

1 State of Arkansas  
2 91st General Assembly  
3 Regular Session, 2017  
4

# A Bill

SENATE BILL 140

5 By: Senators Files, J. Dismang, Teague, B. Sample, Rapert  
6 By: Representative D. Douglas  
7

## For An Act To Be Entitled

9 AN ACT TO PROVIDE FOR THE COLLECTION OF SALES TAX  
10 RATHER THAN USE TAX ON SALES BY CERTAIN REMOTE  
11 SELLERS; AND FOR OTHER PURPOSES.  
12  
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## Subtitle

15 TO PROVIDE FOR THE COLLECTION OF SALES  
16 TAX RATHER THAN USE TAX ON SALES BY  
17 CERTAIN REMOTE SELLERS.  
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20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
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22 SECTION 1. DO NOT CODIFY. Legislative findings.

23 (a) The General Assembly finds that:

24 (1) The inability to effectively collect any Arkansas sales or  
25 use tax from remote sellers who deliver tangible personal property, products  
26 transferred electronically, or services directly into the state is seriously  
27 eroding the sales tax base of this state, causing revenue losses and imminent  
28 harm to the state through the loss of critical funding for state and local  
29 services;

30 (2) The harm from the loss of revenue is especially serious in  
31 Arkansas because sales and use tax revenues are essential in funding state  
32 and local services;

33 (3) Despite the fact that a use tax is owed on tangible personal  
34 property, a product transferred electronically, or services delivered for use  
35 in this state, many remote sellers actively market sales as tax-free or  
36 transactions not subject to sales tax;



1           (4) The structural advantages of remote sellers, including the  
2 absence of point-of-sale tax collection and the general growth of online  
3 retail, make clear that further erosion of this state's sales tax base is  
4 likely to occur in the near future;

5           (5) Remote sellers that make a substantial number of deliveries  
6 into Arkansas or collect large gross revenues from Arkansas benefit  
7 extensively from this state's market, economy, and infrastructure;

8           (6) In contrast with the expanding harms caused to the state  
9 from the exemption of sales tax collection duties for remote sellers, the  
10 costs of such a collection have decreased because advanced computing and  
11 software options have made it neither difficult nor burdensome for remote  
12 sellers to collect and remit sales taxes associated with sales into this  
13 state;

14           (7) As United States Supreme Court Justice Anthony Kennedy  
15 recently recognized in his concurrence in Direct Marketing Association v.  
16 Brohl, 575 U.S. \_\_\_, 135 S. Ct. 1124 (2015) (Kennedy, J., concurring), the  
17 United States Supreme Court should reconsider its doctrine that prevents  
18 states from requiring remote sellers to collect sales tax, and based on the  
19 foregoing findings, this argument has grown stronger and the cause more  
20 urgent with time;

21           (8) Given the urgent need for the United States Supreme Court to  
22 reconsider the doctrine, it is necessary for this state to pass a law  
23 clarifying its immediate intent to require collection of sales taxes by  
24 remote sellers and permitting the most expeditious possible review of the  
25 constitutionality of this law;

26           (9) Expeditious review is necessary and appropriate because,  
27 although it may be reasonable notwithstanding this act for remote sellers to  
28 continue to refuse to collect the sales tax in light of existing federal  
29 constitutional doctrine, this refusal causes imminent harm to this state; and

30           (10) At the same time, the General Assembly recognizes that the  
31 enactment of this law places remote sellers in a complicated position,  
32 precisely because existing constitutional doctrine calls this act into  
33 question.

34           (b) The General Assembly intends to:

35           (1) Clarify that the obligations created by this act would be  
36 appropriately stayed by the courts until the constitutionality of this law

1 has been clearly established by a binding judgment, including without  
 2 limitation a decision from the United States Supreme Court abrogating its  
 3 existing doctrine or a final judgment applicable to a particular taxpayer;

4 (2) Apply Arkansas's sales and use tax obligations to the  
 5 greatest extent possible under federal and state constitutional doctrines;  
 6 and

7 (3) Clarify that Arkansas law permits the state to immediately  
 8 argue in any litigation that the constitutional doctrine should be changed to  
 9 permit the collection obligations of this act.

