

CITY OF UNALASKA
UNALASKA, ALASKA

ORDINANCE 2019-03

AN ORDINANCE AMENDING CHAPTERS 6.40 AND 6.44 TO REQUIRE CERTAIN OUT OF TOWN RETAILERS TO COLLECT AND REMIT SALES TAX INCLUDING CERTAIN RETAILERS WHO MAKE SALES OVER THE INTERNET AND TO MAKE COPORATE OFFICERS RESPONSIBLE FOR UNDERPAYMENT OR NONPAYMENT OF RAW SEAFOOD SALES TAX

WHEREAS, retail sellers making deliveries to customers in the City benefit from municipal services provided by the City; and

WHEREAS, exempting out-of-town retailers from the obligation to collect sales taxes provides these retailers an unfair competitive advantage over local retailers; and

WHEREAS, buyers and collectors of raw seafood products within the City are obligated to collect raw seafood sales tax from sellers and remit it to the City; and

WHEREAS, these collected taxes are held in trust by the buyers and collectors for the benefit of the City.

BE IT ENACTED by the City Council of the City of Unalaska:

Section 1: Form. This is a Code ordinance. Sections 3-6 amend the Unalaska Code of Ordinances.

Section 2: Legislative Findings.

(1) The inability to effectively collect city sales tax from remote sellers who deliver tangible personal property, any products transferred electronically, or services directly to the citizens of Unalaska is seriously eroding the sales tax base of Unalaska, causing revenue losses and imminent harm to this city through the loss of critical funding for services;

(2) The harms from the revenue losses are especially serious in Unalaska because sales tax revenues are essential in funding local services;

(3) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this city's sales tax base is likely soon;

(4) Remote sellers who make a substantial number of deliveries into or have large gross revenues from Alaska benefit extensively from this state's market, including the economy generally, as well as state and city infrastructure; and

(5) In contrast with the expanding harms caused to the city from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into Alaska generally and Unalaska specifically.

Section 3: **Amendment of UCO §6.40.010** Subsection 6.40.010(C) of the Unalaska Code of Ordinances is hereby amended to read as follows: [deleted language is struck and new language underlined]

(C) "MADE IN THE CITY" means:

(1) ~~A sale resulting from an offer being communicated from a seller to a consumer within the City and accepted by the consumer within the City in tangible personal property delivered into the possession of a consumer in the City;~~
A sale resulting from an offer being communicated from a seller to a consumer within the City and accepted by the consumer within the City in tangible personal property delivered into the possession of a consumer in the City;

(a) if the seller has a physical presence in the City; or

(b) if the seller does not have a physical presence in the City but;

(i) the seller's gross revenue from the delivery of tangible personal property, any product transferred electronically or services into the State of Alaska in the previous calendar year or the current calendar year exceeds one hundred thousand dollars; or

(ii) the seller sold tangible personal property or electronically transferred any product or services for delivery in Alaska in two hundred or more separate transactions in the previous calendar year or the current calendar year.

(2) Services and rentals performed wholly within the City; or

(3) Services and rentals performed partially within the City where the end result of the service or rental performed occurs in the City; or

(4) Services performed outside the City in connection with construction of a structure or improvement to real or personal property located within the City.

Situations excluded are where separation of the goods from the stock of the seller takes place at the point of delivery and is outside the boundaries of the City, including such items as oil deliveries, telephone service, television service and electric power service.

Section 4: **Amendment of UCO §6.40.080** Subsection 6.40.080 of the Unalaska Code of Ordinances is hereby amended by deleting subsection (B) in its entirety and re-lettering the remaining subsections.

Section 5: **Amendment of UCO §6.40.110** Subsection 6.40.110 of the Unalaska Code of Ordinances is hereby amended to read as follows: [deleted language is struck and new language underlined]:

6.40.110 PERIOD OF LIMITATION.

(A) The amount of any sales tax imposed under this Chapter may be determined and assessed at any time within a period of six (6) years after the sale tax became due and payable. The period shall begin on the date when a return is required to be filed. Where no sales tax return has been filed, or where a fraudulent return has been filed, then the period of limitation does not begin to run until discovery of the delinquency or fraud occurs. No proceeding for the collection of the sales tax shall be begun after the expiration of this period.

(B) No obligation to collect tax established by section 6.40.010(C)(1)(b) shall be applied retroactively.

Section 6: **Amendment of UCO §6.44.** Chapter 6.44 of the Unalaska Code of Ordinances is hereby amended with the addition of a new Section 6.44.160 to read as follows:

6.44.160 PERSONAL LIABILITY OF CORPORATE OFFICERS FOR UNPAID TAXES.

(A) Any person who receives or collects a tax or any money represented to be a tax from another person holds the amount so collected in trust for the benefit of the City and is liable to the City for the full amount collected plus any accrued penalties and interest on the amount collected.

(B) Persons owning stock of ten percent (10%) or more of the total of corporations or ten percent (10%) interest in limited liability companies with thirty-five (35) or fewer owners and exercising responsibility for fiscal management, shall be jointly and severally liable for raw seafood product sales taxes levied or otherwise required to be collected or paid to the City by such corporation or limited liability company when such taxes become

due and unpaid to the extent that such taxes accrued while such person was exercising responsibility for fiscal management.

