

FINAL PRIVATE LETTER RULING

REQUEST LETTER

[For this redacted copy, the footnote numbering of the request letter has been adjusted.]

16-005

September 2, 2016

Aimee Nielson-Larios
Office of the Commission
Utah State Tax Commission
210 N 1950 W
Salt Lake City UT 84134

Re: Private Letter Ruling Request

Dear Ms. Nielson-Larios:

COMPANY (the “Company”), an affiliate of COMPANY 2 [WORDS REMOVED], pursuant to Utah Code Ann. § 59-1-210 and R861-1A-34, respectfully submits to the Utah State Tax Commission (“Commission”) this Private Letter Ruling request regarding the applicability of Utah’s sales and use tax to the membership service more fully described below. These issues are not under audit or appeal with the Commission.

I. FACTS

Company offers a membership program known as MEMBERSHIP [WORDS REMOVED].¹ The public may sign up for a free [WORDS REMOVED] trial, monthly paid, or annual paid MEMBERSHIP to receive, during the membership period, the intangible right to access certain benefits associated with [WORDS REMOVED] WEBSITE (“Website”). Participants in the membership program are referred to as “MEMBERS” or “Members;” MEMBERS are required to agree to the MEMBERSHIP Terms & Conditions to activate their MEMBERSHIP. Please see Exhibit A. The current suite of MEMBERSHIP benefits that Members have the right to access is outlined below:

- [WORDS REMOVED]
- VIDEOS BENEFIT – MEMBERS may view movies and television shows, designated as “VIDEOS BENEFIT,” an unlimited number of times at no additional cost during the course of their MEMBERSHIP. VIDEOS BENEFIT can be viewed on the MEMBER’s television, computer, ELECTRONIC DEVICE, CERTAIN ELECTRONIC DEVICE, or other compatible device.² All MEMBERS are permitted to stream VIDEOS BENEFIT;

¹ [WORDS REMOVED]

² [WORDS REMOVED]

MEMBERS with CERTAIN ELECTRONIC DEVICES can also download³ VIDEOS BENEFIT [WORDS REMOVED]. If a MEMBER cancels their Membership, or the Membership expires after a movie or television show is downloaded, the MEMBER will lose access to the downloaded movie or televisions show. In compliance with our content agreements, there are restrictions on how much time MEMBERS are allotted to access downloaded VIDEOS BENEFIT without an Internet connection.⁴

- E-BOOK BENEFIT – The E-BOOK BENEFIT allows MEMBERS who own CERTAIN ELECTRONIC DEVICES to choose from thousands of electronic books (“e-books”) to borrow for free, as frequently [WORDS REMOVED], with no due dates.⁵ If a MEMBER cancels their Membership, or the Membership expires after a book is borrowed, the MEMBER will lose access to the borrowed book.⁶
- E-BOOK BENEFIT 2 – The E-BOOK BENEFIT 2 feature allows MEMBERS who own CERTAIN ELECTRONIC DEVICES to receive one free e-book [WORDS REMOVED]. The selected e-book becomes a permanent part of the MEMBER’s LIBRARY. [WORDS REMOVED]
- [WORDS REMOVED]
- MUSIC BENEFIT – MUSIC BENEFIT provides MEMBERS with unlimited, ad-free access to [WORDS REMOVED] songs and albums. MUSIC BENEFIT may be played on the MEMBER’s computer, CERTAIN ELECTRONIC DEVICE, or other compatible device.⁷ MUSIC BENEFIT may be streamed or downloaded for listening without an Internet connection. Similar to other digital benefits outlined herein, if a MEMBER allows their Membership to lapse or expire, they will lose access to the downloaded MUSIC BENEFIT titles.⁸
- [WORDS REMOVED]

While the Company does not directly provide the membership benefits, it is contractually obligated to ensure the benefits *are* provided to MEMBERS. To meet its contractual obligations, Company pays its affiliates to provide the underlying service related to each benefit. [WORDS REMOVED]

II. ISSUES

- A. Is Company’s sale of MEMBERSHIPS to Utah customers subject to sales and use tax?
- B. Is Company’s provision of a free, [WORDS REMOVED] trial MEMBERSHIP to Utah customers subject to sales and use tax?

³ The downloaded VIDEOS may be viewed without an Internet connection.

⁴ [WORDS REMOVED]

⁵ [WORDS REMOVED]

⁶ [WORDS REMOVED]

⁷ [WORDS REMOVED]

⁸ [WORDS REMOVED]

III. LAW

A. Sales and Use Tax

1. Sales Tax

Utah imposes sales tax on “retail sales of tangible personal property made within the state.”⁹ The application of Utah sales tax to retail sales of tangible personal property, digital products, and enumerated taxable services is described in more detail below.

a. Tangible Personal Property

Utah imposes sales tax on the retail sale of tangible personal property.¹⁰ Tangible personal property is personal property which may be “seen; weighed; measured; felt; or touched; or is in any manner perceptible to the senses.”¹¹

b. Digital Products

Utah imposes sales tax on the retail sale of products transferred electronically.¹² “Tangible personal property does not include a product that is transferred electronically.”¹³ “‘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.”¹⁴ Utah does not treat subscriptions to products “transferred electronically” differently than a non-subscription purchase of such product.¹⁵

c. Services

Utah imposes sales tax on specifically enumerated services.¹⁶ The enumerated services include accommodations; admissions to amusement places, athletic entertainment, and recreational events; laundry, cleaning, and providing storage spaces; repairs of tangible personal property; and telecommunications services.¹⁷

1. Membership

Utah imposes sales tax on admission or user fees.¹⁸ Utah imposes sales tax on discounted memberships.¹⁹ In a 1994 Bulletin, the Commission addressed “memberships allowing the card

⁹ Utah Code Ann. § 59-12-103(1)(a).

