

ARSSTC Policy Committee Agenda
September 20, 2022 * 2:00pm – 3:00pm

1. Interpretation on Physical Presence
2. Discussion on Amazon Prime (executive session)
3. Open Discussion



Interpretation 2022.02

Physical Presence in ARSSTC Member Communities

Issue:

What circumstances create physical presence for a seller in an ARSSTC Member Community? A seller's sales tax filing requirements for taxing jurisdictions across Alaska is based on the seller's physical presence or lack thereof in a community.

Background:

Remote seller is defined in Section 270 of the Uniform Code as *"a seller or marketplace facilitator making sales of goods or services for delivery within the State of Alaska without having a physical presence in the member jurisdiction in which delivery is being made."*

Section 270 of the Uniform Code also provides definitions of "remote sale" and "local sale". The difference between these definitions is whether the seller has physical presence in the jurisdiction where delivery is made.

Section 050 of the Uniform Code then outlines specific reporting requirements for sellers depending on whether they are making remote sales or local sales into a taxing jurisdiction.

The key question to be asked is what constitutes physical presence by a seller for purposes of filing with the ARSSTC and/or its member communities?

Analysis

Section 270 of the Uniform Code defines "physical presence" as follows:

"Physical presence" for purposes of section .050 means a seller who establishes any one or more of the following within a member jurisdiction:

- 1. Has any office, distribution or sales house, warehouse, storefront, or any other place of business within the boundaries of the member jurisdiction;*
- 2. Solicits business or receiving orders through any employee, agent, salesman, or other representative within the boundaries of the member jurisdiction;*
- 3. Provides services or holds inventory within the boundaries of the member jurisdiction;*
- 4. Rents or Leases property located within the boundaries of the member jurisdiction.*

A seller that establishes a physical presence within the local member jurisdiction in any calendar year will be deemed to have a physical presence within the member jurisdiction for the following calendar year.



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This definition outlines several standard situations that are typically used in identifying physical presence in a jurisdiction. Each of these will now be discussed in more detail.

#1 - Has any office, distribution or sales house, warehouse, storefront, or any other place of business within the boundaries of the member jurisdiction;

This point addresses the usual “brick and mortar” physical presence standards. If a seller has or establishes any place of business within the boundaries of a jurisdiction, it is deemed to have physical presence in that jurisdiction.

#2 - Solicits business or receiving orders through any employee, agent, salesman, or other representative within the boundaries of the member jurisdiction;

This point addresses situations where a business sends or maintains an employee, agent or other representative within a jurisdiction for the purpose of soliciting business or taking orders. Conducting these activities within a jurisdiction via a company representative creates physical presence in that community.

In general, simply having an **employee visiting or traveling through a jurisdiction** not for the purpose of soliciting business or taking orders does not create physical presence in that jurisdiction.

#3 - Provides services or holds inventory within the boundaries of the member jurisdiction;

This point addresses situations where the business either provides services or maintains inventory within the jurisdiction. The latter of these two is similar to point #1 of the physical presence definition in that maintaining inventory implies some form of physical location in which the inventory is stored. This is sufficient to establish physical presence in that jurisdiction.

Some examples of the business providing services include but are not limited to:

- Maintenance / repair services
- Installation services
- Delivery services
- Inspection services

Regular performance of these services in a jurisdiction is sufficient to establish physical presence in that jurisdiction.



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If a business only performs an occasional, isolated service in a jurisdiction, and does not otherwise maintain or pursue business activity in that jurisdiction, the occasional isolated service is not sufficient to establish physical presence on its own.

#4 - Rents or Leases property located within the boundaries of the member jurisdiction

This point addresses situations where a business rents or leases tangible personal property. Rented or leased property is subject to sales tax based on where the property is located. In addition, the location of said property in a jurisdiction establishes physical presence in that jurisdiction.

An isolated, short term (less than a week's length) rental or lease of property that is physically located in a jurisdiction would not be sufficient to establish physical presence on its own.

