partially via Wyoming Hotel

There may be unique cases where some of the cost of the lodging service is paid to the OTC while another portion of the cost is paid to the actual Wyoming hotel.

When a guest reserves a hotel room, there may be other fees associated with the stay. The guest may choose to stay an additional night (but still less than 30 consecutive days), request a rollaway bed, or purchase an item from the front desk store. In these cases, the party responsible for reporting the sale and any applicable taxes is the party who accepts the payment. The company accepting the payment from the customer is responsible for reporting the sale and any applicable taxes when the scenario solely involves an OTC, a Wyoming hotel, and the traveler.

The marketplace facilitator statute requires the OTCs to collect taxes associated with the goods and services related to the online transaction. The additional taxable items sold by the Wyoming hotel should be collected by the Wyoming hotel itself (if not covered by the OTC transaction).

The marketplace facilitator statutory language applies when a marketplace is used for a transaction solely between the marketplace seller and customer.

Lodging Service Reserved via OTC but Customer Pays Hotel

There are also instances when an OTC will simply reserve a room at a hotel for the guest; however, the guest does not pay the OTC for the lodging service. The Wyoming hotel receives payment from the customer and then pay the OTC a commission at a later time.

In these cases, that sale does not meet the statutory marketplace facilitator guidelines. The OTC helped with the transaction; however, this scenario does not meet the requirement under W.S. 39-15-502(g)(ii)(B) that a marketplace facilitator must collect payment from the customer first before sending compensation or other consideration back to the marketplace seller.

The Wyoming hotel is responsible to report the total cost of the room and any applicable taxes because it collected the payment from the customer. The commission paid back to the OTC is not taxable as it was subsequent to the lodging service. This concept may be similar to lodging services reserved via a travel agent.

Lodging Services via Other Online Platforms

The OTC industry no longer just involves hotels. It has expanded to include short-term rentals of personal residences and vacation homes among a variety of other properties. This transformation has led to travelers having an abundance of lodging options, including in Wyoming.

In these instances, many travelers still reserve lodging services via an OTC website or another online application. These types of OTCs also operate under the marketplace facilitator statute in W.S. 39-15-502. The OTC is responsible for collecting and remitting any applicable taxes from these lodging services when collecting payment from the guest and when this model solely involves an OTC, a Wyoming property, and a traveler.

Lodging Services without Hotel or OTC

Technology has made it much easier for individuals to offer their personal residences and vacation homes as short-term rentals. In instances where an individual provides lodging services to transient guests outside of well-known OTC platforms, we encourage them to contact the Wyoming Department of Revenue for further guidance.

Providing lodging services in Wyoming outside of well-known OTCs or marketplace

facilitators may prompt a licensing requirement with our office to collect tax.

HOW THIS GUIDANCE IS DIFFERENT

Following the 2014 Wyoming Supreme Court decision in *Travelocity*, it was common for the OTC to remit the tax on their markup while the Wyoming hotel remitted the tax on the cost of the hotel room. The customer paid the entire lodging cost to the OTC; however, one party submitted tax on the markup and another party submitted tax for the room rental. This caused a system where tax was being reported by two vendors on the same lodging transaction.

As one can imagine, this causes difficulties in verifying all of the collected tax is reported correctly. This system was in place well before Wyoming's marketplace facilitator statute went into effect in 2019. The language in W.S. 39-15-502 eases this burden by shifting all of the tax reporting responsibility to one party.

This updated guidance aligns Wyoming with its current marketplace facilitator statutes rather than antiquated remittance models before the rise of online marketplaces. It also maintains consistency not only in the lodging sector, but with other industries (including the online retail sector) where marketplace facilitators are prevalent.

FAQs

Why did the Wyoming Department of Revenue change its guidance?