¹⁰ *Id.*

¹¹ Utah Code Ann. § 59-12-102(124)(a).

¹² Utah Code Ann. § 59-12-103(1)(m).

¹³ Utah Code Ann. § 59-12-102(124)(d).

¹⁴ Utah Code Ann. § 59-12-102(94)(a).

¹⁵ Utah Code Ann. § 59-12-103(1)(m).

¹⁶ Utah Admin. R. R865-19S-2

¹⁷ Utah Code Ann. § 59-12-103(1).

¹⁸ Utah Code Ann. § 59-12-103(1)(f).

¹⁹ Utah Tax Commission Bulletin No. 33-94.

holder to enter a facility and make purchases of merchandise at the stated price without any additional markup[] and video memberships that allow members to rent videos at half price.”²⁰ The Commission concluded in the 1994 Bulletin that “amounts paid for memberships are subject to sales tax if the membership entitles the purchaser to discounted or free merchandise or services of a type subject to the sales tax.”²¹ However, membership fees to discount clubs/programs are not subject to tax when sold by a third party who is not the vendor for the goods or services provided.²² In determining whether a transaction is taxable, the “true object” of the transaction must be determined.²³ “Therefore, if the true object of the transaction is a nontaxable intangible benefit or service, no tax is due on the price paid for that transaction....”²⁴

[WORDS REMOVED]

e. Bundled Transactions

As a member of the Streamlined Sales and Use Tax Agreement, Utah has adopted the SSUTA definition of “bundled transaction.”²⁵ Accordingly, a “bundled transaction” means “the retail sale of two or more products when the products are otherwise distinct and identifiable, and the products are sold for one nonitemized price.”²⁶ A bundled transaction does not include the sale of any products in which the sales price varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction. If a sale meets the definition of a bundled transaction, and any of the distinct and identifiable products are taxable, the entire sales price is taxable.²⁷

2. Use Tax

Utah imposes a complementary use tax on use of tangible personal property and enumerated services in Utah.²⁸

IV. ANALYSIS

A. Company’s Sale of the MEMBERSHIP to Utah Customers is Not Subject to Sales and Use Tax

Sales of MEMBERSHIPS to Utah customers are not subject to sales and use tax because they are not retail sales. More specifically, the sale of a MEMBERSHIP is not any of the following: (1) taxable tangible personal property; (2) a taxable digital product; (3) a retail taxable service, including a taxable membership; or (4) a bundled transaction. Rather, the

²⁰ *Id.*

²¹ *Id.*

²² Utah Tax Advisory Opinion 96178 (12/6/96).

²³ *Eaton Kenway, Inc v. Utah State Tax Comm.*, 906 P. 2d 882 (Utah, 1995).

²⁴ Utah Private Letter Rulings, No. 06-025, 02/28/2007.

²⁵ Utah Code Ann. § 59-12-102(18).

²⁶ *Id.*

²⁷ Utah Code Ann. § 59-12-103(2)(d)(iii).

²⁸ Utah Code Ann. § 59-12-103(1)(l) and (m).

MEMBERSHIP fee is for a nontaxable transfer of an intangible right to access certain benefits, the use of which is unknown to Company and customer at the time of purchase.

1. The MEMBERSHIP is Not Taxable Tangible Personal Property

Sales of MEMBERSHIPS are not subject to sales and use tax when sold to Utah customers because the MEMBERSHIP is not tangible personal property. Tangible personal property is personal property which may be seen, weighed, measured, felt or touched, or is in any manner perceptible to the senses.²⁹ Instead, the MEMBERSHIP is properly characterized as an intangible right to access certain benefits. Accordingly, the sale of a MEMBERSHIP is not subject to Utah sales and use tax as tangible personal property.

2. The MEMBERSHIP is Not a Taxable Digital Product

Sales of MEMBERSHIPS are not subject to Utah sales and use tax because the Membership is not a digital product.³⁰ Properly characterized, the MEMBERSHIP is an intangible right to access certain benefits. These benefits include the ability to access certain digital products, including electronically delivered movies, music, and books (some of which may be downloaded and some of which may be streamed or accessed). Through sales of the MEMBERSHIP, however, Company is not specifically contracting for the sale of any individual component, including the digital components, but rather Company is selling the entire suite of membership benefits, with no expectation or demand on how each individual Member will use the benefits. In other words, Company does not know whether a given MEMBER will utilize any benefit, every benefit, one benefit, or a combination thereof during the membership term. Accordingly, MEMBERSHIP sales are not properly subject to Utah sales and use tax as digital products.³¹ This is true whether the customer is purchasing the annual or monthly MEMBERSHIP. The membership is not the digital products, but actually the right to access certain benefits.

