

Excise Tax Advisory

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ETA 3223.2021

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Taxability of Restaurant and Grocery Delivery Services

Scope

The purpose of this Excise Tax Advisory (ETA) is to clarify the taxation of restaurant and grocery food delivery service transactions under identified circumstances.

There are generally up to four parties involved in these transactions:

- Customer
- Marketplace Facilitator or Reseller
- Restaurant/Grocer
- Delivery partner

This ETA addresses how these transactions are taxed under the following three business models¹:

- 1) Marketplace Facilitator/Delivery Partner Business Model
- 2) Marketplace Facilitator Employee Delivery Business Model
- 3) Resale Business Model

There may be different business models not addressed in this ETA. If you have a business model or factual situation different from those identified in this ETA, the Department recommends you seek a [letter ruling](#) to determine taxability.

Definitions and Terms

For purposes of this ETA, the following definitions and terms apply:

¹ This ETA does not address the traditional model where customers place orders directly with retailers, such as restaurants or grocers, who in turn deliver tangible personal property including food to customers either themselves or by hiring a third party. For additional information regarding delivery charges related to the traditional model, see WAC 458-20-110.

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- The “**customer**” is the person purchasing tangible personal property for delivery, usually to a home, business, or other location of its choosing.²
- The “**delivery partner**” is a person (other than the marketplace facilitator) that picks up the tangible personal property from the restaurant or grocer and delivers it to the customer.
- The “**marketplace facilitator**” is a person meeting the requirements of RCW 82.08.010(15). See “Applicable Law” section below for more information.
- “**Person**” has the same meaning as provided in RCW 82.04.030.
- The “**restaurant**” is a person that prepares the food ultimately delivered as prepared food to the customer.
- The “**grocer**” is a person that sells tangible personal property, typically food and food ingredients, soft drinks, bottled water, dietary supplements, and other nonedible goods (groceries) ultimately delivered to the customer.

Business Models

- 1) **Marketplace Facilitator/Delivery Partner Business Model:** Generally, under this model, a customer places an order from a restaurant or grocer listed on a marketplace facilitator’s marketplace. Under a contract with the marketplace facilitator, a third-party delivery partner picks up the tangible personal property from the restaurant/grocer and delivers it to the customer.
- 2) **Marketplace Facilitator Employee Delivery Business Model:** Same as model 1, except the marketplace facilitator’s employees pick up and deliver the tangible personal property to the customer.
- 3) **Resale Business Model:** Under this model, a person purchases tangible personal property from a restaurant or grocer and resells and delivers the tangible personal property to customers either using its employees or by contracting with a delivery partner.

A person may use more than one model. For example, a person may act as a marketplace facilitator for some transactions and a reseller for others.

Applicable Law

Marketplace Facilitator definition

A person is a marketplace facilitator, under RCW 82.08.010(15), if it:

- Contracts with sellers to facilitate for consideration the sale of the seller’s products through a marketplace owned or operated by the person;

² For purposes of this ETA, “tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses, and includes prepared food, food and food ingredients, soft drinks, dietary supplements, bottled water, and other non-edible goods (groceries). RCW 82.08.010.

- Engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between the buyer and seller; and
- Engages directly or indirectly, through one or more affiliated persons, in any of the following activities with respect to the seller's products:
 - Payment processing services;
 - Fulfillment or storage services;
 - Listing products for sale;
 - Setting prices;
 - Branding sales as those of the marketplace facilitator;
 - Taking orders; or
 - Providing customer service or accepting or assisting with returns or exchanges.

Marketplace Facilitator Report to Marketplace Seller

By the 15th calendar day of each month, marketplace facilitators must provide their marketplace sellers with access to gross sales information for all facilitated Washington sales in the immediately preceding month to ensure that marketplace sellers have the necessary information to timely and accurately file their excise tax returns. RCW 82.08.0531(4)(a).

Marketplace Facilitators Deemed Agents

A marketplace facilitator is deemed to be an agent of any marketplace seller making retail sales through its marketplace for purposes of both retail sales tax and B&O tax, and the marketplace facilitator must collect retail sales tax on sales of taxable products through its marketplace, both with respect to its own sales and the sales of third-party marketplace sellers. RCW 82.08.050 and 82.08.0531.