(C) The dissolution of a corporation, limited liability company, limited partnership, limited liability partnership, or limited liability limited partnership does not discharge an officer, member-manager, manager, or partner's liability for a prior failure of the corporation, limited liability company, limited partnership, limited liability partnership, or limited liability limited partnership to file a return or remit the tax due. The sum due for such a liability may be assessed and collected as provided by law.

(D) If the corporate officers, limited liability company member-managers or managers, or partners elect not to be personally liable for the failure to file the required returns or to pay the tax due, the corporation, limited liability company, limited partnership, limited liability partnership, or limited liability limited partnership shall provide the City with a surety bond or certificate of deposit as security for payment of any tax that may become due. The bond or certificate of deposit provided for in this section shall be in an amount equal to the estimated annual gross purchases made by the collector multiplied by the applicable tax rate.

(E) Upon the termination, dissolution, or abandonment of the business of a corporation, partnership, limited partnership, limited liability partnership, or limited liability company, any officer, member, manager, partner, or other person having control or supervision of, or who is charged with the responsibility for the filing of returns or the payment of tax, or who is under a duty to act for the corporation, partnership, limited partnership, limited liability partnership, or limited liability company in complying with any requirement of this Chapter, and who is not jointly and severally liable under § 6.44.160(A), shall be personally liable for any unpaid taxes and interest and penalties on those taxes, if the officer, member, manager, partner, or other person willfully fails to pay or to cause to be paid any taxes due from the corporation, partnership, limited partnership, limited liability partnership, or limited liability company pursuant to this part.

(F) The officer, member, manager, partner, or other person liable under § 6.44.160(E) shall be liable only for taxes that became due during the period he or she had the control, supervision, responsibility, or duty to act for the corporation, partnership, limited partnership, limited liability partnership, or limited liability company, plus interest and penalties on those taxes.

(G) Personal liability may be imposed pursuant to this section only if the City can establish that the corporation, partnership, limited partnership, limited liability partnership, or limited liability company had included tax reimbursement in the selling price of, or added tax reimbursement to the

selling price of raw seafood product purchased in the conduct of its business, or when it can be established that the corporation, partnership, limited partnership, limited liability partnership, or limited liability company made a sale of raw seafood product subject to tax and failed to pay the tax.

(H) For purposes of this section, "willfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action.

Section 7: Effective Date:

A. Subsection 6.40.110(c)(1)(a) as amended clarifies existing law in a manner consistent with past administrative interpretation and the language as amended shall be effective retroactive to January 1, 2013.

B. All other provisions of this ordinance shall be effective thirty days after passage.

PASSED AND ADOPTED by a duly constituted quorum of the Unalaska City Council on the 26 day of March, 2019.


Frank Kelty
Mayor

ATTEST:


Marjie Veeder
City Clerk



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MEMORANDUM

To: Thomas Thomas
City Manager



From: Brooks Chandler

Date: March 7, 2019

Re: Sales Tax Ordinance Changes

This memorandum summarizes and explains proposed amendments to city sales tax code provisions intended to establish clear authority for the city to require certain internet sellers to collect and remit city sales tax. As previously advised in our memorandum of July 30, 2018 it is now “legal” to tax such sales as a result of the South Dakota v. Wayfair decision. It is no longer necessary for a seller to have a physical presence in Unalaska. A “virtual” presence based on the volume of sales made in the entire State of Alaska is enough.

The draft ordinance applies the new legal authority by replacing the phrase “offer being communicated from a seller to a consumer within the city and accepted by the consumer within the city” with language based on delivery of the item purchased to Unalaska. This will clearly require larger internet sellers to collect tax. It is likely the current language already includes such a requirement. But exactly where “communication” that occurs via computer takes place is debatable. Is this where the keyboard is located or where the servers on which Amazon hosts its website are located? What about when an Unalaska resident uses their cell phone while in Anchorage to order something over the internet? The ordinance change removes all doubt.

The threshold levels of sales required to trigger the obligation to collect tax on internet sales are identical to those approved by the United States Supreme Court in the Wayfair decision. Alaska is used as the basis for sales volume rather than Unalaska because the constitutional provision on which Wayfair and the old legal rule were based is one relating to interstate commerce. Using Alaska rather than Unalaska will maximize the number of sellers required to collect tax. If the city council prefers to use Unalaska a much lower threshold gross sales amount should be substituted.

Specific language indicating the City will not retroactively seek tax based on the old “solicitation within the city” language is included in Section 5. The Supreme Court specifically mentioned similar language in the South Dakota statute it upheld in the Wayfair case.

The change in Section 4 is “housekeeping”. The code section being deleted referenced an exemption for “out of town sales” which no longer exists. Section 6 applies provisions previously adopted for sales tax making corporate officers individually responsible for the failure of a corporation to remit sales tax to the city’s fish tax ordinance.

The effective date section has two components. One emphasizes that the city will apply the new language to internet sales upon adoption although previous sales can still be considered taxable based on the former “offer being communicated by a seller to a consumer within the city” language. The other contains a retroactive date for local businesses. This subsection is included in response to claims that sales of fuel made by OSI’s fuel business in Unalaska are not taxable if the fuel sold was ordered through OSI’s Seattle office by way of phone, fax or email. We do not believe this is a correct interpretation of current language or was ever what was intended by the language which justifies a retroactive effective date.

I plan to be available by telephone on March 12 to respond to any council questions.