FINAL PRIVATE LETTER RULING

REQUEST LETTER

08-013

COMPANY
ADDRESS
PHONE
EMAIL

Mr. Marc B. Johnson
Commissioner
Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134

Re: **Taxpayer Request for a Private Letter Ruling**

Dear Mr. Johnson:

Pursuant to Utah Adm. Code Rule R861-1A-34, COMPANY submits this request for a Private Letter Ruling on behalf of its client, respectfully asking whether certain entities have a Utah sales and use tax registration and collection requirement and a Utah corporate income tax filing requirement.

I. Facts

Entertainment Company ("Entertainment") is an out-of-state corporation. It is part of an affiliated group of companies. Entertainment provides services that relate to movies and television, including access to industry information and industry advertising. Entertainment also maintains two divisions – one division provides remote/online registration services for filmmakers and film festivals and the other division provides online entertainment industry reporting services.

Entertainment would like to have some of its employees attend the FESTIVAL Film Festival ("FESTIVAL") in CITY, Utah in January 2009. The employees would stay at FESTIVAL for 10 days – the full length of the festival. They would also attend FESTIVAL in ensuing years. The employees would attend FESTIVAL for the purpose of promoting Entertainment's businesses, building relationships, networking and meeting potential customers. The employees would not negotiate the sale or provision of any of Entertainment's business services while in Utah nor would any contacts for the provision of services be executed. All sales of services and the performance of any services would occur outside of Utah.

Entertainment does not have any tangible or real property in Utah and it does not have any employees in the state.

Entertainment is also affiliated with other entities, including Retailers, Internet sellers of tangible property and digital goods to customers around the world, including customers in Utah. Retailers are located outside of Utah. Retailers do not operate any retail stores, own or lease any property, or have employees in Utah, and are not registered as a retail merchants in Utah.

II. Issues

1. Would Entertainment be required to register to collect and remit Utah sales and use tax based on its proposed annual presence at FESTIVAL?

2. Would Retailer be required to register to collect and remit Utah sales and use tax based on the proposed presence of Entertainment in the state to attend FESTIVAL?

3. Would Entertainment be required to file a Utah corporate income tax return based on its proposed annual presence at FESTIVAL?

III. Legal Framework for Analysis

A. Sales Tax

1. Registration and Collection Requirement

Utah imposes a sales tax on sellers meeting certain statutory requirements. Utah Code § 59-12-107. A "seller" is a person that makes a sale, lease or rental of tangible personal property or a service. Utah Code § 59-12-102(89). Sellers are required to register to collect and remit sales and use tax if the seller has or utilizes:

(a) an office;
(b) distribution house;
(c) sales house;
(d) warehouse;
(e) service enterprise; or
(f) place of business

Utah Code § 59-12-107(1)(a)(i).

In addition, a seller is required to register to collect and remit sales and use tax if the seller engages in any of the following activities:

(a) Maintains a stock of goods within the state;
(b) Regularly solicits orders in the state, unless the seller's only activity is:
    (i) advertising or solicitation by:

(aa) direct mail;
(bb) electronic mail;
(cc) the internet;
(dd) telecommunications service; or
(ee) or another similar means;

(c) Regularly engages in the delivery of property in the state by means other than common carrier or US Mail; or
(d) Regularly engages in an activity directly related to the leasing or servicing of property located within the state.

Utah Code § 59-12-107(1)(a).

a. Affiliate Nexus

Utah tax law also requires sellers that do not have a registration and collection requirement under any of the aforementioned sections to register to collect Utah sales and use tax if the seller is considered a "related seller." Utah Code § 59-12-107(1)(f)(i)(C). A "related seller" is a seller, as part of an affiliated group or through common ownership, that has a sales and use tax collection and registration requirement. Utah Code §59-12-107(1)(f)(C). A seller is also a related seller if it is a limited liability company owned by a parent corporation of an affiliated group if the parent corporation of the affiliated group is required to pay or collect and remit sales and use taxes. Utah Code §59-12-107(1)(F)(I)(C)(II)(Bb).

"Affiliated group" is defined as one or more chains of corporations connected through stock ownership with a common parent corporation that are:

(1) at least 80% of the stock of each of the corporations, excluding the common parent corporation, is owned by one or more of the other corporations in the group; and
(2) the common parent directly owns at least 80% of the stock of at least one of the corporations in the group.

Utah Code § 59-7-101(2)(a).

In addition, "affiliated group" includes a corporation that is qualified to do business, but is not otherwise doing business in the state. Utah Code § 59-12-107(1)(e)(i))A).