The Wyoming Department of Revenue has provided consistent guidance between OTCs and Wyoming hotels since the 2014 Wyoming Supreme Court ruling in *Travelocity*. When Wyoming passed statutory marketplace facilitator language in 2019, our OTC guidance also needed to be updated. Although many of the relationships did not change between the OTCs and Wyoming hotels, our prior guidance was no longer consistent with current statutes. The updated marketplace facilitator language guides the Department to have tax remitted based on who is receiving payment from the customer.

Does the OTC need to provide the Wyoming hotel with an exemption certificate?

No. The OTC does not need to provide the Wyoming hotel with an exemption certificate. The OTC is facilitating the sale on behalf of the Wyoming hotel, not purchasing an exempt hotel room. In turn, the OTC will send a portion of the customer's payment back to the hotel as a commission. In this arrangement, the OTC is responsible for reporting the sale and any applicable taxes.

Once the lodging transaction occurs on an OTC marketplace, the lodging transaction is no longer the reporting responsibility of the Wyoming hotel. Wyoming does <u>not</u> consider this a wholesale for resale transaction, but a sales agreement between the OTC and the Wyoming hotel as a commission subsequent to the taxing event (as long as the hotel is not actually buying the room first). This basic scenario holds true when there is an OTC, a Wyoming hotel, and a traveler.

When it's time to report these lodging transactions to the Wyoming Department of Revenue, how does that work?

The OTC is responsible for reporting the total taxable cost of the lodging service and any applicable taxes to the Wyoming Department of Revenue if the transaction solely involves an OTC, a Wyoming hotel, and a traveler.

Once an OTC or marketplace facilitator licenses with our office, they have similar statutory reporting guidelines and documentation requirements as the hotels located physically in Wyoming.

In the basic scenario between an OTC, a Wyoming hotel, and a traveler, the Wyoming hotel should not report any OTC sales made on its behalf to the Wyoming Department of Revenue (either as taxed or nontaxed). Once the lodging transaction occurs with an OTC and the traveler pays the OTC, the Wyoming hotel is no longer the vendor responsible for reporting these sales (as long as the Wyoming hotel is not actually buying the room first).

The Wyoming Department of Revenue recognizes the Wyoming hotel receives income from these transactions, but they are subsequent to the taxing event per language in our marketplace facilitator statutes.

Many lodging guests in Wyoming use an out-of-country travel agent who then contract with a local travel agent to reserve flights, tour buses, and hotel rooms. The out-of-country traveler pays the out-of-country travel agent for the trip with payments to each travel partner in the process. What is the Wyoming Department of Revenue's guidance with this scenario?

The marketplace facilitator statutes in Wyoming outline when the transaction involves an OTC, a Wyoming hotel, and a traveler. This basic scenario changes once there are more than three parties involved, including out-of-country travel companies.

For example, imagine an overseas traveler wants to see one of Wyoming's national parks. They ask their travel agent in another country book the travel experience. The out-of-country travel agent calls a local travel agent for assistance. The local travel agent uses several different business partners for a flight, transportation, lodging, sightseeing opportunities, meals, etc. In these cases (and any similar variations), the Department considers the business reserving the services as the end consumer. It's likely the Wyoming hotel has no financial interaction with the traveler. The local tour companies are the end consumer and should be billed for applicable taxes by the Wyoming hotel or any travel partners providing taxable services.

The Department's updated OTC guidance should not impact current models used by domestic travel companies and their current relationship with service providers and Wyoming hotels. This updated guidance streamlines tax collections when the scenario involves an OTC, a Wyoming hotel, and a traveler when the traveler pays the OTC directly.

If local tour companies do have any unique scenarios, we encourage them to contact the Wyoming Department of Revenue for further guidance.