Retail Sales Tax

Retail sales sourced to Washington are subject to the retail sales tax.³ RCW 82.04.050; 82.08.020; RCW 82.32.730. "Retail sale" includes sales of tangible personal property, digital products, identified services, and extended warranties to consumers.

- Retail sales tax must be paid by the buyer to the seller, which includes a marketplace facilitator, and is calculated by multiplying the selling price by the applicable combined state and local sales tax rates. RCW 82.08.020; RCW 82.08.050; RCW 82.14.030.
- The selling price includes the total amount of consideration paid by the buyer for the item sold without deduction for charges by the seller for

³ Sourcing refers to the location where a sale is deemed to occur. Generally, this is the location where the sold items are received by the purchaser. The combined state and local sales tax rate applicable to that location of sale will apply.

delivery, any expenses of the seller, or any services necessary to complete the sale. RCW 82.08.010; WAC 458-20-108; WAC 458-20-110.

- Sales of food and food ingredients are generally exempt from retail sales tax, but this product-based exemption does not apply to prepared food, soft drinks, bottled water, or dietary supplements. RCW 82.08.0293 and WAC 458-20-244.
- If a shipment consists of both taxable items and nontaxable items, and delivery charges are included in the sales price, the seller must collect and remit sales tax on the percentage of the delivery charge allocated to taxable items, but does not need to collect and remit tax on the percentage allocated to exempt items. RCW 82.08.145.

Business and Occupation (B&O) Tax

The B&O tax is imposed on the privilege of engaging in business in Washington. The tax is calculated by multiplying the gross proceeds of sales or gross income of the business, as the case may be, by the applicable tax rate. RCW 82.04.220.

- Persons making retail sales are subject to the retailing B&O tax classification and taxable on their gross proceeds of sales. RCW 82.04.250. The retailing B&O tax is calculated by multiplying the gross proceeds of sales by 0.471 percent.
- Persons making such sales for resale are subject to the wholesaling B&O tax classification and taxable on their gross proceeds of sales. RCW 82.04.270. Wholesaling B&O tax is calculated by multiplying the gross proceeds of sales by 0.484 percent. RCW 82.04.270.
- Persons engaging in any business activity not taxed under any other B&O tax classification specified in chapter 82.04 RCW is taxed under the service and other activities B&O tax classification on their gross income of the business. RCW 82.04.290. Service and other activities B&O tax is calculated by multiplying the gross income of the business by the applicable rate under RCW 82.04.290 (generally 1.5 percent or 1.75 percent if \$1 million or greater taxable income in prior calendar year).
- “Gross proceeds of sales” means the value proceeding or accruing from the sale of tangible personal property, digital goods, digital codes, digital automated services, and/or for other services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. RCW 82.04.070.
- “Gross income of the business” means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any

deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.” RCW 82.04.080.

Public Utility Tax

The Public Utility Tax (PUT) is imposed on the privilege of engaging in Washington in a motor or urban transportation business. The PUT tax for motor and urban transportation classifications is calculated by calculating the gross income of the business by the applicable tax rates. RCW 82.16.020.

- The business of operating any motor propelled vehicle transporting persons or property of others for hire constitutes a motor transportation business. RCW 82.16.010. This type of business will be considered an urban transportation business if it operates entirely within the corporate limits of any city or town, or within five miles of the corporate limits thereof; or operates entirely within and between cities and towns whose corporate limits are not more than five miles apart or within five miles of the corporate limits of either thereof. RCW 82.16.020.
- The gross income of a motor transportation business means the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental thereto without any deduction for any expense paid or accrued or on account of any losses. RCW 82.16.010.

Taxability

- 1) Marketplace Facilitators:** A marketplace facilitator that is facilitating retail sales of prepared food or groceries through its marketplace:
 - Must collect and remit retail sales tax on the full selling price charged to the customer for taxable products, including delivery fees, service fees, and any other charges paid by the customer.⁴
 - Is taxable under the service and other business activities B&O tax classification on its gross income for facilitating these sales. Generally, this gross income will include all of its commissions, delivery fees, service fees, other fees, and other income for facilitating marketplace sales, whether paid to the marketplace facilitator by the seller or by the purchaser.