DRAFT



September 2022

Amazon.com Services LLC
Attn: Dylan Waits

Re: Prime Memberships and municipal sales tax

Dear Sir,

This letter is a continuation of the Alaska Remote Seller Sales Tax Commission's (ARSSTC) ongoing discussion with Amazon.com Services LLC (Amazon) regarding the taxability of Prime Memberships (Prime). Specifically, whether or not Prime is generally subject to local sales tax in Alaskan municipalities.

To be clear, the ARSSTC is merely taking the role of facilitating this conversation between Amazon and ARSSTC member jurisdictions. ARSSTC does not have specific authority to determine taxability of Prime within member jurisdictions. With that said, multiple ARSSTC member jurisdictions have concurred with the statements in this letter. In addition, the ARSSTC has verified that each ARSSTC member jurisdiction's sales tax code treats memberships in the same manner thus achieving uniformity across ARSSTC member jurisdictions on this topic.

Background

Your email on August 5th provided significant detail on the benefits that are included with the purchase of a Prime Membership. These benefits include, but are not limited to access to shipping benefits, price savings, access to numerous digital goods and access to various digital streaming services.

Amazon outlined in this same email the following positions:

- Prime is not taxable Tangible Personal Property
- Prime is not taxable digital products
- Prime is not a service
- Prime is not a taxable Delivery/Transportation charge
- Prime is not a taxable Bundle

Amazon's conclusion was that Prime is not subject to local sales tax since it could not be classified as any of the above types of transactions.

Analysis

In general, Alaskan municipalities with a retail sales tax impose their local sales tax very broadly. The sales tax is imposed on retail sales, services and rentals in the municipality. The usage of these three labels implies the goal of broad taxation on all types of sale transactions.

Local sales tax codes also typically include language that states sales tax is imposed on a sale transaction unless there is a specific exemption in the local code. Each municipality has a variety of allowed sales tax exemptions that call out very specific types of transactions that are exempt from the local sales tax.

Based on the broad imposition language and the common language that a transaction is taxable unless specifically exempted, it is clear that the intent of municipal sales tax codes in Alaska is to broadly impose a sales tax on every type of sale transaction delivered into the community.

It is agreed that assigning a transaction label to Prime is a difficult task, as it provides a variety of benefits to the customer. With that said, Amazon's reference to Prime as a purchase of a membership seems accurate, even if the membership benefits are multi-faceted.

When examining ARSSTC member jurisdiction sales tax codes for treatment of memberships, I do not see an instance of memberships being specifically called out as subject to sales tax. However, as explained previously local jurisdictions build their sales tax code using the principle of broad taxation, with specific exemptions. If a transaction is not specifically exempted, it is presumed subject to sales tax regardless of how a transaction is labeled. So, to truly answer this question, we must review the existing sales tax exemptions that are in place for each municipality.

When a municipality joins the ARSSTC, it completes a taxability matrix for its municipality addressing numerous types of transaction categories. One of those categories is memberships. Included with this letter as attachment A is a list showing how each ARSSTC member community addresses memberships. You'll see that memberships to non-profit organizations and memberships to for-profit organizations are specifically addressed.

Reviewing the list, every ARSSTC member community has stated that memberships to for-profit organizations are either taxable or fall under a limited exemption. None of the limited exemption circumstances are applicable to Prime Memberships.

ARSSTC Conclusion

Based on the above discussion points explaining how broadly local municipalities impose their sales tax, and how ARSSTC member communities treat memberships, specifically the clear lack of an applicable exemption, it is the conclusion of the ARSSTC and its members that Prime Memberships are subject to local sales tax.

On behalf of its members, the ARSSTC is requesting that Amazon begin collecting the appropriate local sales tax on sales of Prime Memberships to Alaskan customers. Free, one-month trial Prime memberships would not be subject to local sales tax since there was no monetary exchange when the customer signed up for the trial.

The ARSSTC and its members believes that beginning sales tax collection on Prime Memberships within thirty (30) days of this notice provides Amazon reasonable & sufficient time to comply with this request. If Amazon is in need of additional time, please reach out to the ARSSTC for discussion.

Please note that this letter does not address the question of failure to collect sales tax on past Prime Membership sales. The ARSSTC has communicated to its members Amazon's desire that Prime Membership taxation be applied prospectively only.

Let me know if there are any additional questions.

Sincerely,



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