Please be advised that this bulletin addresses issues in general terms and cannot be appropriate or applicable in all situations. If your situation is markedly different or you have concerns about this issue, please do not hesitate to contact this department. Please send email: **dor_taxability@wyo.gov**

Supporting Authority:

W.S. 39-15-101(a)(i) states:

"Lodging service" means the provision of sleeping accommodations to transient guests and shall include the providing of sites for the placement of tents, campers, trailers, mobile homes or other mobile sleeping accommodations for transient guests;

W.S. 39-15-101(a)(xiv) states:

"Transient guest" means a guest who remains for less than thirty (30) continuous days;

W.S. 39-15-101(a)(xv) states:

"Vendor" means any person engaged in the business of selling at retail or wholesale tangible personal property, admissions or services which are subject to taxation under this article. "Vendor" includes a vehicle dealer as defined by W.S. 31-16-101(a)(xviii), and a remote seller to the extent provided by W.S. 39-15-501 and a marketplace facilitator to the extent provided by W.S. 39-15-502;

W.S. 39-15-101(a)(xvi) states:

"Wholesale sale" means a sale of tangible personal property or services to a vendor for subsequent sale;

W.S. 39-15-103(a)(i)(G) states:

Taxable event. The following shall apply: Except as provided by W.S. 39-15-105, there is levied an excise tax upon:

The sales price paid for living quarters in hotels, motels, tourist courts and similar establishments providing lodging service for transient guests;

W.S. 39-15-502(a) states:

A marketplace facilitator shall be considered the vendor for each sale that the facilitator facilitates on its marketplace for a marketplace seller. Each marketplace facilitator shall:

(i) Be responsible for all obligations imposed under chapters 15 and 16 of this title;

(ii) Keep records and information as may be required by the department to ensure proper collection and remittance of sales tax.

W.S. 39-15-502(b) states:

Subject to the limitations in W.S. 39-15-501(a), a marketplace facilitator shall collect and remit sales tax on all sales:

(i) The marketplace facilitator makes on its own behalf; and

(ii) The marketplace facilitator facilitates on behalf of all marketplace sellers to customers in Wyoming. The marketplace facilitator shall collect and remit sales tax on sales facilitated by the marketplace facilitator and sold into Wyoming regardless of whether the marketplace seller has a sales tax permit or otherwise would have been required to collect sales tax if the sale had not been facilitated by the marketplace facilitator.

W.S. 39-15-502(g) states:

As used in this section:

(i) "Marketplace" means any method through which a marketplace seller may sell or offer for sale tangible personal property, admissions or services which are subject to taxation under chapter 15 or 16 of this title for delivery into this state regardless of whether the marketplace seller has a physical presence in this state;

(ii) "Marketplace facilitator" means any person that facilitates a sale for a marketplace seller through a marketplace by:

(A) Offering for sale by a marketplace seller, by any means,

tangible personal property, admissions or services which are subject to taxation under chapter 15 or 16 of this title for delivery into this state; and

(B) Directly, or indirectly through any agreement or arrangement with one (1) or more 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.

(iii) "Marketplace seller" means a vendor who sells or offers for sale tangible personal property, admissions or services which are subject to taxation under chapter 15 or 16 of this title for delivery into this state through a marketplace that is owned, operated or controlled by a marketplace facilitator.

WY Dept. of Rev. Rules; Chap. 2, Sec. 5(g)(i) states:

Deductions. Vendors are entitled to claim a deduction from gross receipts on the tax return for refunds.

Commissions Not Deductible. Commissions paid to sales agents for their services in making sales shall not be deductible from the sales price of property or services sold.

WY Dept. of Rev Rules, Chap 2, Sec 7(b) states:

Vendors shall obtain completed exemption certificates for all sales transactions, other than those qualifying under section 6 of these rules, where sales tax is not collected from the purchaser at the time of sale. Purchasers shall file a single exemption certificate with each selling vendor for exempt purchases made. The certificates shall be in a format as prescribed by the Streamlined Sales and Use Tax Agreement and shall be retained in the selling vendor's records. The seller shall obtain identifying information of the purchaser and the reason for claiming a tax exemption at the time of the purchase. A purchaser is not required to provide a signature to claim an exemption from tax unless the paper exemption certificate is used. The seller shall use the standard format for claiming an exemption electronically when that format is adopted by the Governing Board of the Streamlined Sales Tax Project.