Note: A taxpayer may be a marketplace facilitator for some transactions and a reseller for others.

⁴ A marketplace facilitator must also collect all other applicable taxes and fees imposed on a buyer that are required to be collected by the seller. RCW 82.02.260.

2) Resellers A reseller who purchases prepared food or other items of tangible personal property from a restaurant or grocer and resells the items with delivery to customers:

- Must collect and remit retail sales tax on the full selling price charged to customers, including delivery fees, service fees, and any other charges paid by customers, and
- Is subject to retailing B&O tax on the gross proceeds of sales of the prepared food.

A person will not be considered a reseller with respect to a sale if it establishes that it is either acting as a marketplace facilitator or otherwise meets the requirements of RCW 82.04.480 and WAC 458-20-159.

Note: A reseller may be entitled to use a reseller permit or claim a tax paid at source deduction to recover sales tax paid for the property resold. See WAC 458-20-102.

3) Restaurants/Grocers: For retail sales made through a marketplace facilitator, a restaurant or grocer:

- Is generally not required to collect retail sales tax if it has obtained documentation indicating that the marketplace facilitator is registered and will collect the retail sales tax on all sales made through the marketplace facilitator's marketplace.
 - The restaurant or grocer may remain liable for uncollected tax, if the marketplace facilitator failed to collect the proper amount of tax due to incorrect information given by the restaurant or grocer. See RCW 82.08.0531.
- Is generally subject to retailing B&O tax on the full gross proceeds of sales.

Note: A restaurant or grocer may be subject to wholesaling B&O tax on its gross proceeds of sales if it sells the prepared food or groceries to a reseller who presents the restaurant or grocer with a valid reseller permit. Retail sales tax does not apply to the wholesale sale by the restaurant or grocer to the reseller.

4) Delivery Partners: Generally, delivery partners will be subject to PUT as a motor transportation business and/or urban transportation business when making deliveries by motor vehicle. For deliveries made by foot or bicycle, the delivery partner will instead be subject to B&O tax under the service and other activities classification.

Examples

The following examples identify a set of facts and then state a conclusion. These examples are only a general guide. The tax results of other situations must be determined after a review of all facts and circumstances. **All examples assume:**

- All parties are operating in Washington;
- A combined state and local retail sales tax rate of ten percent at the location where the prepared food or groceries are received by the customer;
- No exemptions (other than the exemption for food and food ingredients), exclusions, deductions, or credits apply;
- The sales do not involve bundled transactions as described in RCW 82.08.190;
- Delivery Partners meet the \$12,000 gross income threshold or are otherwise required to register under RCW 82.32.030(2);
- The person subject to service and other activities B&O tax had income less than \$1 million in prior year and qualifies for the lower 1.5% tax rate;
- For sales through a marketplace facilitator, the restaurants/grocers involved have obtained documentation from the marketplace facilitator indicating the facilitator is registered and will collect all applicable taxes under Chapters 82.08 and 82.12 RCW; and
- For sales that include both taxable and nontaxable items, the seller has allocated the delivery fees and other fees between taxable and nontaxable based on the percentage of the total sales price. Under RCW 82.08.145, a seller may alternatively allocate the delivery fees and other fees based on the percentage of the total weight of the items shipped.

1) Marketplace Facilitator / Delivery Partner Business Model

The following examples demonstrate taxability under the **Marketplace Facilitator/Delivery Partner Business Model** under a set of described facts.

Example 1.

- **Facts:**
 - FoodToGo is a Marketplace Facilitator that provides a marketplace accessible through cell phones and other means that lists a variety of restaurants from which customers can select prepared food items for purchase.
 - FoodToGo contracts with the restaurants to provide services to facilitate the sale of prepared food through the marketplace in exchange for a commission of 10% of the price of the prepared food. Services provided include:
 - Listing the prepared food on the marketplace.
 - Taking orders on the marketplace, including communicating the offer or acceptance between the restaurant and customer.
 - Payment processing, promotional, marketing, and/or other services.
 - Customer Peter orders prepared food from La Taqueria Restaurant & Market (La Taqueria) through FoodToGo's marketplace. Peter places

the order via his phone and pays an amount totaling \$50.00 (the selling price), which includes \$40.00 for the price of the prepared food, a \$5.00 service fee, and a \$5.00 delivery charge.