3. The MEMBERSHIP is Not a Taxable Service

MEMBERSHIPS are not subject to sales and use tax because it is not an enumerated service. Utah imposes sales tax on enumerated services.³² The MEMBERSHIP is not any of the enumerated services. The MEMBERSHIP is merely an intangible right to access certain benefits during the membership term. Thus, the MEMBERSHIP is not a taxable service subject to Utah sales and use tax.

a. The MEMBERSHIP is Not a Taxable Membership

The MEMBERSHIP does not provide admission or use to clubs or for the use of amusement, entertainment, athletic, or recreational facilities, such as theaters, museums, fairs,

²⁹ Utah Code Ann. § 59-12-102(124)(a).

³⁰ Utah Code Ann. § 59-12-102.

³¹ Utah Code Ann. § 59-12-103(1)(m).

³² Utah Admin. R. R865-19S-2

dances, billiard parlors, batting cages, tennis courts, horseback rides, etc.³³ Therefore, MEMBERSHIPS are not taxable as admission or user fees.

The MEMBERSHIP is not subject to Utah sales and use tax because the Company is not the vendor for the goods or services provided once the customer is a MEMBER.³⁴ Just like the taxpayers in the 1996 Tax Advisory and 2007 Private Letter Rulings, Company is not the provider of any goods or services. Rather customers are receiving an intangible right to access certain benefits which are provided by other parties. Many of the goods and services later accessed by customers are free. Any later purchases of goods or services are separate transactions from the purchase of the MEMBERSHIP. Thus, the true object of the MEMBERSHIP fee is the intangible right to access certain benefits, not the benefits provided by other parties. The purchase price of later transactions for tangible personal property or services are separate and distinct from the purchase of the MEMBERSHIP. Therefore, the MEMBERSHIP is not a taxable membership.

[WORDS REMOVED]

4. Sales of MEMBERSHIPS are not Bundled Transactions

The MEMBERSHIP does not constitute a bundled transaction that would be subject to Utah sales and use tax because the MEMBER is only purchasing the intangible right to access certain benefits and nothing more. Generally, Utah imposes sales tax on the entire purchase price when a retailer bundles distinct and identifiable taxable and exempt items and sells the bundle for one price.³⁵

The MEMBERSHIP Terms and Conditions (provided herein as Exhibit A) explicitly state that customers are not purchasing a bundle. As previously described, the MEMBERSHIP provides MEMBERS access to the following suite of intangible benefits: [WORDS REMOVED]; (2) the ability to download and stream digital content (e.g., VIDEOS BENEFIT and MUSIC BENEFIT); [AND] (3) access to borrowed or downloaded e-book offerings[.] [WORDS REMOVED] An individual MEMBER's use of the right to these benefits is entirely discretionary, however; Company does not know whether a given Member will utilize any benefit, every benefit, or a combination thereof. One MEMBER, for example, may purchase several items on the Website [WORDS REMOVED], while another MEMBER may only make one such purchase. A similar comparison may be drawn for the streaming and downloaded VIDEOS BENEFIT, MUSIC BENEFIT, [AND] e-book benefits[.] [WORDS REMOVED] It is, thus, virtually impossible for Company to allocate the MEMBERSHIP fee to each benefit given the uncertain frequency with which an individual MEMBER will utilize a given benefit. MEMBERSHIPS sales are not the sale of taxable and exempt items and services. Thus, MEMBERSHIPS are not bundled transactions subject to Utah sales and use tax.

Even if the MEMBERSHIP is considered a bundled transaction under Utah law, the MEMBERSHIP fee is paid in advance of the purchase of tangible personal property to be

³³ Utah Code Ann. §59-12-103(1)(f); Utah Admin. R. §R865-19S-33.

³⁴ Utah Tax Advisory Opinion 96178 (12/6//96) and Utah Private Letter Rulings, No. 06-025, 02/28/2007.

³⁵ Utah Code Ann. § 59-12-103(2)(d)(iii). See also Utah Code Ann. § 59-12-102(18).

[WORDS REMOVED], digital products to be accessed, and services to be provided. At the time a Member signs up for MEMBERSHIP, neither Company nor Member knows how, when, and at what frequency individual benefits will be utilized during the membership term. Thus, there is no reasonable method to allocate the supposed use of the intangible benefits included with the MEMBERSHIP. Regarding the customer's exercise of the Membership benefits, Utah customers will be assessed, and Company's affiliate will collect, sales and use tax on the purchase of tangible personal property sold on WEBSITE. [WORDS REMOVED] Thus, the true object of a MEMBERSHIP, the purchase of an intangible right to access certain benefits, is not subject to Utah sales and use tax.

Based on the foregoing analysis, the sale of the MEMBERSHIP to Utah customers is not subject to sales and use tax because: (1) it is not the sale of taxable tangible personal property; (2) it is not the sale of a taxable digital product; (3) it is not the sale of a taxable service, including a taxable membership fee; and (4) it is not the sale of a taxable bundled transaction. The Membership is the sale of the intangible right to access certain benefits and nothing more.

