

2020-07 INTERPRETATION



CLARIFYING PHYSICAL PRESENCE WITH REGARDS TO .COM/E-COMMERCE AND ASSOCIATED BRICK AND MORTAR BUSINESSES

Issue:

Clarifying remote seller versus physical presence with regards to .com/e-commerce and associated brick and mortar businesses

Discussion:

Companies can have a brick and mortar store and conduct e-commerce into a jurisdiction. Companies may have separate EIN for their e-commerce versus brick and mortar stores; they may file two separate returns for each line of business or a consolidated return which includes all revenue streams. Jurisdictions view all transactions for a company that has a brick and mortar store in their locality as physical presence regardless of individual EIN. Feedback from sellers is that it is difficult to separate physical presence from remote sales. Is there a bright line test to distinguish between e-commerce and brick and mortar?

Recommendation:

No definitive recommendation from Policy Committee; local interest maximizes the extent to which a seller should be considered to have physical presence.

Staff recommendation is if the company has a separate EIN, the e-commerce business should be considered a remote sale, even if there is a physical brick and mortar in the jurisdiction. If the company has a single EIN, they should separate their revenue streams and file the physical presence sales with the jurisdictions and the remote sales with the Commission.

Rationale:

A unique EIN distinguishes a company as a unique entity, and it should be assessed for economic nexus based on its own revenue streams.

While technically a business may be considered by the jurisdiction to have physical presence based on its parent or affiliate companies, AML believes that the request to split revenues streams by physical and remote will increasingly lead to perception of an undue burden. To the extent that we can simplify this – by allowing Walmart.com to file with the Commission and Walmart, Inc. to file directly with jurisdictions – then we may avoid this challenge. The current practice is based on the belief that sophisticated companies have the technical ability to do this. We have to keep in mind that they don't have to do this in any other state.