- Under a contract with FoodToGo, Delivery Partner Katherine picks up the prepared food from La Taqueria when the food is ready and uses a motor vehicle to deliver the prepared food to Peter.
- Pursuant to the contract with La Taqueria, FoodToGo collects the full \$50.00 selling price from the customer on behalf of La Taqueria. From the collected \$50.00, FoodToGo:
 - Pays Delivery Partner Katherine \$4.00 for the delivery (determined based on FoodToGo's contract with Delivery Partner Katherine),
 - Retains the \$1.00 difference from the delivery fee, the \$5.00 service fee,
 - Retains the \$4.00 commission (10% of \$40.00), and
 - Pays the \$36.00 remaining portion of the proceeds to La Taqueria.

- **Result:**

- La Taqueria Restaurant & Market is making a retail sale and:
 - Must report, without deduction, the gross proceeds of sale, including the delivery fee and service fee, of \$50.00 under the retailing B&O tax classification and pay B&O tax in the amount of \$0.24 (0.00471 tax rate x \$50.00 gross proceeds of sale).
- FoodToGo is a Marketplace Facilitator and:
 - Must report its gross income of the business under the service and other classification of \$14.00 (\$4.00 commission, \$5.00 service fee, \$5.00 delivery fee) and pay B&O tax in the amount of \$0.21 (\$14.00 x 0.015 tax rate).
 - Marketplace Facilitator may not deduct the \$4.00 it pays the delivery partner from its gross income.
 - Must collect and remit \$5.00 in retail sales tax from Peter on the sale (0.10 tax rate x \$50.00 selling price). The sale is sourced to the delivery location where the prepared food is received by the customer.
 - By the 15th calendar day of each month, Marketplace Facilitator must provide La Taqueria with access to gross sales information for all Washington sales facilitated for La Taqueria in the immediately preceding month.
- Delivery Partner Katherine
 - Must report and pay PUT on her gross income of \$4.00 as either an urban or motor transportation business depending on the applicable facts.

Example 2:

- **Facts:** Same as Example 1, except that the order through FoodToGo also includes \$20.00 for food and food ingredients exempt from retail sales tax and \$20.00 for the prepared food, along with the \$5.00 delivery fee and \$5.00 service fee. Commission terms are the same. La Taqueria’s prepared food sales percentage is lower than seventy-five percent for purposes of WAC 458-20-244(5)(c) and utensils are not provided with the food and food ingredient sales.
- **Result:** Same as Example 1, except:
 - FoodToGo is a Marketplace Facilitator and:
 - Must report B&O tax in same manner as Example 1.
 - Must collect and remit \$2.50 in sales tax from Peter (0.10 tax rate x \$25.00 selling price). Because the delivery fee and service fee apply to the entire order, but \$20.00 (50%) of the sale is tax exempt food, \$5.00 (50%) of the \$10.00 in delivery and service fees is allocated to the taxable items and subject to retail sales tax. The sale is sourced to the delivery location where the items are received by the customer.

Example 3.

- **Facts:** Same facts as Example 1 except FoodToGo contracts with Delivery Partner who delivers the food using a bicycle.
- **Result:** Same as Example 1, except:
 - Delivery Partner Katherine
 - Delivery Partner owes service and other B&O tax on its gross income of \$4.00, rather than PUT, for the delivery in the amount of \$0.06 (\$4.00 x .015).

**2) Marketplace
Facilitator
Employee
Delivery
Business Model**

The following example demonstrates taxability under the **Marketplace Facilitator Employee Delivery Business Model** under a set of described facts.

Example 4.