B. Company's Provision of a [WORDS REMOVED] Trial MEMBERSHIP to Utah Customers is Not Subject to Sales and Use Tax

The provision of a [WORDS REMOVED] trial MEMBERSHIP to Utah customers is not taxable because of the following: (1) there is no charge to customers for the MEMBERSHIP; and (2) the MEMBERSHIP is not a taxable service under Utah law. Utah has a complementary use tax on use of tangible personal property and enumerated services in Utah.³⁶ The purchase price of the trial membership is \$0 - it is provided free of charge. It is merely a discount – providing intangible rights to future MEMBERSHIP benefits. Furthermore, as set forth above, the MEMBERSHIP is not a taxable membership under Utah law and guidance. As a result, the [WORDS REMOVED] trial MEMBERSHIP provided to Utah customers at no charge is not subject to sales or use tax.

V. CONCLUSION

Company respectfully requests confirmation from the Commission of the following:

- A.** Sales of MEMBERSHIPS to Utah customers are not subject to Utah sales and use tax.
- B.** The free, [WORDS REMOVED] trial MEMBERSHIP provided to Utah customers is not subject to Utah sales and use tax.

[Words Removed]

[Words Removed]

Very truly yours,

[REQUESTING PARTY'S NAME, TITLE]
For the Benefit of COMPANY

³⁶ Utah Code Ann. § 59-12-103(1)(l) and (m).

[COMPANY'S ADDRESS AND FEIN]

RESPONSE LETTER
PRIVATE LETTER RULING 16-005

August 9, 2017

[REQUESTING PARTY'S NAME, TITLE]
For the Benefit of COMPANY
[COMPANY'S ADDRESS]

Dear [REQUESTING PARTY'S NAME]:

This letter is in response to your request for a private letter ruling for COMPANY ("Company"), which sells MEMBERSHIPS. Some of the Company's customers are in Utah.

You have asked about the Utah sales and use taxability of, first, the Company's sales of MEMBERSHIPS to Utah customers and, second, the Company's provision of free, [WORDS REMOVED] trial MEMBERSHIPS to Utah customers. This private letter ruling concludes, first, that the Company's sales of MEMBERSHIPS to Utah customers are subject to Utah sales and use taxes and, second, that the Company's provision of free, [WORDS REMOVED] trial MEMBERSHIPS to Utah customers will cause the Company to be subject to Utah sales and use taxes on the Company's purchases of the taxable component parts of those memberships. The analyses for these conclusions are found in Section III. of this private letter ruling.

Through your request letter, you provided us with the following facts about the Company's sales of MEMBERSHIPS.

I. Facts

You explained the following facts about the Company's sales of MEMBERSHIPS as follows:

Company offers a membership program known as MEMBERSHIP [WORDS REMOVED]. The public may sign up for a free [WORDS REMOVED] trial, monthly paid, or annual paid MEMBERSHIP to receive, during the membership period, the intangible right to access certain benefits associated with [WORDS REMOVED] WEBSITE ("Website"). Participants in the membership program are referred to as "MEMBERS" or "Members;" MEMBERS are required to agree to the MEMBERSHIP Terms & Conditions to activate their MEMBERSHIP. Please see Exhibit A. The current suite of MEMBERSHIP benefits that Members have the right to access is outlined below:

- [WORDS REMOVED]
- VIDEOS BENEFIT – MEMBERS may view movies and television shows, designated as “VIDEOS BENEFIT,” an unlimited number of times at no additional cost during the course of their MEMBERSHIP. VIDEOS BENEFIT can be viewed on the MEMBER’s television, computer, ELECTRONIC DEVICE, CERTAIN ELECTRONIC DEVICE, or other compatible device. All MEMBERS are permitted to stream VIDEOS BENEFIT; MEMBERS with CERTAIN ELECTRONIC DEVICES can also download VIDEOS BENEFIT [WORDS REMOVED]. If a MEMBER cancels their Membership, or the Membership expires after a movie or television show is downloaded, the MEMBER will lose access to the downloaded movie or television[] show. In compliance with our content agreements, there are restrictions on how much time MEMBERS are allotted to access downloaded VIDEOS BENEFIT without an Internet connection.
- E-BOOK BENEFIT – The E-BOOK BENEFIT allows MEMBERS who own CERTAIN ELECTRONIC DEVICES to choose from thousands of electronic books (“e-books”) to borrow for free, as frequently [WORDS REMOVED], with no due dates. If a MEMBER cancels their Membership, or the Membership expires after a book is borrowed, the MEMBER will lose access to the borrowed book.
- E-BOOK BENEFIT 2 – The E-BOOK BENEFIT 2 feature allows MEMBERS who own CERTAIN ELECTRONIC DEVICES to receive one free e-book [WORDS REMOVED]. The selected e-book becomes a permanent part of the MEMBER’s LIBRARY. [WORDS REMOVED]
- [WORDS REMOVED]
- MUSIC BENEFIT – MUSIC BENEFIT provides MEMBERS with unlimited, ad-free access to [WORDS REMOVED] songs and albums. MUSIC BENEFIT may be played on the MEMBER’s computer, CERTAIN ELECTRONIC DEVICE, or other compatible device. MUSIC BENEFIT may be streamed or downloaded for listening without an Internet connection. Similar to other digital benefits outlined herein, if a MEMBER allows their Membership to lapse or expire, they will lose access to the downloaded MUSIC BENEFIT titles.
- [WORDS REMOVED]

....

