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## The Taxability of Third-Party Food Delivery Services

### Understanding Complex Local Rules to Determine the Responsible Party



By [Corey L. Rosenthal, JD](#) (<https://www.cpajournal.com/author/crosenthal/>), [Scott Smith](#) (<https://www.cpajournal.com/author/ssmith/>) and [Latasha Lewis, CMI](#) (<https://www.cpajournal.com/author/llewis/>)

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Two years into an unprecedented global pandemic, the impact of coronavirus (COVID-19) is still felt in many industries. The hospitality industry continues to be one of the hardest-hit. Although hotel occupancy is steadily rising as summer travel picks up, the restaurant industry struggles to reestablish its identity. The lack of workers, the lack of supplies, and the lack of customers all contribute. The National Restaurant Association estimates that at least 90,000 restaurant locations were either temporarily or permanently closed as of mid-2021 (The 2021 State of the Restaurant Industry Mid-Year Update, National Restaurant Association, <http://www.restaurant.org> (<http://www.restaurant.org/>)).



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There is one bright spot: the use of third-party food delivery companies. Third-party food delivery companies—such as Uber Eats, Grub Hub, and DoorDash—have allowed restaurants to deliver prepared meals to their customers. Prior to 2020, this delivery service was seen as a convenience. Once businesses closed in 2020, this delivery service was seen as essential. Today, this delivery service is a permanent extension of restaurant operations. Restaurants and third-party food delivery companies continue to balance prices to ensure profitability for both parties. This balancing act often overlooks one of the most important aspects of a sale—the imposition of sales tax. Both parties should ask: Who is responsible for the collection/remittance of sales tax, and which fees are subject to tax? This article will provide an overview of the key issues that CPAs need to be acknowledge when consulting with businesses in the hospitality area.

To this end, third-party food delivery service companies partner with restaurants to use the service provider's digital platform to offer food delivery services to the restaurant's customers. Customers can access the digital platform using a website or app. Typically, customers browse the app, select a meal, and place an order; the restaurant will accept and prepare the order; and the third-party food delivery service company will link with an available delivery driver to facilitate the delivery service. The order receipt will show the price of the meal plus additional fees, such as the delivery fee, service fee, tax, and tips.

Some states consider the third-party food delivery service company to be a marketplace facilitator. A marketplace facilitator is a company or person who facilitates the sale of tangible personal property by a marketplace seller by providing a forum where the sale takes place and collects the receipts from customers for the tangible personal property. This broad definition emboldened states to look at third-party food delivery service companies to shore up state revenue. From a state tax department's viewpoint, the service provider offered the forum and (more than likely) collected the money. So why wouldn't the marketplace facilitator laws apply? It is much easier to collect tax revenue from one large taxpayer than thousands of small taxpayers.



## New York

Take a look at New York. Generally, the receipts from every sale of food and drink when sold in or by restaurants, including the amount of such receipts of any cover, minimum, entertainment, or other charge made to patrons or customers, are subject to New York sales tax. This sales tax is imposed in all instances where the sale is for consumption on the premises where sold, or in those instances where the vendor or any person whose services are arranged for by the vendor, after the delivery of the food or drink by or on behalf of the vendor for consumption off the premise of the vendor, serves or assists in serving, cooks, heats, or provides other services with respect to the food or drink [New York Tax Law section 1105(d)]. Although third-party food delivery companies offer an app to facilitate sales, they generally argue that they are not selling food; they are providing a delivery service only. New York does not impose sales tax on transportation services. The receipt may also include a tip, which can be either mandatory or voluntary. A mandatory tip is automatically added to the bill given to the customer. A mandatory tip is subject to New York sales tax unless the tip is separately stated, clearly identified as a tip, and all of the money is given to the employees. If all three conditions are not met, the mandatory tip is subject to sales tax; if the tip is voluntary and separately stated, it is not subject to New York sales tax (New York Tax Bulletin TB-ST-806, 04/08/2019).

