

APPEAL # 22-1274
TAX TYPE: SALES AND USE TAX
TAX YEAR: 2019-2021
DATE SIGNED: 5/1/2025
COMMISSIONERS: J.VALENTINE, M.CRAGUN, AND J.FRESQUES
EXCUSED/RECUSED: R.ROCKWELL

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER,

Petitioner,

v.

BUSINESS TAXES AND DISCOVERY
DIVISION OF THE UTAH STATE TAX
COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL DECISION**

Appeal No. 22-1274

Account No: #####

Tax Type: Sales & Use Tax

Audit Period: 3/1/2019 - 11/30/2021

Judge: Phan

Presiding:

John L. Valentine, Commission Chair
Rebecca L. Rockwell, Commissioner
Jennifer N. Fresques, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER'S REP-1, Attorney at Law
PETITIONER'S REP-2, Attorney at Law
PETITIONER'S REP-3, Attorney at Law
PETITIONER'S REP-4, Director of Interconnection for TAXPAYER,
Witness
PETITIONER'S REP-5, Vice President of Growth for TAXPAYER, Witness

For Respondent: RESPONDENT'S REP-1, Assistant Attorney General
RESPONDENT'S REP-2, Assistant Attorney General
RESPONDENT'S REP-3, Assistant Attorney General
RESPONDENT'S REP-4, Tax Examiner Manager, Utah State Tax
Commission, Witness

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on October 28, 2024, in accordance with Utah Code Ann. §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

I. General Information

1. On DATE, the Business Taxes and Discovery Division (“Division”) issued a “Statutory Notice – Sales and Use Tax” assessing sales tax on the subscription fees Petitioner (“Taxpayer”) charged to its Utah customers for the period of DATE through DATE (“Audit Period”).¹ The Taxpayer timely appealed the Division’s assessment and the matter proceeded to this Formal Hearing.²

2. The audit tax amount was \$\$\$\$\$, and that is the amount at issue in this matter. No penalties were assessed with the audit. As of the date the Statutory Notice was issued, interest had accrued in the amount of \$\$\$\$\$.³

3. The issue before the Tax Commission at this hearing is whether Utah law imposes sales tax on the subscription fee the Taxpayer charges its Utah customers for use of the Taxpayer's streaming service platform. It was the Division’s position in the audit and at the Formal Hearing that sales tax should have been collected and remitted to the State of Utah on the amount the Taxpayer charged its Utah customers for the subscription fee during the audit period. The Taxpayer argued the subscription fee was not subject to sales tax.

4. Prior to the audit period, the Taxpayer had been collecting sales tax from its Utah customers on the subscription fee and remitting the sales tax to the Utah State Tax Commission. The Division’s witness testified that the Taxpayer had been collecting and remitting the sales tax for many years from the time the Taxpayer’s account was opened, but had stopped collecting and remitting sales tax on its subscription fee at the end of February 2020.⁴

II. Taxpayer’s Evidence

¹ Exhibit R-1.

² As a matter of full disclosure, all four Utah State Tax Commissioners and the Administrative Law Judge are TAXPAYER subscribers, or have a member of their household who is a TAXPAYER subscriber.

³ Interest continues to accrue on any unpaid balance.

⁴ Testimony of RESPONDENT'S REP-4, Tax Examiner Manager, Utah State Tax Commission.

5. The Taxpayer submitted a letter dated DATE to the Tax Commission. In the letter, the Taxpayer stated that it was no longer collecting and remitting sales tax on its service offerings to customers. The letter did not ask for a private letter ruling or request guidance, but instead was a statement that the Taxpayer would no longer collect and remit sales tax on its internet based streaming service.⁵ The letter stated as follows:

This letter is to inform you that TAXPAYER (“TAXPAYER”) is no longer collecting and remitting sales tax on its Internet-based streaming service (“Streaming Service”) in Utah. This letter provides a brief overview of the basis for that decision, but if you would like additional information or analysis, please do not hesitate to contact us at the address listed below.

TAXPAYER has stopped collecting and remitting sales tax on the Streaming Service because it is clear that services like the Streaming Service are not presently subject to tax in Utah. Utah Code Ann. 59-12-103 imposes sales tax on the purchase or sales price for amounts paid or charged for certain transactions. Services are not subject to the sales tax unless they are specifically enumerated. Utah Code Ann. 59-12-103.

Section 59-12-103(1)(m) imposes tax on “amounts paid or charged for a sale: (i)(A) of a product transferred electronically.” “Product transferred electronically” means “a product transferred electronically that would be subject to a tax under this chapter if that product was transferred in a manner other than electronically.” Utah Code Ann. 59-12-102(95)(a). The Utah State Tax Commission has recently held that “product transferred electronically” does not include streaming video. *See e.g.*, Utah Private Letter Ruling No. 16-005(08/09/2017); Utah Private Letter Ruling No. 17-003 (07/12/2018); Utah Private Letter Ruling No. 18-002 (04/10/2019).

In December 2019, the Utah legislature enacted Senate Bill 2001. Among other things, that bill amended Section 59-2-103 to add a new subsection (n). That subsection would have specifically imposed the sales tax on “amounts paid or charged for access to digital audio-visual works. . . including the streaming for a subscription for access to digital audio visual works...” Senate Bill 2001. That amendment was set to go into effect on April 1, 2020 and TAXPAYER intended to collect and remit the sales tax under that statute.

Before the law could go into effect, Utah voters expressed their displeasure over the legislation. The voters were so displeased with the imposition of the tax on services like the Streaming Service that the governor and legislative leaders agreed to repeal Senate Bill 2001. They ultimately did so by enacting House Bill 185 in January 2020. Accordingly, the tax on services like the Streaming Service never went into effect. Because the sales tax currently in effect does not apply to services like the Streaming Service, TAXPAYER has stopped collecting and remitting sales tax on the Streaming Service

.....

⁵ Exhibit R-8 & P-A.

6. At the Formal Hearing, the Taxpayer provided information and testimony regarding the Taxpayer's streaming service for which the Taxpayer charges the subscription fee. PETITIONER'S REP-4, Director of Interconnection for US and Canada, testified at the Formal Hearing regarding the Taxpayer's streaming service platform, which he explained included both online streaming of the programming ("online-streaming product"), as well as the ability to download programming and view it offline ("offline-download product").

7. PETITIONER'S REP-4 testified that when a customer is viewing the online-streaming product, the customer needs an internet connection. He explained that the Taxpayer did not provide internet connection as part of its service. PETITIONER'S REP-4 testified that when a customer viewed the online-streaming product, "chunks" of data are moved from the Taxpayer's open appliance to the buffer. PETITIONER'S REP-4 explained that each movie or video has different files, including audio, video and subtitles. The files are all sent to the buffer in chunks. The buffer assembles the files to be viewed and once viewed the files are discarded from the buffer and replaced by new chunks of files. He explained that if the viewer stops or pauses the content, the content is deleted from the buffer, and if the viewer skips ahead in the online-streaming product, a different set of files is sent to the buffer.

