

American E-Commerce Business Alliance

aeba.org

March 2026

The Honorable Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

RE: Existing Authority Under IRC Section 864 and the Tax Cuts and Jobs Act to Tax Foreign E-Commerce Sellers Operating in the United States

Dear Commissioner:

On behalf of the American E-Commerce Business Alliance (AEBA), a coalition of American businesses advocating for a fair and level digital marketplace, we are writing to bring to your attention a critical finding: the IRS already possesses the legal authority to tax foreign e-commerce sellers operating through U.S. marketplace platforms -- no new legislation or treaty renegotiation is required.

Foreign sellers -- particularly those from China -- generate an estimated \$220 billion or more in annual U.S. marketplace sales across Amazon, Walmart, Temu, Shein, TikTok Shop, and other platforms. They store inventory in American warehouses, ship to American consumers, and use American infrastructure. Yet they pay zero U.S. income tax, based on interpretations that these activities do not constitute permanent establishment under the 1987 U.S.-China Income Tax Treaty.

We respectfully submit that this interpretation is incorrect -- and that existing domestic law, properly applied, already requires these sellers to pay U.S. taxes.

Alignment with Administration Revenue Priorities

President Trump has made clear that the United States should generate revenue from foreign sources rather than increasing taxes on American citizens. The creation of the External Revenue Service reflects a stated priority: collect revenue from those who profit from the American market, not from the American taxpayer.

The enforcement actions outlined in this letter are directly aligned with that priority. Applying existing law to foreign marketplace sellers would recover an estimated \$9 to \$60 billion in annual revenue -- entirely from foreign entities who are profiting from American consumers and American infrastructure. This revenue comes without raising taxes on a single American citizen, without creating a single new tax, and without imposing a single new tariff. It is simply the collection of taxes that are already owed under existing law but are not being enforced.

At a time when the Administration is actively seeking revenue offsets for the tax relief provided to American families and businesses through the One Big Beautiful Bill Act, this represents one of the largest untapped sources of federal revenue available -- and it comes exclusively from foreign sellers, not from American taxpayers.

The Cost of Inaction

This is not an abstract policy question. The failure to apply existing law is causing measurable, escalating harm to American businesses and the U.S. economy:

1.9 million American small businesses compete daily on the same marketplace platforms against foreign sellers who pay no U.S. income tax -- a built-in cost advantage of up to 50.3% on every transaction. \$9 to \$60 billion in annual federal and state tax revenue is forfeited. Over 15,000 U.S. retail stores are projected to close in 2025 alone. For many foreign sellers, U.S. marketplace sales represent their sole or primary source of revenue.

I. IRC Section 864 Already Establishes a U.S. Trade or Business

Under IRC Section 864(b), a foreign person is engaged in a "trade or business within the United States" if they conduct substantial, continuous, and regular business activity in the United States. Foreign marketplace sellers who store inventory in U.S. warehouses, fulfill orders from U.S. soil, generate substantial revenue from U.S. customers, and advertise through U.S. platforms clearly meet this threshold.

When a foreign person has a U.S. trade or business, their income becomes Effectively Connected Income (ECI) under IRC Sections 871 and 882, taxable at standard U.S. rates. They must file Form 1120-F or 1040-NR. This is existing law -- not a new tax.

II. The Tax Cuts and Jobs Act Strengthened This Authority

The Tax Cuts and Jobs Act (P.L. 115-97), enacted December 22, 2017, further strengthened this framework. Section 863(b) was amended to source income from inventory sales based on production activities. Section 864(c)(8) was added, establishing that gains from partnership interests in U.S. trades or businesses are effectively connected income. The TCJA amplified scrutiny on foreign activities and clarified that inventory storage can signal permanent presence.

III. The "Later in Time" Rule: Domestic Law Can Override the Treaty

Under the "later in time" rule codified in IRC Section 7852(d), U.S. domestic statutes and tax treaties have equal legal standing. When the two conflict, whichever was enacted later prevails. The TCJA was enacted in December 2017 -- thirty years after the treaty took effect. Domestic law may supersede the treaty's PE exemption without requiring treaty renegotiation.