In addition, New York offered guidance that a marketplace provider is not required to collect sales tax on transactions that are not considered the sale of tangible personal property, such as sales of restaurant food [New York Technical Memorandum TSB-M-19(2.1)S, 10/17/2019]. The restaurant is responsible for the collection and remittance of the sales tax; however, third-party food delivery companies may opt to accept responsibility for the collection and remittance of sales tax through its contract with the restaurant. Although not required, the restaurant may accept a copy of a fully completed New York Form ST-150, Marketplace Provider Certificate of Collection, from the provider; this form offers tax liability relief to the seller. Remember that the state does not consider the sale of restaurant food as the sale of tangible personal property. This form, in addition to the contract, is simply stored to substantiate why the restaurant did not collect and remit sales tax on its third-party delivery sales. Both parties should pay attention to any contract clauses that reference restaurant-related sales taxes. Interestingly, as of this writing, the Uber Eats website shows that it is collecting sales tax in New York (<https://bit.ly/3scARpW>) (<https://bit.ly/3scARpW>), but the DoorDash website shows that it is not (<https://bit.ly/3w6CGpw> (<https://bit.ly/3w6CGpw>)).

## California

California does not consider third-party food delivery companies to be the marketplace facilitator responsible for collecting and remitting sales tax. However, a third-party food delivery company can choose to be a marketplace facilitator. If the company chooses to be a marketplace facilitator, that company is then responsible for the collection and remittance of tax. If the company does not choose to do so, the tax obligation remains with the restaurant. It is important that the restaurant and the online ordering service provider have a written agreement that adequately describes the responsibilities of each party involved. It should be made clear whether the online ordering service provider is acting as an agent of the restaurant in the advertising, ordering, and delivery of the meal, or whether the online ordering service provider is purchasing the meals for resale.

Under California law, when an online ordering service provider acts as an agent of the restaurant, the restaurant is considered the retailer of the meals sold through the online ordering service and is liable for the tax, measured by the full selling price of those sales, without any deduction of the commission retained by the service provider. If the agreement between the restaurant and the online ordering service provider does not establish an agency relationship, however, such a provider would be considered a retailer that is required to hold a seller's permit and is liable for the tax on the sales of meals through the online ordering service. When an agency relationship does not exist, the restaurant must obtain a resale certificate from the online service providers that purchase the meals for resale. The receipt may also include a tip. Payments of tips are not taxable if they are paid by customers on an entirely optional basis and are retained by employees (California Publication 22, Dining and Beverage Industry, October 2020).

## Other Issues and Responsibilities

The focus above has been on state sales tax. What if the cities or counties in the relevant jurisdiction have a local restaurant related tax? In Indiana, counties or municipalities that have been granted the necessary statutory authority may adopt a local food and beverage tax. The food and beverage tax operates in a similar manner to the sales tax (Indiana Information Bulletin 29, 07/01/2019). If the meal is subject to state sales tax, the meal is also subject to the local food and beverage tax. The marketplace facilitator laws are generally applicable to state sales tax and might not address local restaurant related taxes. Restaurants and third-party food delivery companies, along with their professional advisors, should review local tax ordinances and address the remittance of local taxes in their contracts.

How does a restaurant or third-party delivery company determine which party is responsible for the collection and remittance of sales tax? Both parties should first review the tax laws of the jurisdiction. If the laws are unclear, a contract should properly address who will be responsible for remitting the sales tax collected. The restaurant should also review their weekly or monthly reconciliation reports from the service provider. This reconciliation report should reflect the amount collected by the service provider and the amount deposited to the restaurant. If the restaurant's deposit includes a sales tax entry, the restaurant should confirm the party responsible for remitting this to the taxing jurisdiction.

The responsibility will depend on the service—the provider, the state law, and the relevant contract. If both parties fail to remit sales tax, the taxing jurisdiction could hold both parties responsible. The liability may rest on which party is audited first. Indeed, states continue to look for revenue and sales/use tax audits are on the rise. The state may simply look at who collected the payment, including the sales tax, holding the tax collector responsible for the tax remittance. Moreover, restaurants should want to pay the correct sales tax, and understanding all various applicable tax laws will ensure proper compliance and avoid double taxation. As the hospitality industry climbs out of the COVID-19 hole, restaurants should ensure they are in compliance in order to avoid huge state sales/use tax assessments.

CPAs must be aware of these complex issues and the impact these could have on their clients and employers. Given the multiple jurisdictions that may impose a sales tax, CPAs must stay abreast of these third-party delivery service rules and their associated sales tax implications in order to properly serve the restaurant industry. 

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