"Common ownership" is defined as direct or indirect control or ownership of more than 50% of the outstanding voting stock of:

(1) a parent-subsidiary controlled group as defined under IRC Sec. 1563, except that 50% shall be substituted for 80%;

(2) a brother-sister controlled group as defined under IRC Sec. 1563, except that 50% shall be substituted for 80%; or

(3) three or more corporations each of which is a member of an affiliated group of corporations, as defined above, and one of which is

(a) a common parent corporation included in a group of corporations in which 80% of the stock of each corporation is owned by one or more of the other corporations; and
(b) included in a group of corporations where the common parent directly owns at least 80% of the stock of at least one of the corporations in the group.

Utah Code § 59-7-101(7)

Utah law provides a related seller exception to the requirement to register and collect Utah sales and use tax described above. A "related seller" is not required to register to collect and remit Utah sales or use tax if the seller (to which the related seller is related) does not engage in any of the following activities on behalf of the related seller:

(1) advertising;
(2) marketing:
(3) sales; or
(4) other services.

Utah Code § 59-12-107(1)(f)(ii)(B).

In addition, the seller (to which the related party is related) may not accept returns of the related seller's tangible personal property unless it accepts returns of items sold by others on the same terms as offered to the related seller. Utah Code § 59-12-107(1)(f)(ii)(C).

b. Tradeshows

While the aforementioned provisions set forth the statutory standard, the Utah State Tax Commission ("Commission") has consistently held that a physical presence in the state for certain purposes will not create a sales and use tax registration and collection requirement. For example, the Commission has indicated that it is their policy not to consider participants who are in the state for less than two weeks to attend a trade show to create a sales and use tax registration and collection requirement unless the participants have some other nexus creating contact with Utah or their trade show presence in Utah is regular or systematic. Advisory Opinion 98-021, Utah State Tax Commission, March 20, 1998.

B. Income Tax

1. Filing Requirement

Utah tax law imposes an income tax on all taxpayers doing business in Utah.

Utah Code § 59-7-104. "Doing business" is defined as any transaction in the course of its business by a domestic or foreign corporation qualified to do or doing intrastate business. Utah Code §59-7-101(10)(a). Doing business includes the right to do business through incorporation or qualification; the owning, renting, or leasing of real or personal property within the state; and the participation in joint ventures, working agreements and operating agreements when the performance of those ventures and agreements takes place in the state. Utah Code § 59-7-101. Utah regulations also provide further guidance on the types of activities that constitute doing business, including, but no limited to making delivery from stocks of goods in the state, performing the necessary duties to fulfill contracts or subcontracts in the state and deriving income from revenue producing properties located in the state or moving through Utah or from services performed by personnel in the state. Utah Adm. Code Rule 865-6F-6.

The Commission has also indicated, as described above, that it is their policy not to consider participants who are in the state for less than two weeks for purposes of attending a trade show in Utah to have income tax nexus in the state. Advisory Opinion 98-021, Utah State Tax Commission, March 20, 1998.

IV. Legal Analysis of Questions Presented

A. Sales Tax

1. Entertainment is Not Required to register to collect and Remit Utah Sales and Use Tax

Entertainment is not required to register to collect and remit Utah sales and use tax because it would not meet the statutory requirements to be considered doing business in Utah. Entertainment will not maintain an office, distribution house, sales, house, warehouse, service enterprise or place of business in Utah. Entertainment's only presence in Utah would be to attend FESTIVAL for 10 days in January 2009 and each year thereafter. Entertainment's presence in Utah at FESTIVAL would be limited to establishing and furthering client relationships, observing industry trends and businesses, and attending film screenings and events. In addition, entertainment may also post reports of the events on their website. These "blogs" would be prepared and posted during the event. Entertainment's website and servers are operated and maintained outside Utah. They would not maintain a stock of goods in the state, not solicit orders while in the state. Any contracts for business services and the provision of any service would be conducted outside Utah. Thus, Entertainment does not meet any of the statutory requirements for registration and collection of Utah sales and use tax and would not have sales and use tax registration requirement in the state.

Utah's treatment of participants at trade shows provides further support for the conclusion that Entertainment does not have a Utah sales and use tax registration requirement. The Commission has ruled that attendance at a trade show in Utah for less than two weeks, without other regular presence in the state, will not create a Utah sales and use tax registration and collection requirement. Advisory Opinion 98-021, Utah State Tax Commission, March 20, 1998. Entertainment's presence at FESTIVAL is similar to participation at a trade show. Film and

entertainment industry persons attend FESTIVAL for the purpose of seeing new films and interacting and building relationships, similar to the way businesses attend trade shows to review new products and meet vendors. Thus, Entertainment's presence in Utah for the purpose of attending FESTIVAL for 10 days should be afforded the same treatment as attending a trade show and should not lead to a Utah sales and use tax registration and collection requirement.

2. Retailers Do Not Have a Sales and Use Tax Registration or Collection Requirement in Utah Based on Utah's Statutory Provisions.