- **Facts:**
 - FoodToGo operates as a Marketplace Facilitator in the same manner as Example 1, except that delivery is made by FoodToGo’s employees.
 - Customer Johnny orders prepared food from Beijing Noodles Restaurant using FoodToGo’s web application.
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- Customer Johnny pays \$100.00, which includes a \$5.00 delivery charge, \$5.00 service fee, and \$90.00 for the prepared food.
- Beijing Noodles Restaurant pays a 20% commission (\$18.00) to the Marketplace Facilitator.
- FoodToGo's employee delivers the prepared food by motor vehicle.
- **Result:**
 - Beijing Noodles Restaurant is making a retail sale and:
 - Must report, without deduction, the gross proceeds of sale, including the delivery fee and service fee, of \$100.00 under the retailing B&O tax classification and pay B&O tax in the amount of \$0.47 (0.00471 tax rate x \$100.00 gross proceeds of sale).
 - FoodToGo is a Marketplace Facilitator and:
 - Must report under the service and other activities classification on its gross income of \$28.00 (\$18.00 commission, \$5.00 service fee, \$5.00 delivery fee) and pay B&O tax in the amount of \$0.42 (\$28.00 x 0.015 tax rate).
 - Must collect and remit \$10.00 in sales tax from Johnny on the sale (0.10 tax rate x \$100.00 selling price). The sale is sourced to the delivery location where the prepared food is received by the customer.
 - FoodToGo does not owe PUT on the delivery charge because it is a seller (as agent) of the prepared food, and makes the delivery itself as part of the retail sale.
 - By the 15th calendar day of each month, FoodToGo must provide Beijing Noodles with access to gross sales information for all Washington sales facilitated for Beijing Noodles in the immediately preceding month.

3) Resale Business Model

The following examples demonstrate taxability under the **Resale Business Model** and the tax consequences under a set of described facts.

Example 5.

- **Facts:**
 - MealsToYou offers a marketplace in which it lists products from various restaurants that it partners with for the sale of the restaurants' prepared food with delivery by delivery partners.
 - MealsToYou:
 - May enter into contracts with the partner restaurants and/or customers, but under these agreements, (a) MealsToYou is not made a selling agent of the restaurants, and (b) MealsToYou or

- delivery partner is not made an agent of the customer to purchase the prepared food on behalf of the customer.
 - Charges the customer a delivery fee and service fee.
 - Generally charges customers a higher price for the prepared food than the price it pays to the restaurant or grocer for the item.
 - Retains the markup on the sale, and restaurant is at no time legally entitled to the markup.
 - MealsToYou contracts with independent contractor delivery partners to go to the restaurant's physical location and use a debit card provided by MealsToYou to purchase prepared meals or other items ordered by customers through the MealsToYou platform and to deliver the ordered items to the customers.
 - For this service, MealsToYou pays the delivery partner a commission or fee.
 - The delivery partner is authorized to use the MealsToYou debit card only for the purchases as directed by MealsToYou.
 - Customer Jack orders a burger, fries, and soft drink for \$20.00 plus a \$12.00 delivery fee from MealsToYou platform to be purchased from Round and Brown Restaurant and delivered to Jack.
 - MealsToYou agrees to pay the delivery partner a \$10.00 fee for its delivery service.
 - Through Delivery Partner Robert, MealsToYou purchases the burger, fries, and soft drink from Round and Brown Restaurant for \$15.00 and delivers the food to Jack via motor vehicle.
 - MealsToYou does not provide to Round and Brown Restaurant a reseller permit or other documentation that the sale is made for resale.
- **Result:**
 - Meals To You is a Reseller, and not a marketplace facilitator, for this transaction because it purchases the products itself from Round and Brown Restaurant, not as an agent, and is fully entitled to the markup on the sale to Jack. Rather than facilitating a sale from Round and Brown Restaurant to Jack, Meals to You is making a purchase and then reselling the products.
 - Round and Brown Restaurant is treated as making a retail sale to Meals to You because it was provided no documentation demonstrating the purchase was for resale and:
 - Must report, without deduction, the gross proceeds of sale of \$15.00 under the retailing B&O tax classification and pay B&O tax in the amount of \$0.07 (0.00471 tax rate x \$15.00 gross proceeds of sale). The delivery charge is not included in Round and Brown Restaurant's gross proceeds of sale or the selling price.
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- Must collect and remit \$1.50 in sales tax from MealsToYou on the sale (0.10 tax rate x \$15.00 selling price). The sale to MealsToYou is sourced to the restaurant's location where delivery partner receives the prepared food on behalf of MealsToYou.
- Meals to You is making a retail sale to Jack and:
 - Must report, without deduction, the gross proceeds of sale of \$32.00 under the retailing B&O tax classification and pay B&O tax in the amount of \$0.15 (0.00471 tax rate x \$32.00 gross proceeds of sale). Reseller must include the full delivery charge in its gross proceeds of sale and may not deduct the expense for the cost of the purchased prepared food.
 - Must collect and remit \$3.20 in sales tax from Jack on the sale (0.10 tax rate x \$32.00 selling price). However, MealsToYou may be eligible to take a tax paid a source deduction for sales tax paid to Round and Brown Restaurant. The sale to MealsToYou's customer is sourced to the delivery location where customer receives the prepared food.
- Delivery Partner Robert
 - Must report and pay PUT on his \$10.00 in gross income as either an urban or motor transportation business depending on the applicable facts.