Furthermore, the treaty's Article 5(4) exemption applies only to activities that are "preparatory or auxiliary." For sellers whose entire U.S. business consists of storing goods in American warehouses and delivering them to American consumers, these activities are not auxiliary -- they ARE the business. The 2017 OECD anti-fragmentation rule (Article 5, paragraph 4.1) supports this reading.

IV. The Wayfair Precedent

In *South Dakota v. Wayfair* (2018), the Supreme Court held 5-4 that physical presence is not required to establish tax nexus. Economic presence is sufficient. Every state adopted economic nexus for sales tax. A seller with \$100,000 in sales owes state sales tax. Yet a foreign seller with \$10 million in U.S. marketplace sales owes zero U.S. income tax. This principle should be applied federally.

V. The Treaty's Foundational Premise Has Failed

The treaty assumed sellers would pay tax at home. In November 2025, China ordered Amazon to hand over seller revenue data -- revealing massive underreporting. Over 780 sellers changed their Amazon entity to Hong Kong in a single month to avoid China's tax reporting. These sellers pay zero tax in the U.S. and zero tax in China. The income disappears entirely.

VI. The Enforcement Mechanism: Withholding at the Point of Sale

Even with clear legal authority, enforcement against foreign sellers with no U.S. presence beyond marketplace inventory presents a practical challenge. We strongly recommend mandatory withholding at the marketplace level. This approach has well-established precedent under existing law:

1. FIRPTA Withholding (IRC Section 1445)

When a foreign person sells U.S. real property, the buyer must withhold 15% and remit directly to the IRS. An analogous approach could require marketplace platforms to withhold a percentage of payments to foreign sellers.

2. Backup Withholding (IRC Section 3406)

Existing law requires 24% withholding on reportable payments to any payee who fails to provide a correct taxpayer identification number. Foreign sellers without a valid U.S. TIN should already be subject to this withholding.

3. Withholding on Foreign Persons (IRC Sections 1441/1442)

Current law requires withholding agents to withhold 30% on certain U.S.-source income paid to foreign persons. The IRS should evaluate whether marketplace disbursements constitute income subject to this existing requirement.

Marketplace platforms already possess the infrastructure for this. They collect and remit state sales tax in all applicable jurisdictions. The systems required for income tax withholding are substantially similar.

Requested Actions

1. Issue Guidance Under IRC Section 864 and the TCJA

Declare that foreign sellers exceeding \$500,000 in annual U.S. marketplace sales or 200 transactions are engaged in a U.S. trade or business, generating ECI subject to U.S. taxation. Aggregate sales across related entities.

2. Assert the "Later in Time" Principle

Clarify that the TCJA's provisions supersede the 1987 treaty's PE exemption under IRC Section 7852(d), or that the treaty's "preparatory or auxiliary" exemption does not apply to primary marketplace business activity.

3. Implement Withholding at the Marketplace Level

Using existing authority under FIRPTA (Section 1445), backup withholding (Section 3406), and/or Sections 1441/1442, require marketplace platforms to withhold and remit directly to the IRS.

4. Conduct a Comprehensive Investigation

Launch an audit program targeting foreign sellers using fulfillment services to examine whether their activities constitute a USTB.

5. Enforce Filing Requirements

Require foreign sellers meeting the above thresholds to file Form 1120-F or 1040-NR and impose penalties for non-compliance.

6. Coordinate with Congress if Needed

If additional legislative authority is required, provide specific recommendations exercising the "later in time" principle under IRC Section 7852(d).

IRC Section 864 defines the standard. The TCJA strengthened it. Wayfair established the precedent. FIRPTA, Section 3406, and Section 1441 provide the collection mechanism. What is missing is the IRS's willingness to apply these tools to the largest category of untaxed foreign commerce in the United States.

Thank you for your service and commitment to upholding the principles of equitable taxation.

Respectfully,

The American E-Commerce Business Alliance

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Co-signer Name & Title

Company / Organization

Date