Retailers would not be considered "related sellers' requiring registration and collection of Utah sales or use tax based on Entertainment's presence in the state. Retailers and Entertainment are related entities and therefore satisfy the definition of an "affiliated group". Both Entertainment and Retailers share a greater than 80% stock ownership by a common parent. However, in order to be considered "related sellers", the affiliated or commonly owned entity must have a sales/use tax registration and collection requirement in Utah. As discussed above, Entertainment does not have a sales and use tax registration requirement in Utah therefore, Retailers would not be considered "related sellers" requiring a sales and use tax registration.

In addition, Retailers would not be subject to Utah's requirement to register and collect Utah sales and use tax because they do not satisfy Utah's statutory doing business standard. Retailers do not maintain an office, distribution house, sales house, warehouse, service enterprise or place of business in Utah. In addition, Retailers do not maintain a stock of goods in the state, regularly solicit orders in the state other than by the Internet, regularly engage in the delivery of property in the state by other than common carrier or regularly engage in an activity related to the leasing or servicing of property located in the state. Thus, Retailers would not be required to register to collect and remit Utah sales and use tax.

B. Income Tax

1. Entertainment Does Not Have a Utah Corporate Income Tax Filing Requirement Based on Utah Statutory Provisions

Entertainment does not have a corporate income tax filing requirement in Utah because it is not doing business in Utah. In order to be considered "doing business" for Utah corporate income tax purposes, Entertainment must be incorporated or qualified in the state; own, rent, or lease real or personal property within the state; participate in joint ventures, working agreements and operating agreements in the performance of those ventures and agreements takes place in the state; delivering stock of goods in the state or deriving revenue from services performed by personnel in the state. Entertainment is not qualified or incorporated in Utah nor would it own, rent, or lease any real of personal property in Utah. In addition, Entertainment would not participate in any join ventures or agreements that take place in Utah. Entertainment would not sell tangible property maintained or delivered in the state and it would not have employees that are performing services in the state. Entertainment's presence in Utah would be limited to attendance at FESTIVAL of 10 days for the purpose of networking with industry professionals and building relationships – similar to attendance at a tradeshow which the Commission has indicated would not create corporate income tax nexus. Entertainment's business in located

outside of Utah and all of the services it provides are performed outside of Utah. Therefore, Entertainment would not have a corporate income tax filing requiring in Utah.

V. Conclusions

Taxpayer seeks confirmation of the Commissioner's agreement with the following conclusions, which result from application of Utah's statutory and judicial guidance.

1. Because Entertainment would not maintain a place of business in Utah and it would not be considered to be doing business in Utah, it would not be considered a seller and it would not be required to register to collect or remit Utah sales and tax.

2. Because Retailers affiliate, Entertainment, does not have Utah sales and use tax registration and collection requirement, Retailers should not be considered "related sellers' and therefore would not have Utah sales and use tax registration and collection requirement. In addition, Retailers would not maintain a place of business in Utah and they would not be considered to be doing business in Utah, thus they would not be considered sellers required to register to collect or remit Utah sales and tax.

3. Because Entertainment is not doing business in Utah for corporate income tax purposes, it does not have a corporate income tax filing requirement in Utah.

In advance of the issuance of a response to this request for a ruling, we respectfully request that the Commission contact us to discuss any facts or questions that may potentially result in an adverse ruling.

Please feel free to contact NAME PHONE or 2ND NAME 2ND PHONE if you have any questions.

Very truly yours

NAME NAME

cc: Mr. Bruce Johnson, Commissioner, Utah State Tax Commission

RESPONSE LETTER

May 4, 2009

FIRST NAME
SECOND NAME
COMPANY
ADDRESS

Sent via e-mail
Original to follow in U.S. Mail

Re: Private Letter Ruling Request—Sales Nexus and Corporate Franchise Tax Nexus Analysis for Out-of-State Company Attending 10-day Festival in Utah

Dear 1ST NAME AND SECOND NAME:

You have requested a ruling as to whether a company ("Entertainment") that will send some of its employees to the FESTIVAL ("Festival") will cause Entertainment and other affiliates ("Retailers") to acquire nexus within the State of Utah.

I. Facts

Entertainment is an out-of-state corporation that is part of an affiliated group of companies. Entertainment provides services that relate to movies and television, including access to industry information and advertising. Entertainment maintains two divisions–one division provides remote/online registration services for filmmakers and film festivals, the other provides online entertainment industry reporting services. Entertainment does not sell tangible personal property.

Entertainment would like to have some of its employees attend all ten days of the Festival in January 2009 and in subsequent years. The employees' purposes would be to promote Entertainment's businesses, build relationships, network, and meet potential customers. The employees would also observe industry trends and businesses, attend film screenings and events, and may also prepare and post reports or "blogs" of the events on Entertainment's website. (Entertainment's website and servers are operated and maintained outside Utah.) The employees would not negotiate the sale or provision of any of Entertainment's services nor would they enter into any contacts for the production of such. All sales and performance of any services would occur outside of Utah. Entertainment does not have any tangible personal property, real property, or employees in Utah.