While the Company does not directly provide the membership benefits, it is contractually obligated to ensure the benefits *are* provided to MEMBERS. To meet its contractual obligations, Company pays its affiliates to provide the underlying service related to each benefit. [WORDS REMOVED]

....

(Footnotes removed.)

Under the “MEMBERSHIP Terms,” “COMPANY and/or its affiliates (‘WEBSITE’ or ‘Us’)” are obligated to provide the MEMBERSHIP benefits to a customer purchasing a MEMBERSHIP. [WORDS REMOVED]. Based on a review of the WEBSITE website, COMPANY NAME is the name under which the Company and the Company’s affiliates seamlessly fulfill the MEMBERSHIP benefits exercised by a customer. These benefits may include [WORDS REMOVED] the “e-book benefits” that you mentioned in the paragraph above. Thus, from a Utah customer’s perspective, the Utah customer is purchasing the MEMBERSHIP from COMPANY NAME and/or the Company; and also from the customer’s perspective, COMPANY NAME and/or the Company provide the MEMBERSHIP benefits as the Utah customer exercises them.

[WORDS REMOVED]

II. Applicable Law

Utah Code Ann. § 59-12-103 imposes Utah sales and use taxes on purchasers for certain transactions including the following:

- (1) A tax is imposed on the purchaser as provided in this part on the purchase price or sales price for amounts paid or charged for the following transactions:
 - (a) retail sales of tangible personal property made within the state;
 -
 - (f) except as provided in Section 59-12-104, amounts paid or charged as admission or user fees for theaters, movies, operas, museums, planetariums, shows of any type or nature, exhibitions, concerts, carnivals, amusement parks, amusement rides, circuses, menageries, fairs, races, contests, sporting events, dances, boxing matches, wrestling matches, closed circuit television broadcasts, billiard parlors, pool parlors, bowling lanes, golf, miniature golf, golf driving ranges, batting cages, skating rinks, ski lifts, ski runs, ski trails, snowmobile trails, tennis courts, swimming pools, water slides, river runs, jeep tours, boat tours, scenic cruises, horseback rides, sports activities, or any other amusement, entertainment, recreation, exhibition, cultural, or athletic activity;
 -
 - (k) amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is:
 - (i) stored;
 - (ii) used; or
 - (iii) otherwise consumed;

- (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; and
- (m) amounts paid or charged for a sale:
 - (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.
- (2)
 - (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;
 - (iv) For purposes of Subsection (2)(d)(iii), 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.

Utah Code Ann. § 59-12-102 defines various terms, stating in part:

As used in this chapter:

-
- (18) (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.

.....

- (d) (i) For purposes of Subsection (18)(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 (18)(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.

.....

[WORDS REMOVED]

- (95) (a) Except as provided in Subsection (95)(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.

.....

[WORDS REMOVED]

Utah Code Ann. § 59-12-104(25) provides an exemption for products purchased for resale, as follows:

Exemptions from the taxes imposed by this chapter are as follows:

.....

- (25) a product purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product . . .

Utah Code Ann. § 59-12-107(8) states the following about a retailer who represents that a product purchased from a wholesaler is for resale:

If any sale of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), is made by a wholesaler to a retailer, the wholesaler is not responsible for the collection or payment of the tax imposed on the sale and the retailer is responsible for the collection or payment of the tax imposed on the sale if:

- (a) the retailer represents that the personal property is purchased by the retailer for resale; and
- (b) the personal property is not subsequently resold.

Utah Administrative Code R865-19S-62 A. states the following about merchandise cards:

- A. Meal tickets, coupon books, or merchandise cards sold by persons engaged in selling taxable commodities or services are taxable, and the tax shall be billed or collected on the selling price at the time the tickets, books, or cards are sold. Tax is to be added at the subsequent selection and delivery of the merchandise or services if an additional charge is made.

Utah Code Ann. § 59-26-103 imposes the multi-channel video or audio service tax as follows:

Subject to Section 59-26-104.5, there is imposed as provided in this part a tax on the purchaser equal to 6.25% of amounts paid or charged for multi-channel video or audio service provided by a multi-channel video or audio service provider:

- (1) within the state; and
- (2) to the extent permitted by federal law.

III. Analysis

You stated your issues as follows:

1. Is Company's sale of MEMBERSHIPs to Utah customers subject to sales and use tax?
2. Is Company's provision of a free, [WORDS REMOVED] trial MEMBERSHIP to Utah customers subject to sales and use tax?

This private letter ruling answers your two issues as follows:

1. The Company's sales of MEMBERSHIPS to Utah customers are subject to Utah sales and use taxes.
2. The Company's provision of a free, [WORDS REMOVED] trial MEMBERSHIP to Utah customers does not subject the Utah customers to Utah sales and use taxes; however, the transaction causes the Company to be subject to Utah sales and use taxes.