8. PETITIONER'S REP-4 also testified regarding the offline-download product. He explained that offline-download product viewing is only available for use on phones or tablets and customers cannot watch offline-download products on a television or laptop computer. He explained that in order to use the offline-download product, the customer must use the TAXPAYER App ("App"). He also explained that not all online-streaming products are available to watch in an offline-download format, but the content available for offline-download viewing would be presented in the App. He explained that the customer would choose the content in the App and would download the content onto their device, which required an internet connection. After downloading the content, the customer could view the content without an internet connection, but could only view the content through the App. PETITIONER'S REP-4 testified that the content would only be available to view for thirty days from when it was downloaded and about 48 hours from the time the customer began watching the content. He explained that after this time period a red "X" would appear over the content in the App and the customer could no longer view it.

9. PETITIONER'S REP-4 also testified that not all content is available everywhere due to licensing agreements. He provided the testimony that if a customer downloaded content in the United States that was not available in Canada, and then traveled to Canada, the customer could only view the offline-download product if the customer remained offline in Canada. He explained, however, that the moment the customer connected the device to the internet in Canada, the App would indicate that the

content was not available in Canada, the red “X” would appear over the content and the customer could not view the content while in Canada. PETITIONER'S REP-4 also explained that content was sometimes only available for certain periods of time because of the licensing agreements. He said if the customer downloaded the content before the license expired and then the license expired, the customer could only watch the content offline, but as soon as the customer connected a device to the internet, the App would indicate that the content was not available, the red “X” would appear over the content and the customer could not view it.

10. PETITIONER'S REP-4 also testified that for the offline-download product, the customer could not avoid losing content by staying offline. PETITIONER'S REP-4 explained that if a customer stayed offline for too long, the App would require that the customer log back in to “reauthenticate” every 48 to 72 hours. Once the customer did this, the App would update the content that was available for viewing.

11. PETITIONER'S REP-4 testified that the online-streaming product used a different set of files, depending on the quality of the internet connection, but the customer would never have the full movie or video at one time. For the offline-download product, the entire movie or video would be on the customer’s device through the App, but PETITIONER'S REP-4 pointed out that it would only be available to the customer to view for a limited time as discussed above.

12. PETITIONER'S REP-4 testified that as far as viewing the content, the online-streaming product and the offline-download product provided the same start, stop, fast-forward, rewind and pause functions. He provided the opinion that the customer could not do more with the downloaded content than with the streaming content. He acknowledged that the downloaded content might stay on the customer’s device even after the customer no longer had access to it, until the customer actually deleted the content.

13. PETITIONER'S REP-4 testified that the process he described was the same throughout the audit period.

14. PETITIONER'S REP-4 also presented an exhibit at the Formal Hearing regarding monthly statistics from the Utah customers for the periods beginning DATE through DATE.⁶ He testified that this exhibit showed that of the Utah accounts, only %%%%, as the high per month, and only %%%% as the low per month, of the content was viewed as an offline-download product. He also testified that this exhibit showed that at the high end per month, %%%% of the accounts had used the offline-download product during the month and at the low end only %%%% of the accounts had used the offline-download product during the month.

⁶ Exhibit P-C. This exhibit lacked clear information or captions to show it related to the download-offline product. Thus, the Commission is relying on PETITIONER'S REP-4’s testimony as to what the numbers listed in the exhibit represent.

15. When questioned at the hearing, PETITIONER'S REP-4 testified that he did not know how much of the content the Taxpayer provided on its streaming service platform was available as an offline-download product. He stated that there were different licensing requirements and not all of the content was available for offline-download viewing.

16. PETITIONER'S REP-5, Vice President of Growth for TAXPAYER, also testified at the Formal Hearing. She testified regarding the Terms of Use agreements⁷ that a customer would have to accept during the audit period when signing up for a subscription to use the Taxpayer's streaming service platform. She pointed out that these agreements had changed some over time and the Taxpayer had provided copies of the agreements in use during the audit period. She explained that based on these agreements, the customers did not get to keep any of the content.

17. PETITIONER'S REP-5 testified at the hearing that the subscription agreement automatically renews until it is terminated, the method of payment is stored and the customer is billed monthly. She explained that the service is pre-paid and the customer would have access to the content until the end of the billing period.

18. Regarding the offline-download product, PETITIONER'S REP-5 testified that the Taxpayer had started offering that option on its streaming service platform in DATE. She testified that this was never a feature that the customer had to pay for in addition to the subscription fee. She testified that when a customer canceled their subscription, the customer would no longer have access to any of the downloaded content.

19. PETITIONER'S REP-5 testified that in the United States the offline-download product was typically used for watching content during travel. She stated that in other countries with poor internet service, it was used for other reasons.

20. PETITIONER'S REP-5 also testified with regards to pricing. She stated that the Taxpayer provides subscription services in ##### countries and generally looks at pricing country by country. She testified that in the United States the Taxpayer offered three different plans, but the prices per plan were the same prices throughout the United States. She stated that pricing was generally changed every ##### to ##### months.

21. Regarding the three plans offered in the United States, she explained that the lowest priced plan came with advertisements. The middle priced plan did not have advertisements and the highest priced plan had 4K video and enhanced audio. She testified that the price per month for a plan did not change regardless of how much content the customer viewed or even if the customer viewed no content.

⁷ Exhibits P-E through P-H.

22. The Taxpayer submitted as an exhibit a number of price comparison grids for the plans offered in the United States which were dated from DATE through DATE.⁸ PETITIONER'S REP-5 testified that these price comparison grids were published to help people make a decision on which plan they wanted. The first price comparison grid presented in the exhibit was dated DATE. This showed the following:

REDACTED TABLE

23. During her testimony, PETITIONER'S REP-5 referred to the DATE price comparison grid, which indicated the same pricing and features as the DATE grid as follows:⁹

REDACTED TABLE

24. PETITIONER'S REP-5 testified that after the offline-download product was added in DATE, the published price for the basic, standard and premium packages remained the same. The DATE price comparison grid was provided with the exhibit and it indicated the same prices for each package as the grids summarized above. It did not mention the new offline-download product. The DATE price comparison grid indicated the following:¹⁰

REDACTED TABLE

25. The first price comparison grid to show a price increase after the offline-download product was added, was dated DATE.¹¹ The DATE price comparison grid listed all of the same features as the previous price comparison grids with no mention of the offline-download product. The price for the basic package was still \$\$\$\$\$, but the price for the standard package increased to \$\$\$\$\$, and the price for the premium package increased to \$\$\$\$\$.¹²

⁸ Exhibit P-D. The price comparison grids listed a date from the internet archive system and for many a second date for "price after free month ends," but it was unclear if these dates were the actual effective dates when a price change had been made, or if the price grids were just printed at intervals and price changes had actually occurred at some time prior to the date for which the price grid had been obtained.

⁹ Exhibit P-D, pg. 23.

¹⁰ Exhibit P-D, pg. 26.

¹¹ As noted in the footnote above, it is not clear if this was the actual effective date of the price increase, or just the date for which this price comparison grid had been obtained.

¹² Exhibit P-D, pg. 59.

26. The exhibit provided a price comparison grid dated DATE. This price comparison grid showed the basic package had increased to \$\$\$\$\$, the standard package increased to \$\$\$\$\$, and the premium package increased to \$\$\$\$\$.¹³

27. The price comparison grid dated DATE was the first time the price comparison grids noted downloading. This grid indicated the following:¹⁴

REDACTED TABLE

28. The pricing increased again later in DATE.¹⁵ The basic package was still \$\$\$\$\$, but the standard package increased to \$\$\$\$\$, and the premium package increased to \$\$\$\$\$. The price comparison grid continued to list the “number of phones or tablets you can have downloads on.” The Taxpayer did not provide any of the price comparison grids for DATE.