Entertainment is also affiliated with Retailers, Internet sellers of tangible property and digital goods to customers around the world, including customers in Utah. Retailers are located

outside of Utah. Retailers do not operate any retail stores, own or lease any property, or have employees in Utah, and they are not registered as retail merchants in Utah.

II. Issues

You asked the following three questions:

1. Would Entertainment be required to register to collect and remit Utah sales and use tax based on its proposed annual presence at the Festival?

2. Would Retailers be required to register to collect and remit Utah sales and use tax based on the proposed presence of Entertainment in the state to attend the Festival?

3. Would Entertainment be required to file a Utah corporate income tax return based on its proposed annual presence at the Festival?

III. Applicable Law

The applicable law for Utah sales tax and Utah corporate franchise tax is discussed below.

A. Sales Tax

Under Utah Code Ann. § 59-12-107, Utah imposes a sales and use tax on sellers meeting certain statutory requirements. Utah Code Ann. § 59-12-102(100) (effective Jan. 1, 2009) defines "seller" as "a person that makes a sale, lease, or rental of: (a) tangible personal property; (b) a product transferred electronically; or (c) a service." Utah Code Ann. § 59-12-107(1)(a) (effective Jan. 1, 2009)[1] states:

> (1)(a) Except as provided in Subsection (1)(d) . . ., each seller shall pay or collect and remit the sales and use taxes imposed by this chapter if within this state the seller:
> (i) has or utilizes: (A) an office; (B) a distribution house; (C) a sales house; (D) a warehouse; (E) a service enterprise; or (F) a place of business similar to Subsections (1)(a)(i)(A) through (E);
> (ii) maintains a stock of goods;
> (iii) regularly solicits orders, regardless of whether or not the orders are accepted in the state, unless the seller's only activity in the state is: (A) advertising; or (B) solicitation by: (I) direct mail; (II) electronic mail; (III) the Internet; (IV) telecommunications service; or (V) a means similar to Subsection (1)(a)(iii)(A) or (B);
> (iv) regularly engages in the delivery of property in the state other than by: (A) common carrier; or (B) United States mail; or

[1] Section 59-12-107(1)(a) contains the following exceptions that were not quoted because they do not apply: § 59-12-107.1 (re: direct payment permits), § 59-12-123 (re: direct mail), and § 59-12-107(1)(e) (re: property at printer's facility).

(v) regularly engages in an activity directly related to the leasing or servicing of property located within the state.

Utah Code Ann. § 59-12-107(1)(d) (effective Jan. 1, 2009) states:

(d) A person shall pay a use tax imposed by this chapter on a transaction described in Subsection 59-12-103(1) if:
(i) the seller did not collect a tax imposed by this chapter on the transaction; and
(ii) the person: (A) stores the tangible personal property or product transferred electronically in the state; (B) uses the tangible personal property or product transferred electronically in the state; or (C) consumes the tangible personal property or product transferred electronically in the state.

Utah Code Ann. § 59-12-102(69) (effective Jan. 1, 2009) defines a "person" to include "any individual, firm, partnership, . . . corporation, [etc.]" Utah Code Ann. § 59-12-103(1) (effective Jan. 1, 2009) enumerates transactions that are subject to Utah sales and use tax. Included in that list is subsection (1)(l), which provides that sales and use tax is imposed on:

(l) amounts paid or charged for tangible personal property if within this state the tangible personal property is: (i) stored; (ii) used; or (iii) consumed . . .

In Private Letter Ruling ("PLR") 98-021, the Commission addressed a situation involving an out-of-state seller that would have a temporary trade booth in the state for less than two weeks. At the booth, the seller would promote its products, give away catalogs, have a temporary stock of goods for display only, and directly respond to customers that had a complaint. The seller would not sell goods, accept deposits, take orders, approve or accept orders, or service, repair or install equipment. The Commission stated:

It is the policy of the Commission not to apply sales and use tax nexus to trade show participants who are in the state for less than two weeks, unless they have some other contact with Utah that results in nexus or their trade show presence in Utah is regular or systematic. Please be advised that if you participate in various Utah trade shows in a manner that would suggest regular or systematic presence, then sales and use tax nexus with Utah may then exist.

Your participation in a trade show for less than two weeks does not create sales and use tax nexus. Nevertheless, you should apply for a Utah temporary sales tax license so you may report any sales made while in Utah at the trade show. While you indicate that no traditional sales will be made, Utah law recognizes your planned giveaway of catalogues or other promotional items as a taxable event. Utah Admin. Code R865-19S-68 provides that donors of tangible personal property, such as catalogues, are regarded as the consumers of that donated property for use tax purposes. Accordingly, the sale of the catalogues to you is a taxable event. If you have not already paid sales tax on the items you give away,

then you will need to calculate a use tax based on the price you paid for those items and remit that tax to Utah.