The answers for your two issues are further analyzed below.

A. The Company's Sales of MEMBERSHIPS to Utah Customers are Subject to Utah Sales and Use Taxes.

This subsection includes the following items:

- A list of the MEMBERSHIP benefits divided into [WORDS REMOVED] distinct items (Subsections III.A.1.).
- Analyses of the taxability of each of the [WORDS REMOVED] benefits if sold separately (Subsections III.A.2. through III.A.15.).
- A summary of the taxability of each of the [WORDS REMOVED] benefits if sold separately (Subsection III.A.16.).
- A discussion of taxability of the [WORDS REMOVED] benefits when sold together for one nonitemized price (Subsection III.A.17.).

1. The Benefits of the MEMBERSHIPS can be Divided into [WORDS REMOVED] Distinct Items.

The MEMBERSHIP provides a Utah customer with the following benefits:

- [WORDS REMOVED]
- VIDEOS BENEFIT—viewing, without downloading, movies and TV shows streamed over the Internet.
- VIDEOS BENEFIT—downloading movies and TV shows for the duration of a membership if a member has the required equipment.
- E-BOOK BENEFIT—downloading books for the duration of a membership if a member has a CERTAIN ELECTRONIC DEVICE.
- E-BOOK BENEFIT 2—downloading and permanently receiving [WORDS REMOVED] e-book [WORDS REMOVED].

- [WORDS REMOVED]
- MUSIC BENEFIT—listening to, without downloading, music streamed over the Internet.
- MUSIC BENEFIT—downloading music for the duration of a membership.
- [WORDS REMOVED]

To analyze the taxability of the purchase price of the MEMBERSHIP, the taxability of the underlying items must be considered. Consistent with the Commission’s treatment of the renewal fees in Private Letter Ruling (“PLR”) 15-008 and in PLR 99-025, for the MEMBERSHIPS, the Commission “look[s] beyond that label [attached to a product] to examine the underlying nature of the transaction.”¹ What the Utah customer is actually purchasing with a MEMBERSHIP are the benefits listed above.

Below, the sales taxability of the [WORDS REMOVED] items listed above is analyzed, first, as the sale of each item if sold separately (Subsections III.A.2. through III.A.16.) and, next, as the sale of the [WORDS REMOVED] items together for one nonitemized price (Subsection III.A.17.).

[WORDS REMOVED]

3. *If the VIDEOS BENEFIT Benefit of Viewing, Without Downloading, Movies and TV Shows Over the Internet Were Sold Separately, the Benefit Would Not be Taxable Under § 59-12-103(1).*

Section 59-12-103(1)(f) taxes “amounts paid or charged as admission or user fees for . . . any . . . amusement, entertainment, recreation, exhibition, cultural, or athletic activity.”² This subsection has not been applied to viewing streamed media content sold to an individual for viewing in an individual’s home. Thus, a Utah customer’s purchase of the VIDEOS BENEFIT benefit of viewing media without downloading would not be subject to Utah sales and use taxes if this benefit were purchased separately.

In § 59-26-103, the Multi-Channel Video or Audio Service Tax Act imposes the multi-channel video or audio service tax on “amounts paid or charged for multi-channel video or audio service provided by a multi-channel video or audio service provider.” The VIDEOS BENEFIT benefit of viewing media without downloading is not subject to the multi-channel video or audio service tax because the VIDEOS BENEFIT benefit of viewing media is not a *multi-channel* video or audio service. Multiple channels are not involved. Thus, if the VIDEOS BENEFIT benefit of viewing media without downloading were sold separately, the amounts paid or

¹ Private letter rulings can be accessed through the tax.utah.gov website.

² Utah Code § 59-12-102(3) defines “admission or user fee” and states the following in part: “(b) ‘Admission or user fees’ does not include annual membership dues to private organizations.” The Utah Administrative Code R865-19S-33(2) defines “annual membership dues to a private organization” as “includ[ing] only those dues paid by members who, directly or indirectly, establish the level of the dues.” Thus, § 59-12-102(3)(b) does not apply to the MEMBERSHIP because the members do not “establish the level of the dues,” as required by R865-19S-33(2).

charged for this item would not be subject either to Utah sales and use taxes or to the Utah multi-channel video or audio service tax.

4. *If the VIDEOS BENEFIT Benefit of Downloading Movies and TV Shows were Sold Separately, the Benefit Would be Taxable Under § 59-12-103(1)(m).*

Section 59-12-102(95)(a) defines “product transferred electronically” as “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.” The downloaded movies and TV shows meet this definition. If the movies and TV shows were transferred in a manner other than electronically, such as through a DVD, the movies and TV shows would be subject to Utah sales and use taxes.

Section 59-12-103(1)(m) provides that products transferred electronically are subject to Utah sales and use taxes and that subsection states the following, in part:

[A]mounts paid or charged for a sale:

(i) (A) of a product transferred electronically . . .

....

(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.

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. Thus, if the VIDEOS BENEFIT benefit of downloaded movies and TV shows were sold separately, the amounts paid or charged would be subject to Utah sales and use taxes.