29. PETITIONER'S REP-5 testified that once the offline-download product became available in DATE, it was available for all of the plans. She explained that if the customer had the basic plan they could download only on one device, with the standard plan they could download on 2 devices and with the premium plan they could download on 4 devices.

30. When asked about a different product that was offered by the Taxpayer during the audit period, DVD by mail, and the percentage of the Taxpayer's customers who used this feature, PETITIONER'S REP-5 stated she did not have information about that product.

31. The Taxpayer submitted a copy of a news release dated DATE, in which PERSON-1, Director of Product Innovation, announced that the Taxpayer was adding the offline-download product.¹⁶ In this release PERSON-1 stated:

TAXPAYER members worldwide can now download in addition to stream great series and films at no extra cost. Many of your favorite streaming series and movies are already available for download, with more on the way, so there is plenty of content available for those times when you are offline. For example, SHOW-1, SHOW-2 and SHOW-3 are available for download today. The new feature is included in all plans and available for phones and tablets on Android and iOS.

32. The Taxpayer provided a copy of a news story dated DATE, in which PERSON-2, TAXPAYER's Chief Content Officer, had been interviewed and indicated at that time that the United States might not be the first market in which the offline-download product would be offered. PERSON-2

¹³ Exhibit P-D, pg. 103.

¹⁴ Exhibit P-D, pg. 139. The only date indicated on these later price comparison grids was the web archive date. For this exhibit, the web archive date was DATE.

¹⁵ Based on the web archive number for this exhibit, it appears this grid was issued on DATE. See Exhibit P-D, pg. 145. As noted in the footnote above, it is not clear if this was the actual effective date of the price increase, or just the date for which this price-comparison grid had been obtained.

¹⁶ Exhibit P-I.

discussed providing the product in undeveloped and developing parts of the world.¹⁷ There was an article in the DATE edition of wired.com that discussed that TAXPAYER was now providing the offline-download product.¹⁸ Also, the Taxpayer provided an article on Vox dated DATE about the offline-download product being offered.¹⁹ The Taxpayer also provided news reports on CNN²⁰ and CNBC²¹ about the offline-download product that were dated DATE.

33. The Taxpayer provided at the Formal Hearing the enrolled copy of 2019 Second Special Session S.B. 2001, Tax Restructuring Revisions (“S.B. 2001”).²² S.B. 2001 was a comprehensive tax reform bill that included a provision specifying that online streaming services were part of the taxable sales and use tax base as well as numerous other changes such as an increase to the sales tax on food.

34. The Taxpayer also provided the enrolled copy of 2020 General Session H.B. 185, Tax Restructuring Revisions-Repeal (“H.B. 185”).²³ This bill repealed all of the provisions of S.B. 2001.

III. Division’s Evidence

35. At the Formal Hearing, RESPONDENT'S REP-4, Tax Examiner Manager, Utah State Tax Commission, testified about the Division’s audit. He testified that the Division had considered sales and use tax statutes as well as guidance from prior Private Letter Rulings (“PLRs”) issued by the State Tax Commission. RESPONDENT'S REP-4 testified at the hearing that the Division had issued its assessment on the full subscription fee for the use of the Taxpayer’s streaming service platform because of the downloadability of the content. RESPONDENT'S REP-4 pointed to the comment in the Notice of Deficiency, which explained, “The audit report includes taxable sales of downloadable streaming services not previously reported.”²⁴

36. RESPONDENT'S REP-4 testified that he had reviewed the audit Notice of Deficiency²⁵ and that the full audit tax amount of \$\$\$\$ was the correct amount of the audit tax deficiency. Interest also accrues on any unpaid balance. However, he testified at the hearing that Schedule 1 of the audit, which was Underreported Tax Amounts, had indicated a tax amount of \$\$\$\$\$. It was his conclusion as of the Formal Hearing that this tax amount should not have been included in Schedule 1, and instead, should have been included in Schedule 3, Additional Taxable Sales. This correction made no change in the total tax deficiency. No penalties were assessed with the audit.

¹⁷ Exhibit P-J.

¹⁸ Exhibit P-K.

¹⁹ Exhibit P-L.

²⁰ Exhibit P-M.

²¹ Exhibit P-N.

²² Exhibit P-W.

²³ Exhibit P-X.

²⁴ Exhibit R-1, pg. DIV 011.

²⁵ Exhibit R-1.

37. RESPONDENT'S REP-4 testified that prior to 2020, the Taxpayer was charging and remitting sales tax on the subscription fee the Taxpayer's customers paid to access content on the Taxpayer's streaming service platform. RESPONDENT'S REP-4 stated that the Division's audit imposed sales tax on the entire amount the Taxpayer charged its customers for use of the streaming service platform.

38. RESPONDENT'S REP-4 testified that when performing the audit, the Division did not see a separate charge for the offline-download product, and that the subscription fee for use of the streaming service platform was sold as one package that included both the online-streaming product and the offline-download product.

39. RESPONDENT'S REP-4 testified that he was aware of the enactment and subsequent repeal of S.B. 2001, but took the position that downloadable content was subject to sales and use taxes both before and after the enactment and subsequent repeal of S.B. 2001. He pointed out that PLR 19-003 was issued after the repeal of S.B. 2001 and was consistent with PLRs 16-005 and 17-003, which were issued before the enactment and repeal of S.B. 2001. RESPONDENT'S REP-4 pointed out that in its guidance in PLRs, the Tax Commission had used the term "downloadable" and not the term "downloaded." It was his testimony at the hearing that the Division's position, for purposes of determining whether the subscription fee for the streaming service platform was taxable, was that it did not matter whether the product was actually downloaded, it mattered only that it was downloadable. RESPONDENT'S REP-4 also testified that he understood from the PLRs that steaming content was not taxable, both before and after the enactment and subsequent repeal of S.B. 2001.

40. RESPONDENT'S REP-4 testified that during the audit period, the Taxpayer also provided a separate service, DVD by mail. He pointed out that the Taxpayer had continued collecting and remitting sales tax on the DVD by mail service until the Taxpayer stopped providing that service in 2023.

41. The Division provided as an exhibit at the Formal Hearing copies of the Taxpayer's internet homepage in 2019, 2020 and 2021.²⁶ The 2019 homepage stated, "Watch TV shows and movies anytime, anywhere-personalized for you." The homepage stated that a viewer could watch content "instantly" or "download for later." The Taxpayer's 2020 homepage listed an "Enjoy on your TV" option first, but then just as prominently and in the same font listed "Download your shows to watch offline" option second. The 2021 homepage was very similar to the 2020 homepage. The Division also provided a copy of the homepage dated DATE, which was after the audit period.²⁷ This internet homepage discussed its plans, which started at \$\$\$\$ per month and featured "unlimited movies, TV shows, and more." The

²⁶ Exhibit R-4.

²⁷ Exhibit R-5.

offline-download product and the online-streaming product were both mentioned as part of the plans using equal font size and space. The Division also provided a copy of a news release from the TAXPAYER website dated DATE.²⁸ This discussed the offline-download product. The news release stated: “Holidays; check. Long commutes to visit friends and family; check. A must-watch list of shows and movies to keep you entertained; check! ‘Tis the season to watch your favorite titles anytime, anywhere even when your internet is spotty, thanks to TAXPAYER Downloads.”