The Commission found that the company was not required to collect and remit sales tax but the company would be required to remit use tax if it purchased tangible personal property (catalogs) tax-free and then gave them away in Utah. This conclusion is consistent with § 59-12-103(1)(l), under which tax is imposed on "amounts paid . . . for tangible personal property if within [Utah] the tangible personal property is . . . used . . . or . . . consumed."

Under Utah law an out-of-state seller may have Utah nexus based on its relationship to another seller with Utah nexus. A seller that does not by itself have a registration and collection requirement may be required to register and collect Utah sales and use tax if it is related to another seller that has a registration and collection requirement (a nexus seller) and the nexus seller engages in certain activities on behalf of the first seller. Publication 37, titled "Business Activity and Nexus in Utah" and revised 5/04, briefly explains this requirement as follows:

> A "related seller" is a seller related to a nexus seller, but by itself does not have sufficient activity in Utah to establish nexus, and is therefore not required to collect and remit Utah sales and use tax. However, a related seller must collect and remit sales and use tax if the entity it is related to (which has nexus) engages in advertising, marketing or sales activities on its behalf.
>
> To maintain the related seller's non-nexus status, the nexus seller must also accept the return of items from non-related entities.

See also Utah Code Ann. § 59-12-107(1)(f) (defining related seller under subsection (i)(C) and specifying the conditions that the seller must meet to retain its non-nexus status under subsection (ii)).

a. **B. Income Tax**

Utah tax law imposes an income tax on all corporations doing business in Utah. Utah Code Ann. § 59-7-104. Utah Code Ann. § 59-7-101(12) defines "doing business" as follows:

(a) "Doing business" includes any transaction in the course of its business by a domestic corporation, or by a foreign corporation qualified to do or doing intrastate business in this state.
(b) Except as provided in Subsection 59-7-102(2), "doing business" includes:
  (i) the right to do business through incorporation or qualification;
  (ii) the owning, renting, or leasing of real or personal property within this state; and
  (iii) the participation in joint ventures, working and operating agreements, the performance of which takes place in this state.

In Utah Admin. Code R865-6F-6 ("Rule 6"), Utah regulations also provide further guidance on the types of activities that constitute doing business. Rule 6 discusses protections that apply to some corporations selling tangible personal property to customers in the state. In particular, subsection C. of Rule 6 specifies that foreign corporations outside of the state are not taxable if: "1. they maintain no office nor stocks of goods in Utah, and 2. they engage in no other activities in Utah." Rule 6 closely relates to P.L. 86-272, as seen in subsection J. of Rule 6, which explains the protections of P.L. 86-272. Noteably, Rule 6 and P.L. 86-272 do not protect the sales of services. Rule 6.J.1. states:

> Only the solicitation to sell personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting licensing or other disposition of tangible personal property, or transactions involving intangibles such as franchises, patents, copyrights, trade marks, service marks and the like, or any other type of property are not protected activities under P. L. 86-272. ***The sale or delivery and the solicitation for the sale or delivery of any type of service that is not either (1) ancillary to solicitation, or (2) otherwise set forth as a protected activity below is also not protected under P.L. 86-272 or this rule.*** (Emphasis added.)

For sales of tangible personal property, solicitation alone does not create nexus. Rule 6.J.2. Subsection A.4. of Rule 6 defines solicitation as follows:

> "Solicitation" means:
> a) speech or conduct that explicitly or implicitly invites an order; and
> b) activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order.

Under subsection K. of Rule 6, activities of a de minimis level do not create nexus. Subsection A.2. defines de minimis activities as follows:

> "De minimis activities" means those activities that, when taken together, establish only a trivial connection with the taxing state. An activity conducted within Utah on a regular or systematic basis or pursuant to a company policy, whether or not in writing, shall not normally be considered trivial.

In PLR 98-021, the Commission also addressed whether a company that sold goods would have nexus for Corporate Franchise Tax purposes by having a trade show booth in the state for ten days. The Commission explained that Rule 6 applied, stating:

> Utah Admin. Code R865-6F-6 indicates which activities will subject an entity to nexus with Utah for purposes of its income tax. Subpart (J) of this rule recognizes Public Law 86-272, which restricts Utah from imposing an income tax on a corporation whose only activity within the state is the solicitation of sales for tangible personal property. Subpart (K) lists activities that will subject an entity to income tax nexus. Similarly, subpart (L) lists activities that will not subject an entity to income tax nexus.

The Commission applied Rule 6 to each of the company's activities and found that the activities at the trade fair, by themselves, were not enough to create income tax nexus.