5. *If the E-BOOK BENEFIT Benefit were Sold Separately, the Benefit Would be Taxable Under § 59-12-103(1)(m).*

The E-BOOK BENEFIT allows a Utah customer to download books for the duration of the Utah customer’s MEMBERSHIP. This item is similar to the VIDEOS BENEFIT benefit allowing downloads of movies and TV shows. The downloaded books are products transferred electronically. The amounts paid or charged for the downloaded books are taxable under § 59-12-103(1)(m). Thus, if the E-BOOK BENEFIT were sold separately, the amounts paid or charged would be subject to Utah sales and use taxes.

6. *If the E-BOOK BENEFIT 2 Benefit were Sold Separately, the Benefit Would be Taxable Under § 59-12-103(1)(m).*

The E-BOOK BENEFIT 2 benefit allows a Utah customer to permanently download books. This item is similar to the downloaded movies and television shows of the VIDEOS BENEFIT benefit and the downloaded books of the E-BOOK BENEFIT. The downloaded books are products transferred electronically. The amounts paid or charged for downloaded books are taxable under § 59-12-103(1)(m). Thus, if the E-BOOK BENEFIT 2 benefit were sold separately, the amounts paid or charged would be subject to Utah sales and use taxes.

[WORDS REMOVED]

12. *If the MUSIC BENEFIT Benefit of Listening to, Without Downloading, Music Streamed over the Internet were Sold Separately, the Benefit Would Not be Taxable Under § 59-12-103(1).*

Section 59-12-103(1)(f) taxes “amounts paid or charged as admission or user fees for . . . any . . . amusement, entertainment, recreation, exhibition, cultural, or athletic activity.” This subsection has not been applied to listening to streamed media content sold to an individual for listening in an individual’s home. Thus, a Utah customer’s purchase of the MUSIC BENEFIT benefit of listening to media without downloading would not be subject to Utah sales and use taxes if this benefit were purchased separately.

In § 59-26-103, the Multi-Channel Video or Audio Service Tax Act imposes the multi-channel video or audio service tax on “amounts paid or charged for multi-channel video or audio service provided by a multi-channel video or audio service provider.” The MUSIC BENEFIT benefit of listening to music without downloading is not subject to the multi-channel video or audio service tax because the MUSIC BENEFIT benefit of listening to music is not a *multi-channel* video or audio service. Multiple channels are not involved. Thus, if the MUSIC BENEFIT benefit of listening without downloading were sold separately, the amounts paid or charged would not be subject either to Utah sales and use taxes or to the Utah multi-channel video or audio service tax. This result is consistent with that of the VIDEOS BENEFIT benefit of viewing media without downloading, discussed in Subsection III.A.3.

13. *If the MUSIC BENEFIT Benefit of Downloading Music were Sold Separately, the Benefit Would be Taxable Under § 59-12-103(1)(m).*

Section 59-12-102(95)(a) defines “product transferred electronically” as “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.” The downloaded music meets this definition. If the music were transferred in a manner other than electronically, such as through a CD, the music would be subject to Utah sales and use taxes. Products transferred electronically are taxable under § 59-12-103(1)(m). Thus, if the MUSIC BENEFIT benefit were sold separately,

the amounts paid or charged would taxable under § 59-12-103(1)(m). This result is consistent with that of the VIDEOS BENEFIT benefit of downloading movies and TV shows through the Internet, discussed in Subsection III.A.4.

[WORDS REMOVED]

16. Taxability of the MEMBERSHIP Benefits if Sold Separately are Summarized Below.

If the [WORDS REMOVED] items were sold separately, their taxability would be as follows:

<u>Item</u>	<u>Utah Sales Tax Treatment</u>
[WORDS REMOVED]	[WORDS REMOVED]
<ul style="list-style-type: none"> ● VIDEOS BENEFIT—viewing without downloading movies and TV shows streamed over the Internet. 	Not taxable
<ul style="list-style-type: none"> ● VIDEOS BENEFIT—downloading movies and TV shows. 	Taxable
<ul style="list-style-type: none"> ● E-BOOK BENEFIT—downloading books. 	Taxable
<ul style="list-style-type: none"> ● E-BOOK BENEFIT 2—downloading and permanently receiving [WORDS REMOVED] e-book [WORDS REMOVED]. 	Taxable
[WORDS REMOVED]	[WORDS REMOVED]
<ul style="list-style-type: none"> ● MUSIC BENEFIT—listening to, without downloading, music streamed over the internet. 	Not taxable
<ul style="list-style-type: none"> ● MUSIC BENEFIT—downloading music. 	Taxable
[WORDS REMOVED]	[WORDS REMOVED]

17. Taxability of the [WORDS REMOVED] Items When Sold Together for One Nonitemized Price

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.

B. The Company's Provision of a Free, [WORDS REMOVED] Trial MEMBERSHIP to Utah Customers Does Not Subject the Utah Customers to Utah Sales and Use Taxes; However, the Transaction Causes the Company to be Subject to Utah Sales and Use Taxes.