42. The Division provided as an exhibit a copy of the DVD Terms of Use for the DVD by mail service. The exhibit indicated that the DVD by mail plans did not include access to streaming and stated that “[i]f you wish to access TAXPAYER’s streaming services, you must subscribe to a TAXPAYER streaming plan.”²⁹

43. The Division provided as an exhibit a copy of a DATE COMPANY-1 Terms of Service.³⁰ The terms of that agreement stated, “You may use COMPANY-1 to browse, locate, view, stream, or download content for your mobile, computer, tv, watch or other supported device.” Additionally, the Division provided the COMPANY-2 policy³¹ and the COMPANY-3 Terms of Use,³² which both discussed the option of streaming or downloading. However, the Division’s representative did not disclose information about these other entities’ tax filings because disclosure of this information is prohibited under Utah Code § 59-1-403.

44. The Division’s witness testified that Utah was a member of the Streamlined Sales and Use Tax Agreement (“SST”), provided a copy of the agreement,³³ and testified that Utah is a member of the Streamlined Sales Tax Governing Board.³⁴ The Division’s witness testified regarding SST and stated that Utah has to update its compliance with the agreement annually, review a taxability matrix and state whether the state taxes certain items or not.

APPLICABLE LAW

Utah imposes sales and use taxes on products transferred electronically pursuant to Utah Code § 59-12-103(1) (2020)³⁵, as follows:

(m) amounts paid or charged for a sale:

²⁸ Exhibit R-6.

²⁹ Exhibit R-7.

³⁰ Exhibit R-12.

³¹ Exhibit R-11.

³² Exhibit R-10.

³³ Exhibit R-13.

³⁴ Exhibit R-14.

³⁵ This decision cites the statutory provisions in effect as of January 1, 2020. There were some minor changes that occurred during the audit period, but none were relevant to the issues in this appeal.

- (i) (A) of a product transferred electronically; or
(B) of a repair or renovation of a product transferred electronically; and
- (ii) regardless of whether the sale provides:
 - (A) a right of permanent use of the product; or
 - (B) a right to use the product that is less than a permanent use, including a right: (I) for a definite or specified length of time; and (II) that terminates upon the occurrence of a condition.

Utah law imposes sales and use tax on a “bundled transaction” at Utah Code §59-12-103(2)(2020)³⁶ as follows:

(a) Except as provided in Subsections (2)(b) through (e), a state tax and a local tax are imposed on a transaction described in Subsection (1) equal to the sum of: (i) a state tax imposed on the transaction at a tax rate equal to the sum of:

(A) (I) through March 31, 2019, 4.70%; and (II) beginning on April 1, 2019, 4.70% plus the rate specified in Subsection (13)(a); and

(B) (I) the tax rate the state imposes in accordance with Part 18, Additional State Sales and Use Tax Act, if the location of the transaction as determined under Sections 59-12-211 through 59-12-215 is in a county in which the state imposes the tax under Part 18, Additional State Sales and Use Tax Act;

....

(d)(iii) Subject to Subsection (2)(d)(iv), for a bundled transaction other than a bundled transaction described in Subsection (2)(d)(i) or (ii):

(A) if the sales price of the bundled transaction is attributable to tangible personal property, a product, or a service that is subject to taxation under this chapter and tangible personal property, a product, or service that is not subject to taxation under this chapter, the entire bundled transaction is subject to taxation under this chapter unless: (I) the seller is able to identify by reasonable and verifiable standards the tangible personal property, product, or service that is not subject to taxation under this chapter from the books and records the seller keeps in the seller's regular course of business; or (II) state or federal law provides otherwise;

(e) (i) Except as otherwise provided in this chapter and subject to Subsections (2)(e)(ii) and (iii), if a transaction consists of the sale, lease, or rental of tangible personal property, a product, or a service that is subject to taxation under this chapter, and the sale, lease, or rental of tangible personal property, other property, a product, or a service that is not subject to taxation under this chapter, the entire transaction is subject to taxation under this chapter unless the seller, at the time of the transaction:

(A) separately states the portion of the transaction that is not subject to taxation under this chapter on an invoice, bill of sale, or similar document provided to the purchaser; or

³⁶ For clarity, this is the version of Utah Code Sec. 59-12-103 that became effective June 29, 2020, and was then later superseded on May 5, 2021. There were numerous changes to this code section during the audit period, which affected the numbering of subsections. However, there was no argument from the parties that any of the changes made during the audit period would affect the outcome of this decision.

(B) is able to identify by reasonable and verifiable standards, from the books and records the seller keeps in the seller's regular course of business, the portion of the transaction that is not subject to taxation under this chapter.

(ii) A purchaser and a seller may correct the taxability of a transaction if:

(A) after the transaction occurs, the purchaser and the seller discover that the portion of the transaction that is not subject to taxation under this chapter was not separately stated on an invoice, bill of sale, or similar document provided to the purchaser because of an error or ignorance of the law; and

(B) the seller is able to identify by reasonable and verifiable standards, from the books and records the seller keeps in the seller's regular course of business, the portion of the transaction that is not subject to taxation under this chapter.

(iii) For purposes of Subsections (2)(e)(i) and (ii), books and records that a seller keeps in the seller's regular course of business includes books and records the seller keeps in the regular course of business for nontax purposes.

“Bundled transaction,” “lease or rental,” “product transferred electronically” and “sales” are defined at Utah Code § 59-12-102 as follows:

(19)(a) "Bundled transaction" means the sale of two or more items of tangible personal property, products, or services if the tangible personal property, products, or services are:

(i) distinct and identifiable; and

(ii) sold for one nonitemized price.

(b) "Bundled transaction" does not include:

(i) the sale of tangible personal property if the sales price varies, or is negotiable, on the basis of the selection by the purchaser of the items of tangible personal property included in the transaction;

(ii) the sale of real property;

(iii) the sale of services to real property;

(iv) the retail sale of tangible personal property and a service if:

(A) the tangible personal property:

(I) is essential to the use of the service; and

(II) is provided exclusively in connection with the service; and

(B) the service is the true object of the transaction;

(v) the retail sale of two services if:

(A) one service is provided that is essential to the use or receipt of a second service;

(B) the first service is provided exclusively in connection with the second service;

and

(C) the second service is the true object of the transaction;

(vi) a transaction that includes tangible personal property or a product subject to taxation under this chapter and tangible personal property or a product that is not subject to taxation under this chapter if the:

(A) seller's purchase price of the tangible personal property or product subject to taxation under this chapter is de minimis; or

(B) seller's sales price of the tangible personal property or product subject to taxation under this chapter is de minimis; and

(vii) the retail sale of tangible personal property that is not subject to taxation under this chapter and tangible personal property that is subject to taxation under this chapter if:

- (A) that retail sale includes: (I) food and food ingredients; (II) a drug; (III) durable medical equipment; (IV) mobility enhancing equipment; (V) an over-the-counter drug; (VI) a prosthetic device; or (VII) a medical supply; and
- (B) subject to Subsection (19)(f): (I) the seller's purchase price of the tangible personal property subject to taxation under this chapter is 50% or less of the seller's total purchase price of that retail sale; or (II) the seller's sales price of the tangible personal property subject to taxation under this chapter is 50% or less of the seller's total sales price of that retail sale.