Utah Code Ann. § 59-7-319 (effective Jan. 1, 2009), which was recently amended, provides when the receipt of services is considered to be in the state of Utah. Subsection (3) of § 59-7-319 states:

> (3) (a) Subject to Subsection (3)(b), a receipt from the performance of a service is considered to be in this state if the purchaser of the service receives a greater benefit of the service in this state than in any other state.
>
> (b) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may by rule prescribe the circumstances under which a purchaser of a service receives a greater benefit of the service in this state than in any other state.

IV. Application

The Commission addresses each of your three questions below. The first two are addressed under "Sales Tax" and the third is addressed under "Income Tax." Your questions deal with Utah nexus only.

b. **A. Sales Tax**

You have asked two questions about Utah sales tax nexus. Please note, your request does not ask for a determination about the taxability of Entertainment's services in general, nor have you provided enough detailed information to make such a determination. If Entertainment's services/products are not subject to Utah sales and use tax, then there would be no sales tax collection or reporting requirement and the question of sales tax nexus would be moot.

Question 1: Would Entertainment be required to register to collect and remit Utah sales and use tax based on its proposed annual presence at the Festival?

Entertainment would not be required to register to collect and remit Utah sales tax under § 59-12-107(1)(a) based on its presence at the Festival. Entertainment does not have an office, warehouse, etc. in Utah; it does not maintain a stock of goods in Utah; it does not *regularly* solicit orders in Utah by means other than advertising or solicitation by direct mail, email, Internet, telecommunications services, or similar means; it does not regularly deliver property into Utah by means other than common carrier or U.S. mail; and it does not engage in activities related to leasing or servicing property in Utah.

PLR 98-021 provides that attendance at a trade show in Utah for less than two weeks does not equate to "regularly soliciting orders regardless of whether or not the orders are accepted in the state . . ." The principles in PLR 98-021 for attendance of trade shows also apply to attendance of the Festival. Annual attendance of the ten-day Festival, alone, is not sufficiently "regular" and "systematic" to create nexus. Therefore, since your request states that

Entertainment has not satisfied any of the other listed criteria in § 59-12-107 and even though it appears Entertainment may solicit orders during the festival and attend the festival annually, its employees' attendance at the Festival would not invoke sales tax nexus.

However, if Entertainment participates in other Utah events, such participation would indicate a regular or systematic presence wherein Entertainment may be regularly soliciting orders, a condition found in § 59-12-107(1)(a)(iii). In PLR 98-021, the Commission warned the company with the trade booth: "Please be advised that should you participate in various Utah trade shows in a manner that would suggest regular or systematic presence, then sales and use tax nexus with Utah may then exist."

Furthermore, Entertainment might be required to pay Utah use tax under §§ 59-12-107(1)(d) and 59-12-103(1)(l) if it gives away promotional items at the Festival. In PLR 98-021 the Commission explained how this requirement would apply to the company with the trade show booth in Utah, giving away its catalogs:

> Utah law recognizes your planned giveaway of catalogues or other promotional items as a taxable event. Utah Admin. Code R865-19S-68 provides that donors of tangible personal property, such as catalogues, are regarded as the consumers of that donated property for use tax purposes. Accordingly, the sale of the catalogues to you is a taxable event. If you have not already paid sales tax on the items you give away, then you will need to calculate a use tax based on the price you paid for those items and remit that tax to Utah.

Likewise, Entertainment would be subject to Utah use tax if it gives away promotional materials on which it has not previously paid sales tax. S*ee also* § 59-12-103(1)(l) (imposing tax on property consumed in Utah) and § 59-21-107(1)(d) (requiring a person to remit tax if she had not previously paid tax on the purchase of the property). If Entertainment gives away items and is subject to use tax, then it must calculate a use tax based on the price it paid for those items and remit that tax to Utah.

By email, you asked two related, follow-up questions specifically about regular and systematic presence in the state and trade show attendance:

> *Is Utah's position that an out-of-state company's attendance at tradeshows in Utah does not create nexus based on the number of trade shows attended during the year or the number of days the out-of-state company spends in Utah? For example, if a company spends less than 2 weeks in Utah during the tax year, but during that time attends 5 trade shows – one trade for 2 days, another trade show for 5 days, another for 3 days, etc. – does this create nexus? Or, if a company spends 12 days at one trade show during the year does this create nexus?*

and

> *In order to understand whether Entertainment may be able to attend another trade show in Utah this year, would the Department be able to tell us whether the*

following tradeshow attendance scenarios would fall within the tradeshow exception in Utah:

a. Entertainment will attend 3 tradeshows during the year for a total of 13 days in the state?

b. Entertainment will attend 4 tradeshows during the year for a total of 10 days in the state?

c. Entertainment will attend 5 tradeshows during the year for a total of 13 days in the state?

