

2020-06 INTERPRETATION



MULTI-LEVEL MARKETING INDEPENDENT SALES REPRESENTATIVE AS PHYSICAL PRESENCE

Issue:

Clarifying remote seller versus physical presence with regards to multi-level marketing (MLM) independent sales consultants (ISR). The ISR is considered an agent who may or may not have inventory to exchange for payment, does this meet qualification for physical presence?

Discussion:

The Committee noted there is no national standard for the definition of physical presence and each state sets their own definitions. ARSSTC set their standard stated below. Jurisdictions view ISRs as physical presence regardless of inventory. Feedback from sellers is that it is difficult to separate physical presence from remote sales. Due to the diversified nature of MLM companies, requiring them to remit sales tax through the ARSSTC Portal would likely increase tax compliance. There are a number of ISRs who facilitate sales but do not exchange inventory for payment. The Uniform Code could be revised to (i) define MLM companies and (ii) require remittance through the ARSSTC Portal for all mail order or internet sales.

Recommendation:

Yes, the presence of an ISR meets the definition for physical presence agent and sales tax should be filed directly with the jurisdiction for any transaction the consultant facilitates or gets credit for.

Company charges sales tax on the retail price at the local jurisdiction rate to the ISR when ISR buys product at the wholesale price.

Company remits sales tax to the jurisdiction where the ISR is located.

If the product is purchased solely on a website using the ISR's portal, the Company charges sales tax based on the rate of the delivery address and files with that jurisdiction accordingly.

NOTE: some jurisdictions will require the ISR to obtain a local business license. Check regulations in the local jurisdiction. If the ISR is required to get a local license, they will claim all their sales as tax exempt under the resale exemption since the parent company is filing directly with the jurisdiction. The ISR may need to get a resale certificate from the local jurisdiction if required by local rules.

Rationale:

It is well established that States (and thus local jurisdictions) can claim sufficient nexus to tax MLM companies where the MLM company's only connection is through ISRs.

An ISR, regardless of inventory, meets the definition of company agent. The definition of Physical Presence in the Uniform Code includes the situation where a seller:

"[s]olicits business or receiving orders through any employee, agent, salesman, or other representative within the boundaries of the local taxing jurisdiction or engages in activities in this state that are significantly associated with the seller's ability to establish or maintain a market for its products in this state."

Accordingly, Section 230(C) of the Uniform Code establishes that the MLM company should report and remit directly to the taxing jurisdiction if the consultant is operating in that taxing jurisdiction.