(c)(i) For purposes of Subsection (19)(a)(i), tangible personal property, a product, or a service that is distinct and identifiable does not include:

- (A) packaging that: (I) accompanies the sale of the tangible personal property, product, or service; and (II) is incidental or immaterial to the sale of the tangible personal property, product, or service;
- (B) tangible personal property, a product, or a service provided free of charge with the purchase of another item of tangible personal property, a product, or a service; or
- (C) an item of tangible personal property, a product, or a service included in the definition of "purchase price."

(ii) For purposes of Subsection (19)(c)(i)(B), an item of tangible personal property, a product, or a service is provided free of charge with the purchase of another item of tangible personal property, a product, or a service if the sales price of the purchased item of tangible personal property, product, or service does not vary depending on the inclusion of the tangible personal property, product, or service provided free of charge.

(d)(i) For purposes of Subsection (19)(a)(ii), property sold for one nonitemized price does not include a price that is separately identified by tangible personal property, product, or service on the following, regardless of whether the following is in paper format or electronic format:

- (A) a binding sales document; or
- (B) another supporting sales-related document that is available to a purchaser.

(ii) For purposes of Subsection (19)(d)(i), a binding sales document or another supporting sales-related document that is available to a purchaser includes:

- (A) a bill of sale;
- (B) a contract;
- (C) an invoice;
- (D) a lease agreement;
- (E) a periodic notice of rates and services;
- (F) a price list;
- (G) a rate card;
- (H) a receipt; or
- (I) a service agreement.

(e) (i) For purposes of Subsection (19)(b)(vi), the sales price of tangible personal property or a product subject to taxation under this chapter is de minimis if:

- (A) the seller's purchase price of the tangible personal property or product is 10% or less of the seller's total purchase price of the bundled transaction; or
- (B) the seller's sales price of the tangible personal property or product is 10% or less of the seller's total sales price of the bundled transaction.

(ii) For purposes of Subsection (19)(b)(vi), a seller:

(A) shall use the seller's purchase price or the seller's sales price to determine if the purchase price or sales price of the tangible personal property or product subject to taxation under this chapter is de minimis; and

(B) may not use a combination of the seller's purchase price and the seller's sales price to determine if the purchase price or sales price of the tangible personal property or product subject to taxation under this chapter is de minimis.

(iii) For purposes of Subsection (19)(b)(vi), a seller shall use the full term of a service contract to determine if the sales price of tangible personal property or a product is de minimis.

(f) For purposes of Subsection (19)(b)(vii)(B), a seller may not use a combination of the seller's purchase price and the seller's sales price to determine if tangible personal property subject to taxation under this chapter is 50% or less of the seller's total purchase price or sales price of that retail sale.

...

(60)(a) "Lease" or "rental" means a transfer of possession or control of tangible personal property or a product transferred electronically for:

- (i) (A) a fixed term; or (B) an indeterminate term; and
- (ii) consideration.

(b) "Lease" or "rental" includes an agreement covering a motor vehicle and trailer if the amount of consideration may be increased or decreased by reference to the amount realized upon sale or disposition of the property as defined in Section 7701(h)(1), Internal Revenue Code.

(c) "Lease" or "rental" does not include:

- (i) a transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments;
- (ii) a transfer of possession or control of property under an agreement that requires the transfer of title: (A) upon completion of required payments; and (B) if the payment of an option price does not exceed the greater of: (I) \$100; or (II) 1% of the total required payments; or
- (iii) providing tangible personal property along with an operator for a fixed period of time or an indeterminate period of time if the operator is necessary for equipment to perform as designed.

.....

(99)(a) Except as provided in Subsection (99)(b), "product transferred electronically" means a product transferred electronically that would be subject to a tax under this chapter if that product was transferred in a manner other than electronically.

(b) "Product transferred electronically" does not include: (i) an ancillary service; (ii) computer software; or (iii) a telecommunications service.

.....

(114) (a) "Sale" means any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), for consideration.

(b) "Sale" includes:

- (i) installment and credit sales;
- (ii) any closed transaction constituting a sale;
- (iii) any sale of electrical energy, gas, services, or entertainment taxable under this chapter;
- (iv) any transaction if the possession of property is transferred but the seller retains the title as security for the payment of the price; and
- (v) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.

....

The Commission has promulgated Administrative Rule R865-19S-2 to provide additional guidance on sales tax as follows:

- A. The sales and use taxes are transaction taxes imposed upon certain retail sales and leases of tangible personal property, as well as upon certain services.
- B. The tax is not upon the articles sold or furnished, but upon the transaction, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state.

Burden of proof and statutory construction are addressed at Utah Code § 59-1-1417, as follows:

- (1) In a proceeding before the commission, the burden of proof is on the petitioner

....

- (2) Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:
 - (a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and
 - (b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

STATEMENT OF PARTIES' LEGAL ARGUMENTS

At the Formal Hearing and in their prehearing briefs, the parties offered a number of arguments and alternative arguments in support of their respective positions. The Commission considers the factual evidence presented at the Formal Hearing by the parties as stated in the Findings of Fact, the parties' arguments and the applicable law. Ultimately, the application of the facts to the law presents primarily legal issues to the Commission and the Commission's conclusions are discussed below in its Conclusions of Law. The arguments submitted by the parties at the hearing are addressed in the Conclusions of Law and summarized below as follows:

I. Taxpayer's Arguments

At the Formal Hearing and in their prehearing brief, the Taxpayer made a number of arguments to support its position that the audit deficiency of sales tax charged against the entire subscription fee the Taxpayer charges for use of the Taxpayer's streaming service platform should be abated. The Taxpayer argued: 1) that the online-streaming product was not subject to tax in Utah; 2) that the offline-download product was not subject to tax in Utah; and, alternatively, 3) if the offline-download product was subject to tax in Utah, the entire subscription fee for use of the Taxpayer's streaming service platform was not subject to tax in Utah.

The Taxpayer pointed to PLR 17-003 and other PLRs for support of its first argument that the online-streaming produced was not subject to tax in Utah prior to the enactment of S.B. 2001. The Taxpayer noted that S.B. 2001 enacted sales and use taxes on online streaming, but that S.B. 2001 was subsequently repealed.

At the hearing, the Taxpayer argued that the offline-download product was also not subject to tax in Utah. The Taxpayer argued that the offline-download product it offers is not a “product transferred electronically.” The Taxpayer provided dictionary definitions of “product” and “transfer” and argued that the offline-download offering is not a product. The Taxpayer also cited to PLRs in which the Commission found that online streaming services are not part of the taxable sales and use tax base, arguing there is no distinction between downloading and streaming.

The Taxpayer further argued that even if the offline-download product were subject to sales and use taxes, the entire subscription fee for use of the Taxpayer's streaming service platform should not be subject to tax. The Taxpayer made a number of different arguments on this point. The Taxpayer argued that the use of the offline-download product was de minimis. The Taxpayer argued that the subscription fee charged for use of the streaming service platform was not a charge for a “bundled transaction” pursuant to Utah Code §59-12-102(19)(a) and Utah Code §59-12-103(2)(f), arguing that its products are not “distinct and identifiable” “because TAXPAYER provides subscribers with one streaming service that allows them to request access to one thing: the TAXPAYER content library. Streaming and offline viewing are ways of watching TAXPAYER content.”³⁷ The Taxpayer also argued the offline-streaming product was not “distinct and identifiable” because it was provided free of charge.