The Utah Code does not impose Utah sales and use taxes on a transaction in which the Company provides a customer with a free, [WORDS REMOVED] trial MEMBERSHIP. Section 59-12-103(1) imposes Utah sales and use taxes on the purchaser “for amounts paid or charged for the . . . transactions” listed in § 59-12-103(1). There is no amount paid or charged for a free, [WORDS REMOVED] trial MEMBERSHIP. Thus, § 59-12-103(1) does not impose sales or use taxes on a Utah customer who receives a free membership.

While tax is not imposed on a Utah customer receiving the free membership, the transfer of a free membership triggers use tax on the Company. Section 59-12-103(1) imposes Utah sales and use taxes on many of the Company's purchases from its affiliates. These purchases include the Company's purchases from its affiliates of the downloaded videos, books, and music [WORDS REMOVED]. Section 59-12-104(25) provides an exemption for “a product purchased for resale in this state . . . either in its original form or as . . . [a] component part of a . . . compound product.” Many of the Company's purchases that are described in § 59-12-103(1) meet the exemption found in § 59-12-104(25). These purchases are of items that are component parts of the MEMBERSHIPS that the Company sells. However, the Company does not sell the free, [WORDS REMOVED] trial MEMBERSHIPS. When the Company provides MEMBERSHIPS for free, the Company's purchases of the component parts for the free MEMBERSHIPS do not meet the Utah sales and use tax exemption found in § 59-12-104(25). Instead, these purchases remain taxable under § 59-12-103(1). Section § 59-12-107(8) explains that a retailer is responsible for the payment of the Utah sales and use taxes imposed on the retailer's purchase of tangible personal property from a wholesaler when the retailer represents that the tangible personal property is purchased for resale and the retailer does not subsequently resell that property. Thus, the Company must pay Utah sales and use taxes on its taxable purchases of the items that are component parts of the free MEMBERSHIPS provided to Utah customers.

C. Prospective Enforcement is Appropriate for Your Situation.

Based on the facts and circumstances of your unique situation, the Commission finds that prospective enforcement of Utah sales and use tax collection is appropriate for the sales of the

MEMBERSHIPS. You also explained that time needed to revise your tax-collection software. After considering your situation, two weeks is an appropriate amount of time for you to revise your tax-collection software. Thus, as of two weeks from the date of this letter, you are obligated to collect Utah sales and use taxes on your sales of the MEMBERSHIPS to Utah customers.

IV. Conclusions

The Company's sales of MEMBERSHIPS to Utah customers are subject to Utah sales and use taxes. The Company's sale of a MEMBERSHIP is a bundled transaction. The sales of the following items if sold separately would be subject to tax:

- VIDEOS BENEFIT—downloading movies and TV shows.
- E-BOOK BENEFIT—downloading books.
- E-BOOK BENEFIT 2—downloading and permanently receiving one e-book [WORDS REMOVED].
- [WORDS REMOVED]
- MUSIC BENEFIT—downloading music.

The sales of the following items if sold separately would not be subject to tax:

- [WORDS REMOVED]
- VIDEOS BENEFIT—viewing without downloading movies and TV shows streamed over the Internet.
- [WORDS REMOVED]
- MUSIC BENEFIT—listening to, without downloading, music streamed over the Internet.
- [WORDS REMOVED]

For the bundled transaction, 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.

The Company's provision of a free, [WORDS REMOVED] trial MEMBERSHIP to Utah customers does not subject the Company's Utah customers to Utah sales or use taxes. However, when the Company provides free MEMBERSHIPS, the Company must pay Utah sales and use taxes on its taxable purchases of the items that are component parts of the free MEMBERSHIPS provided to Utah customers.

The Tax Commission's conclusions are based on the facts as you described them and the Utah law currently in effect. Should the facts be different or if the law were to change, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, you have additional facts that may be relevant, or you have any other questions, please feel free to contact the Commission.

Additionally, you may also appeal the private letter ruling in the following two ways.

First, you may file a petition for declaratory order, which would serve to challenge the Commission's interpretation of statutory language or authority under a statute. This petition must be in written form, and submitted within thirty (30) days after the date of this private letter ruling. You may submit your petition by any of the means given below. **Failure to submit your petition within the 30-day time frame could forfeit your appeal rights and will be deemed a failure to exhaust your administrative remedies.** Declaratory orders are discussed in Utah Administrative Code R861-1A-34 C.2., available online at <http://tax.utah.gov/commission/effective/r861-01a-034.pdf>, and in Utah Administrative Code R861-1A-31, available online at <http://tax.utah.gov/commission/effective/r861-01a-031.pdf>.

Second, you may file a petition for redetermination of agency action if your private letter ruling leads to an audit assessment, a denial of a claim, or some other agency action at a division level. This petition must be written and may use form TC-738, available online at <http://tax.utah.gov/forms/current/tc-738.pdf>. Your petition must be submitted by any of the means given below, within thirty (30) days, generally, of the date of the notice of agency action that describes the agency action you are challenging.

You may access general information about Tax Commission Appeals online at <http://tax.utah.gov/commission-office/appeals>. You may file an appeal through any of the means provided below:

- **Best way**—by email: taxappeals@utah.gov
- By mail: Tax Appeals
USTC
210 North 1950 West
Salt Lake City, UT 84134
- By fax: 801-297-3919

For the Commission,

Rebecca L. Rockwell
Commissioner

RLR/aln
16-005