10  
 11 SECTION 2. Arkansas Code Title 26, Chapter 52, Subchapter 1, is  
 12 amended to add an additional section to read as follows:

13 26-52-111. Collection by remote sellers.

14 (a) A seller selling tangible personal property, products transferred  
 15 electronically, or services for delivery into Arkansas, that does not have a  
 16 physical presence in this state:

17 (1) Is subject to the provisions of this chapter; and

18 (2) Shall remit the sales tax and follow all applicable  
 19 procedures and requirements of law as if the seller had a physical presence  
 20 in the state, if the seller meets either of the following criteria in the  
 21 previous calendar year or the current calendar year:

22 (A) The seller's gross revenue from the sale of tangible  
 23 personal property, any product transferred electronically, and services  
 24 delivered into Arkansas exceeds one hundred thousand dollars (\$100,000); or

25 (B) The seller sold tangible personal property, any  
 26 product transferred electronically, and services for delivery into Arkansas  
 27 in at least two hundred (200) separate transactions.

28 (b)(1) The state may bring a declaratory judgment action against any  
 29 person the state believes meets the criteria of subsection (a) of this  
 30 section to establish that the obligation to remit sales tax is applicable and  
 31 valid under state and federal law.

32 (2) The state is not required to initiate an audit or other tax  
 33 collection procedure before bringing a declaratory judgment action under this  
 34 section.

35 (3) The circuit court shall act on a declaratory judgment action  
 36 filed under this section as expeditiously as possible, and this action shall

1 proceed with priority over any other action presenting the same question in  
2 any other venue.

3 (4) The award of attorney's fees is not allowed in a declaratory  
4 judgment action brought under this section or any appeal from a declaratory  
5 judgment action brought under this section.

6 (c)(1) The filing of a declaratory judgment action by the state under  
7 this section operates as an administrative injunction during the pendency of  
8 the action, prohibiting any state entity from enforcing the obligation in  
9 subsection (a) of this section against any taxpayer that does not  
10 affirmatively consent or otherwise remit the sales tax on a voluntary basis.

11 (2) An administrative injunction under this subsection does not  
12 apply if there is a previous judgment from a court establishing the validity  
13 of the obligation in subsection (a) of this section with respect to the  
14 particular taxpayer.

15 (3) If the declaratory judgment action is resolved in favor of  
16 the state, in general or with respect to a specific taxpayer, the state shall  
17 assess and apply the obligation established in subsection (a) of this section  
18 from that date forward with respect to any taxpayer covered by the  
19 administrative injunction.

20 (d) The obligation to remit the sales tax required under this section  
21 shall not be applied retroactively.

22 (e)(1) A taxpayer complying with this section may seek a recovery of  
23 taxes, penalties, or interest only by following the procedures established in  
24 Arkansas Code Title 26, Chapter 18.

25 (2) However, a claim shall not be granted on the basis that the  
26 taxpayer lacked a physical presence in the state and complied with this  
27 section voluntarily while covered by an injunction under this section.

28 (f) This section does not limit the ability of a taxpayer to obtain a  
29 refund for any other reason, including without limitation a mistake of fact  
30 or mathematical miscalculation of the applicable tax.

31 (g) A seller that remits sales tax under this section is not liable to  
32 a purchaser who claims that the sales tax has been over-collected because a  
33 provision of this section is later deemed unlawful.

34 (h) This section does not affect the obligation of a purchaser from  
35 this state to remit use tax on any applicable transaction in which the seller  
36 does not collect and remit sales tax.

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SECTION 3. EFFECTIVE DATE. Sections 1 and 2 of this act are effective on the first day of the second calendar month following the effective date of this act.