In its prehearing brief and at the Formal Hearing, the Taxpayer asserted that “even if a TAXPAYER subscription were considered a bundled transaction, in all events the full sales price of a TAXPAYER subscription would not be subject to tax.”³⁸ In support of this position, the Taxpayer argued that the “allegedly taxable component—the offline viewing feature—is de minimis and cannot justify taxing

³⁷ Petitioner’s Prehearing Brief, pg. 16.

³⁸ Petitioner’s Prehearing Brief, pg. 3.

the whole subscription.”³⁹ The Taxpayer also argued that even if the subscription fee were taxable as a “bundled transaction,” only the portion of the fee attributable to the offline-download product would be subject to tax.

II. Division’s Arguments

In reviewing the information the Division presented at the Formal Hearing and in its prehearing brief, the Division appears to have presented three different arguments for why the entire subscription fee for use of the Taxpayer’s streaming service platform should be included in the sales tax base. The first argument was made by the Division’s witness at the Formal Hearing, who testified that the Division had assessed the tax because portions of the Taxpayer’s streaming service platform were downloadable. The second argument made by the Division was that both the online-streaming product and the offline-download product are subject to tax in Utah. The Division’s representative acknowledged that this position was contrary to the Tax Commission PLRs and argued that the Tax Commission should change its position on this issue. The Division also argued that S.B. 2001 did not impose a new tax on streaming services because streaming services were already subject to sales and use tax as a product transferred electronically.

In the alternative, the Division argued that if the Tax Commission affirmed its position that online streaming is not subject to sales and use taxes, the entire subscription fee for the streaming service platform was taxable as a bundled transaction. The Division argued that “[i]n Utah a ‘bundled transaction’ is the ‘sale of two or more items of tangible personal property, products, or services if the tangible personal property, products, or services are: (i) distinct and identifiable; and (ii) sold for one nonitemized price.’” Utah Code § 59-12-102(19)(a). The Division acknowledged that a product is not distinct and identifiable if is “provided free of charge with the purchase of another item of tangible personal property, a product, or a service.”⁴⁰ However, the Division argued that the offline-download product was distinct and identifiable, that the streaming service platform was offered for one nonitemized price and the offline-download product was not provided “free of charge.”⁴¹

The Division also argued that the Taxpayer had offered the wrong metric in its de minimis analysis. The Division argued that the measurement is not how much of the content is downloaded, it is whether the content is downloadable, citing to the decision issued by the Tax Commission in PLR 19-003.

CONCLUSIONS OF LAW

³⁹ Petitioner’s Prehearing Brief, pg. 3.

⁴⁰ Respondent’s Prehearing Brief, pg. 20.

⁴¹ Respondent’s Prehearing Brief, pgs. 20-22.

1. Upon review of the facts, the applicable law and the arguments of the parties, the Commission first notes that Utah imposes sales and use taxes on the amounts paid or charged for a sale of products transferred electronically pursuant to Utah Code § 59-12-103(1). A “product transferred electronically” is defined at Utah Code §59-12-102(99) to be a “a product transferred electronically that would be subject to a tax under this chapter if that product was transferred in a manner other than electronically.” Pursuant to Utah Code §59-12-102(114), “sale” includes, among other factors, any transaction under which the right to possession is granted under a lease. Utah Code §59-12-102(60) provides that a lease includes transfer of possession or control of a product transferred electronically “for: (i) (A) a fixed term; or (B) an indeterminate term; and (ii) consideration.” As noted in Administrative Rule R865-19S-2, sales tax is a transactional tax and is imposed on the transaction and not the articles furnished or sold. In its audit, the Division has imposed sales tax on the entire subscription fee that the Taxpayer charged to its customers during the audit period for use of the Taxpayer’s streaming service platform. It is this transaction that is at issue in this appeal.

2. As noted in the Findings of Fact above, the Taxpayer’s streaming service platform includes two different products: the online-streaming product and the offline-download product. The Taxpayer argued at the Formal Hearing that the online-streaming product is not subject to sales and use tax in Utah. At the Formal Hearing, the Division’s witness acknowledged that the online-streaming product, if sold separately, was not subject to sales tax based on the Tax Commission's findings in prior PLRs. However, the Division’s attorney argued in their prehearing brief and at the Formal Hearing that the Tax Commission should change its position on this issue. The Division’s attorney also argued that S.B. 2001 did not impose a new tax on streaming services, because streaming services were already subject to sales and use tax as a product transferred electronically. However, as the Taxpayer pointed out at the Formal Hearing, the Tax Commission has concluded in several PLRs, including PLR No. 17-003, that streamed video content is not a “product transferred electronically.” In PLR No. 17-003, the Commission found that streamed video content is not a “product transferred electronically” because “the whole product is not necessarily transferred, especially with audio or audio-visual products. Instead, only parts of the products are transferred or buffered for the online viewing.”⁴² The Commission also concludes, as the Taxpayer has argued in this matter, that the language in S.B. 2001 that would have included streaming services as part of the taxable sales and use tax base was not a clarification of prior interpretation of the law, but instead an imposition of tax on transactions that were not previously subject to sales and use taxes in Utah. The Division, in its prehearing brief, argued that the Tax Commission

⁴² See also, PLR Nos. 19-003 (May 20, 2021); 18-002 (April 10, 2019); 17-003 (July 12, 2018); 16-005 (September 2, 2016); and 12-002 (January 10, 2012).

should take a different position on this issue.⁴³ However, the Commission declines to adopt the Division's position, and finds that streamed content, if sold separately, is not part of the taxable sales and use tax base.

3. The Commission then considers whether the offline-download product was subject to sales and use taxes. As noted above, sales and use taxes are imposed on products transferred electronically pursuant to Utah Code §59-12-103(1) At the Formal Hearing and in its prehearing brief, the Taxpayer argued that the offline-download product it offers is not a "product transferred electronically." The Taxpayer's representatives cited to dictionary definitions of "product" and "transfer" and argued that the offline-download offering is not a product. The Taxpayer also cited to Tax Commission PLRs in which the Commission found that streaming services are not part of the taxable sales and use tax base. The Taxpayer argued that there is not a distinction between downloading and streaming.⁴⁴ However, the Tax Commission finds these arguments to be unpersuasive.

4. The Tax Commission has previously found in PLRs that downloadable content constitutes a product transferred electronically because the entire product is transferred, while streaming does not constitute a product transferred electronically because the whole product is not necessarily transferred but rather only a portion of the product is transferred or buffered for online viewing. In fact, the evidence submitted at the Formal Hearing supports this conclusion. The Taxpayer's witness, PETITIONER'S REP-4, testified at the Formal Hearing that while streaming a customer would never have the entire movie or video on the customer's device at one time. He testified that with downloading, the entire movie or video could be on the customer's device. The later price comparison grids and the Taxpayer's homepages also listed the online-streaming product and offline-download product as two separate and distinct products. The Commission has issued several PLRs in which it concluded that the amounts paid or charged for downloading or downloadable video content were subject to sales and use taxes as a product transferred electronically. In PLR 16-005, the Commission considered the taxability of a company's membership subscription. Among other features, this membership included the ability to both stream and download movies and TV shows, in the same manner offered by the Taxpayer on its streaming service platform. The Commission determined that the online-streaming product was not taxable, but analyzed the offline-download product separately and concluded the offline-download product was taxable. The Tax Commission has affirmed and followed this ruling on at least two other occasions. In PLR 17-003, at pg. 18, the Commission ruled that "educational resources that are downloadable for offline viewing are subject to Utah sales and use taxes under §59-12-103(1)(m)," and in

⁴³ Respondent's Prehearing Brief, pg. 2-18 and 28-30.