Example 6.

- **Facts:**
 - FreshAtHomeGroceries offers a marketplace in which it lists products from various grocers for sale with delivery by delivery partners.
 - FreshAtHomeGroceries:
 - Has no contractual arrangement with the grocers.
 - Does not enter into agreements making it an agent of the customer to purchase goods on behalf of the customer.
 - Charges the customer a delivery and service fee.
 - Generally charges customers a higher price for the groceries than the price it pays to the grocer for the items.
 - Retains the markup on the sale, and grocer is at no time legally entitled to the markup.
 - FreshAtHomeGroceries contracts with independent contractor delivery partners to go to the grocer's physical location and use a GroceriesDirect debit card to purchase groceries or other items ordered by customers through Reseller's platform and to deliver the ordered items to the customers.

- For this service, GroceriesDirect pays the delivery partner a commission or fee.
 - The delivery partner is authorized to use the GroceriesDirect debit card only for the purchases as directed by Reseller.
 - Customer Charley orders food and food ingredients exempt from retail sales tax for \$50.00 and taxable items for \$25.00 plus a \$15.00 delivery and service fee from the FreshAtHomeGroceries platform to be purchased from Super Market and delivered to Charley.
 - FreshAtHomeGroceries agrees to pay the delivery partner a \$10.00 fee for its delivery service.
 - On behalf of FreshAtHomeGroceries, Delivery Partner Abby purchases the exempt food items from Super Market for \$40.00 and the taxable items for \$20.00 and delivers to Charley via motor vehicle.
 - On behalf of FreshAtHomeGroceries, Delivery Partner Abby provides a valid reseller permit to Super Market.
- **Result:**
 - Super Market
 - Super Market should report, without deduction, the gross proceeds of sale of \$60.00 under the wholesaling B&O tax classification and pay B&O tax in the amount of \$0.29 (0.00484 tax rate x \$60.00 gross proceeds of sale to FreshAtHomeGroceries).
 - Because the delivery is not sold to FreshAtHomeGroceries, the delivery charge is not included in Super Market's gross proceeds of sale or the selling price.
 - Super Market is not required to collect sales tax on the sale to Reseller because FreshAtHomeGroceries provided a valid reseller permit.
 - Reseller
 - FreshAtHomeGroceries should report, without deduction, the gross proceeds of sale of \$90.00 under the retailing B&O tax classification and pay B&O tax in the amount of \$0.42 (0.00471 tax rate x \$90.00 gross proceeds of sale). FreshAtHomeGroceries must include the full service and delivery charge in its gross proceeds of sale and may not deduct the expense for the cost of the purchased items.
 - FreshAtHomeGroceries must collect and remit \$3.00 in sales tax from Charley on the sale (0.10 tax rate x \$30.00 selling price of taxable items). In addition to the \$25.00 for taxable items, one third (\$5.00) of the service and shipping fee is allocated to the taxable items as the taxable portion was one-third of the

total selling price. The sale to Charley is sourced to the delivery location where he receives the prepared food.

- Delivery Partner Abby
 - Must report and pay PUT on her \$10.00 in gross income as either an urban or motor transportation business depending on the applicable facts.