Utah has not formally created a "tradeshow exception" and we have not used "tradeshow exception" as a term of art in the past. Rather, the issue is whether a company has a regular and systematic presence in Utah, which involves a fact-based analysis. There is not an established fixed number of days or trade shows in Utah to use in determining sales tax nexus. The number of trade shows and days is one factor to be considered in determining whether there is a regular and systematic presence. However even without any other presence, the greater number of trade shows and/or days, the greater the likelihood a company will establish Utah nexus for sales tax purposes. For the various scenarios above, it is likely that Entertainment would have a regular and systematic presence in Utah by attending the 10-day Festival plus three to five additional tradeshows within one year.

Question 2: Would Retailers be required to register to collect and remit Utah sales and use tax based on the proposed presence of Entertainment in the state to attend the Festival?

Retailers would not be required to register to collect and remit Utah sales and use tax based on the proposed presence of Entertainment in the state as you have described. You have represented that Retailers, by themselves, do not meet any of the conditions in § 59-12-107(1)(a). Based on § 59-12-107(1)(f), there are two reasons that Retailers are not related sellers with Entertainment. First, Entertainment does not have Utah sales tax nexus based on its activities while in Utah, as discussed previously, so Retailers cannot have nexus through Entertainment. Second, Entertainment is not engaging in advertising, marketing, or other sales activities on behalf of Retailers. Therefore, Retailers will retain its non-nexus status even if Entertainment's employees are in Utah annually for the Festival.

c. **B. Income Tax**

Question 3: Would Entertainment be required to file a Utah corporate income tax return based on its proposed annual presence at the Festival?

Entertainment would not be required to file a Utah corporate income tax return *based on* its proposed annual presence at the Festival. Under § 59-7-104, Utah imposes income tax on all corporations doing business in Utah. Under § 59-7-101(12)(a), "'[d]oing business' includes any transaction in the course of its business by . . . a foreign corporation . . . doing interstate business in this state." We note that, under subsection J.1.of Rule 6, companies selling services are not protected by Rule 6 or by P.L. 86-272. However, similar to our ruling in PLR 98-021, in this

situation, we find that Entertainment does not have nexus for sales tax or income tax purposes when its only connection with Utah is attendance of the Festival.

You have also asked several follow-up questions relating to this issue. These questions resulted from conversations between you and our staff. Some of the conversations and email exchanges resulted in statements that do not represent the Commission's official position. Therefore, the Commission will address what we understand to be your follow-up questions. Rather than answer them in order, we will group them in terms of relevance and subject matter. The first two questions were:

1. *I understand that Utah does recognize a de minimis exception for income tax purposes. My understanding was that the Department applies its trade show exception for both income and sales tax purposes. Is that correct?*

and

2. *Does Utah recognize a sales/use and income tax de minimis exception outside of the tradeshow exception? For example, if Entertainment (assuming it didn't go to FESTOVA;) wanted to come to Utah for 3-4 days during the year (maybe 3 separate trips) to visit a potential customer to discuss its services (services are provided from outside of Utah) would Utah consider this sort of presence in the state to be de minimis and not create sales/use or income tax nexus?*

As explained previously, for the attendance at a trade show and, in this case, for the annual attendance of the Festival, we find that the activities of the companies would not create nexus for sales or income tax purposes based on the facts specific to the situations presented. Utah has not recognized sales/use and income tax de minimis exceptions that specifically address your hypothetical situations. Nor would we make a finding either way without additional information.

3. *Is Utah extending the protections of P.L. 86-272 to services? Or is Utah applying the P.L. 86-272 de minimis standard as Utah's de minimis standard (even for non-Public Law 86-272 companies)?*

In this case we have found that Entertainment's annual attendance at the Festival, with no other Utah connection, is a situation similar to that of PLR 98-021, even though Entertainment is a seller of services. However, we emphasize that Utah is not extending the protections of P.L. 86-272 to services nor is Utah applying the P.L. 86-272 de minimis standard as Utah's de minimis standard for companies providing services. Utah and federal law does not protect the sale of services. Rule 6.J.1.

However, if a seller of services is targeting the Utah market and making sales of services into Utah beyond a de minimis level, economic presence would be created. This presence would

be sufficient to entitle the State of Utah to impose its corporate franchise or income tax on such corporation.

If Entertainment does more in Utah than merely attend the Festival, such as provide services in Utah, then Entertainment may have a Utah filing requirement with respect to the additional activities. For sourcing of services, § 59-7-319(3)(a) (effective Jan. 1, 2009) states that "receipt from the performance of a service is considered to be in [Utah] if the purchaser of the service receives a greater benefit of the service in [Utah] than in any other state."

4. You also inquired whether the standard in § 59-7-319(3) is based on having an economic presence in Utah.

The language of § 59-7-319(3)(a) only addresses the sourcing of the sale of services and does not specifically address nexus. However, if a company sells services to a Utah customer, it will likely create nexus, as the greater benefit of the service is likely to be in Utah. In this case, if Entertainment provides services in which the purchaser receives the greater benefit in Utah, it will be considered to be performing services in Utah. Accordingly, by providing services in Utah, Entertainment will have a filing requirement in Utah.