⁴⁴ Petitioner's Prehearing Brief, pg. 10.

PLR 19-003, at pg. 14, the Commission ruled that a subscription for downloadable prerecorded video courses is subject to sales and use taxes as a product transferred electronically.

5. At the Formal Hearing and in its prehearing brief, the Taxpayer made the point that although the customer could download content for later offline viewing, the customer did not have unlimited access to the content. For instance, if the customer ended their subscription, or traveled to a location where the content was not available, or when the licensing for the content expired, they would no longer be able to view the downloaded content. The Taxpayer argued “offline viewing is nothing more than a feature of the TAXPAYER streaming service that allows subscribers to temporarily view content after disconnecting from the Internet.”⁴⁵ However, PLR 16-005 involved similar facts regarding the downloadable content. In PLR 16-005 the Commission concluded, “Because the downloaded movies and TV shows are products transferred electronically, they are subject to Utah sales and use taxes. This conclusion does not change even though a Utah customer will lose access to downloaded movies and TV shows if the Utah customer’s MEMBERSHIP expires.”⁴⁶ Based on the law and after consideration of the facts presented, the Taxpayer’s offline-download product for viewing content is subject to sales and use taxes in Utah.

6. The Commission concludes, therefore, that the real issue before the Tax Commission at this Formal Hearing is whether the Taxpayer’s subscription fee for use of its streaming service platform, which includes both the online-streaming product and offline-download product, is subject to sales tax as a “bundled transaction.” Although the Division argued that the entire subscription fee was subject to tax because both the online-streaming product and the offline-download product were subject to sales tax as products transferred electronically, the Division argued, in the alternative, that the entire subscription was taxable as a bundled transaction.⁴⁷ The Taxpayer argued the entire subscription fee should not be subject to tax under these provisions for a number of different reasons. Utah Code §59-12-103(2)(d)(iii) provides as part of the definition of “bundled transaction”: “(A) if the sales price of the bundled transaction is attributable to tangible personal property, a product, or a service that is subject to taxation under this chapter and tangible personal property, a product, or service that is not subject to taxation under this chapter, the entire bundled transaction is subject to taxation under this chapter” unless the seller can identify by “reasonable and verifiable standards” the tangible personal property, product transferred electronically, or service that is not subject to taxation in the books and records the seller keeps in the seller’s regular course of business. Subject to certain exceptions, Utah Code §59-12-102(19) defines “bundled transaction” to mean “the sale of two or more items of tangible personal property, products, or

⁴⁵ Petitioner’s Prehearing Brief, pg. 2.

⁴⁶ PLR 16-005, pg. 17.

⁴⁷ Respondent’s Prehearing Brief, pgs. 19-26, 30-31.

services if the tangible personal property, products, or services are: (i) distinct and identifiable; and (ii) sold for one nonitemized price” The definition of “bundled transaction” further provides that a product is not distinct and identifiable if it is “provided free of charge with the purchase of another item of tangible personal property, a product, or a service.” The Tax Commission provided guidance on the taxability of a membership fee as a bundled transaction in PLR 16-005. In PLR 16-005, the Commission concluded that the entire membership fee was subject to tax as a bundled transaction based on the following.⁴⁸

Next, the sales taxability of the [WORDS REMOVED] items sold together must be analyzed. The [WORDS REMOVED] items sold together are “distinct and identifiable” and “sold for one nonitemized price,” so their sale meets the definition of “bundled transaction” found in §59-12-102(18)(a). Section 59-12-103(2)(d)(iii)(A) provides “the entire bundled transaction is subject to taxation . . . unless: . . . the seller is able to identify by reasonable and verifiable standards the tangible personal property, product, or service that is not subject to taxation . . . from the books and records the seller keeps in the seller’s regular course of business . . .” Thus, if the Company knows the values of the items not subject to tax versus the value of the items subject to tax, then only the portion of the bundled transaction relating to the taxable items will be subject to Utah sales and use taxes. Otherwise, the entire purchase price of the [WORDS REMOVED] items of the MEMBERSHIP will be subject to Utah sales and use taxes.

7. It is clear from the factual evidence submitted at this Formal Hearing that the Taxpayer charged a flat subscription fee for use of its steaming service platform and the streaming service platform included a number of distinct and identifiable features that were sold for one nonitemized price, including the online-streaming product and the offline-download product. The testimony from PETITIONER'S REP-5, the price comparison grids submitted as evidence by the Taxpayer, and the copies of the Taxpayer’s homepages from the audit period submitted by the Division are clear that these two separate and identifiable features were sold for one nonitemized price. In the U.S. market, including Utah, the customer could subscribe to the Taxpayer’s streaming service platform by choosing the “Basic,” “Standard,” or “Premium” package option and paying the flat rate monthly fee for the option. During the audit period, each of the packages provided unlimited viewing of the online-streaming product and the offline-download product along with some additional features. The later price comparison grids make it clear that the offline-download product was one of the products that was a distinct and identifiable part of the package, along with the online-streaming product and other package features that were provided for the single flat rate monthly subscription fee. There was no indication that the monthly subscription fee was ever advertised in a way that separately identified the fees for the taxable from the nontaxable features of the package. The Taxpayer’s web pages submitted by the Division from the audit period all touted the offline-download product as a significant feature of the subscription packages. Information

⁴⁸ PLR 16-005, pgs. 19-28.

about the offline-download product was given equal space and was in the same font as the information about the online-streaming product. These facts support that the subscription fee to use the streaming service platform was a “bundled transaction” for purposes of Utah Code §59-12-103(2)(d), unless an exception at Utah Code §59-12-102(19) applies.