5. With respect to § 59-7-319(3), you further asked if Utah considers the sale of digital goods to be the sale of tangible personal property or the sale of a service.

For income tax purposes, Utah would consider the sale of digital goods via the Internet to be the sale of tangible personal property, not the sale of a service.[2] Such goods might either be purchased in a package or downloaded and the form of delivery should not make a difference as to their classification.

6. Finally, with respect to § 59-7-319(3), you ask us to explain what is meant by "greater benefit of the services."

The "greater benefit of the service" is based on where your customer receives the benefit of the service that you sell. For example, if you provide your customer with the use of custom-written computer software for payroll preparation and your customer uses that software in two states—90% in the first state and 10% in the second, under § 59-7-319(3)(a), your customer's receipt of your service is considered to be in the first state.

In addition to addressing your specific questions and follow-up questions, we will address an additional ancillary question. We had commented in our initial written and verbal

[2] Therefore, Retailers, which are Internet sellers of tangible property and digital goods, would not be affected by § 59-7-319(3), which addresses the sourcing of services.

In making this determination about the treatment of digital goods, the Tax Commission is analogizing to state precedent in the sales tax area. This precedent is not interpreting the federal law. If the Utah Supreme Court, other state courts, or the federal courts were to interpret "digital goods" to be outside the definition of "tangible personal property" for purposes of P.L. 86-272, our treatment could change.

discussions that if Entertainment's activities were to create Utah nexus and if Entertainment performed certain services in Utah on behalf of Retailers, then Retailers would have Utah nexus as well. Utah follows the "Finnigan" rule. *See* Utah Admin. Code R865-6F-24 (discussing "activities of any member of a unitary business"). One member of a unitary group can create nexus for another if either member has nexus. If Entertainment's employees at the Festival were to make any sales, approve any orders, or otherwise perform activities on behalf of Retailers and P.L. 86-272 did not protect such activities, then nexus would be created for Retailers.

During these conversations, you asked about possible inclusions in the sales factor numerator; in particular, you asked which factors would be affected by Utah's application of the Finnigan rule. You also emailed the following comments and question:

> *We understand that unitary groups must file combined returns in Utah and the tax base (taxable income) of the unitary group will include the taxable income of all entities in the unitary group. We also understand that Utah follows a Finnigan approach for the sourcing of sales in a unitary group. Under Finnigan if one member of the unitary group has nexus in Utah, this may result in sales of other members of the unitary group without nexus being included in the sales factor numerator of the sales factor apportionment formula. Is this concept of calculating unitary taxable income what is meant by the statement "One member of a unitary group can create nexus for another if either member has nexus?"*

Utah Admin. Code R865-6F-24 ("Rule 24") essentially states that the unitary group is viewed as one person for purposes of applying the provisions of P.L. 86-272. While other provisions of Rule 24 only address the sales factor, any Utah property and Utah payroll of any company within the unitary group is also includable in the combined Utah numerators of such factors. However, usually in the case of a corporation within a unitary group that makes sales into Utah but does not have nexus by itself, the amounts of payroll and property, if any, are minimal and would not significantly increase the combined Utah apportionment fraction. These payroll and property amounts might include items such as company automobiles given to salesmen, office furniture and equipment provided to salesmen in an in-home office, and the salaries of in-state salesmen. It is logical to include Utah property and payroll factors of companies filing a combined report because such items could not be assigned to any other state's numerator, and therefore inclusion would not create double taxation, while exclusion would generally create some 'nowhere income.' Therefore, there are inclusions in the sales factor numerator, but there are also the inclusions of Utah property and payroll of all companies in a unitary group where at least one of such companies has exceeded the limitations of Public Law 86-272.

V. Conclusion

To summarize, the Commission finds:

1. Entertainment would not be required to register to collect and remit Utah sales tax under § 59-12-107(1)(a) based on its presence at the Festival. However, if Entertainment participates in other Utah trade shows, such participation could create a regular or

systematic presence wherein Entertainment may be required to collect and remit tax. Furthermore, Entertainment might be required to pay Utah use tax under §§ 59-12-107(1)(d) and 59-12-103(1)(l) if it gives away promotional items at the Festival.

2. Retailers would not be required to register to collect and remit Utah sales and use tax based on the proposed presence of Entertainment in the state to attend the Festival even though Entertainment and Retailers form an affiliated group.

3. Entertainment would not be required to file a Utah corporate income tax return based on its proposed annual presence at the Festival. However, if Entertainment's activities are more extensive than proposed, then nexus could result.

Our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, if you have additional facts that may be relevant, or if you have any other questions, please contact us.

For the Commission,

Marc B. Johnson
Commissioner

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