8. One exception to the definition of “bundled transaction” provided in Utah Code §59-12-102(19)(b)(vi) is if the seller’s sales price of the tangible personal property or product subject to sales and use taxation is de minimis. The Taxpayer argued at the Formal Hearing that the use of the offline-download product “is de minimis and cannot justify taxing the whole subscription.” The Taxpayer also argued that “even if a TAXPAYER subscription were considered a bundled transaction, in all events the full sales price of a TAXPAYER subscription would not be subject to tax.”⁴⁹ However, neither of these assertions are fully reconcilable with Utah law. The Taxpayer’s evidence showed that most of the content viewed by its Utah customers was viewed via the online-streaming product and less than %%% of the content was viewed via the offline-download product. The evidence indicated that on a per month basis, only %%% to %%% of Utah accounts even used the offline-download product. The evidence did not, however, establish how much of the streaming service platform content was downloadable,⁵⁰ other than that it was some amount less than the full content available as an online-streaming product due to licensing agreements.⁵¹

9. As noted by the Division in its arguments, the Taxpayer is using the wrong metric in its de minimis analysis.⁵² Subsection 59-12-102(19)(b)(vi) clarifies how de minimis is determined for purposes of the statute. Subsection 59-12-102(19)(e)(i) states, “For purposes of Subsection (19)(b)(vi), the sales price of tangible personal property or a product subject to taxation under this chapter is de minimis if: . . . the seller's sales price of the tangible personal property or product [subject to taxation under this chapter] is 10% or less of the seller's total sales price of the bundled transaction.” The Taxpayer did not present information from its books and records to establish whether the sales price of the offline-download product was 10% or less of the seller’s total sales price of the bundled subscription. Rather, the Taxpayer’s representatives merely argued that the use of the offline-download product was far less than the use of the online-streaming product. Additionally, as the Division’s witness stated at the hearing, in PLR Nos. 19-003 and 17-003, the Commission focused on what content was “downloadable” as opposed to what content was actually downloaded. At the Formal Hearing, the Taxpayer did not

⁴⁹ Petitioner’s Prehearing Brief, pg. 3.

⁵⁰ The Commission questioned the Taxpayer’s witness on this point and the witness was not able to answer the question during the Formal Hearing.

⁵¹ This fact suggests that the online-streaming product and offline-download product are considered to be two distinct and separate products for licensing purposes.

⁵² Respondent’s Prehearing Brief, pg. 24.

present how much of the streaming service platform's content was downloadable, but rather only provided the statistics on the amount that was downloaded. Therefore, the Taxpayer failed to establish that the de minimis exception was met for the audit period.

10. The Taxpayer made the additional argument that under Subsection 59-12-102(19)(c), the subscription fee charged for the use of the Taxpayer's streaming service platform would not be part of a "bundled transaction" pursuant to Utah Code §59-12-102(19)(a) and Utah Code §59-12-103(2)(f), arguing that its products are not "distinct and identifiable." The Taxpayer argued that the offline-download product is not distinct and identifiable from the online-streaming product and that the Taxpayer provides "subscribers with one streaming service that allows them to request access to one thing: the TAXPAYER content library."⁵³ The Commission finds this argument to be unpersuasive. As noted above, evidence submitted at this Formal Hearing supports that the online-streaming product and offline-download product were two separate and distinct products, and the Taxpayer consistently advertised that the subscription fee to use the Taxpayer's streaming service platform provided these two separate products.

11. The Taxpayer also argued that the offline-download product was not a "distinct and identifiable" product because it was provided free of charge. As noted above, Utah Code Subsection 59-12-102(19)(a) provides that, subject to certain exceptions, a bundled transaction "means the sale of two or more items of tangible personal property, products, or services if the tangible personal property, products, or services are: (i) distinct and identifiable; and (ii) sold for one nonitemized price." Subsection 59-12-102(19)(c) provides that "tangible personal property, a product, or a service that is distinct and identifiable does not include: . . . (B) tangible personal property, a product, or a service provided free of charge with the purchase of another item of tangible personal property, a product, or a service . . ." Subsection 59-12-102(19)(c)(ii) additionally provides that "[f]or purposes of Subsection (19)(c)(i)(B), an item of tangible personal property, a product, or a service is provided free of charge with the purchase of another item of tangible personal property, a product, or a service if the sales price of the purchased item of tangible personal property, product, or service does not vary depending on the inclusion of the tangible personal property, product, or service provided free of charge."

12. At the Formal Hearing, PETITIONER'S REP-5 testified that the offline-download product was never a feature that the customer had to pay for in addition to the subscription fee. The Taxpayer also submitted a DATE news release stating that "TAXPAYER members worldwide can now download in addition to stream great series and films at no extra cost." The Taxpayer argued that this showed the product was provided free of charge. However, the evidence also showed that prior to the audit period, on DATE, the Taxpayer had raised the price of its subscription and increased the price again

⁵³ Petitioner's Prehearing Brief, pg. 16.

on DATE, which was during the first month of the audit period. There were additional price increases during the audit period. Furthermore, the later price comparison grids and the Taxpayer's homepage during the audit period advertised the offline-download product as one of several features in a subscription package provided for one, nonitemized price. None of the evidence from DATE through the end of the audit period suggested that the offline-download product was "free" with the purchase of the subscription package. As the Division noted, the Commission decision in PLR No. 16-005 recognized that simply labeling a product as "free" or at "no additional cost," does not mean that the benefits are truly free.⁵⁴ The Taxpayer did not prove by reasonable and verifiable standards that there was not a charge for the offline-download product embedded in the total subscription price during the audit period. Additionally, the subscription fee charts later in the audit period indicated that the ability to download to additional devices increased as tiers of the subscription package increased, and monthly subscription fees increased. With the basic package, the subscriber could only download to one device, the standard package allowed downloads on two devices and the premium package allowed downloads on four devices. Other enhanced features were added as subscription tiers, and prices increased. If the offline-download product were provided free of charge, it would seem logical that the download capability would be the same across all packages. The Commission finds that based on the evidence presented and the applicable law, that that offline-download product was a distinct and identifiable product sold with the online-streaming product and other features for one nonitemized price. The Commission concludes on that basis that the subscription fee met the statutory definition of "bundled transaction."

13. Other than the arguments presented above that the Commission has already found to be unpersuasive, the parties did not present any additional arguments or evidence to support that another exception that would exclude the subscription fee from being a "bundled transaction" applies in this matter.

14. Having concluded that the subscription fee for the streaming service platform is a bundled transaction, the entire transaction is subject to taxation. At the Formal Hearing, the Taxpayer made the argument that even if the subscription fee were taxable as a "bundled transaction," only the portion of the fee attributable to the offline-download product would be subject to tax.⁵⁵ However, the Taxpayer did not provide any books and records to separately identify by "reasonable and verifiable standards" how much of the subscription fee was attributable to the online-streaming product, how much of the fee was attributable to the offline-download product, and how much of the subscription fee was

⁵⁴ Respondent's Prehearing Brief, pg. 21.

⁵⁵ In its Prehearing Brief, the Taxpayer cited to Utah Code §59-12-103(2)(f)(iii)(A), which appears to be a reference to the current version of the statute and not the statute in effect during the audit period.

attributable to other features. The Taxpayer provided only some limited statistics on how often the offline-download product was used. The Tax Commission finds that the Taxpayer has failed to "identify by reasonable and verifiable standards" the portion of the subscription fee not subject to tax. Therefore, the entire bundled transaction is subject to sales and use taxes.

After considering the facts submitted at the Formal Hearing and the applicable law, the Tax Commission should sustain the audit deficiency issued by the Division for the audit period of March 1, 2019 to November 30, 2021.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Division's audit deficiency of sales tax and the interest accrued thereon for the period of March 1, 2019 through November 30, 2021, is sustained. It is so ordered.

DATED this ____ day of ____, 2025.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Rebecca L. Rockwell
Commissioner

Jennifer N. Fresques
Commissioner

Notice of Appeal Rights and Payment Requirement: Any balance due as a result of this order must be paid within thirty (30) days of the date of this order, or a late payment penalty could be applied. If you disagree with this order you have twenty (20) days after the date of this order to file a Request for Reconsideration with the Commission in accordance with Utah Code Ann. §63G-4-302. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.