

**FINAL PRIVATE LETTER RULING**

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**REQUEST LETTER**

17-001

November 17, 2016

Office of the Commission  
Utah State Tax Commission  
210 N 1950 W  
Salt Lake City, UT 84134

**Re: Private Letter Ruling Request on Application of Utah Sales and Use Tax to Restaurant Order Placement Services**

Dear Office of the Commission:

In accordance with Utah Administrative Code R861-1A-34, Company, through COMPANY 1, hereby respectfully requests from the Utah State Tax Commission (“Commission”) a private letter ruling regarding the issue presented herein, based on the specific facts and circumstances set forth below.

The Company is not currently subject to an audit or an administrative proceeding issue before the Commission and is not currently subject to any litigation in this matter.

**I. Issue Presented**

Whether Company is the seller of food prepared and sold by restaurants, and as such, responsible to collect and remit sales tax in the State of Utah on orders processed through Company’s website?

Additionally, while the Company does not take possession of the food as of the date of the ruling request, the Company would like to know if, in the future the Company decides to employ its own drivers to make deliveries, using Company employees to deliver orders or arranging order delivery with a delivery service provider (as opposed to the restaurants arranging delivery, which is currently what happens in the vast majority of times) alters and/or impacts the Commission’s opinion regarding the issue presented above.

**II. Factual Background**

Company maintains and operates a website that anyone can visit to order food items from participating restaurants. The restaurants provide the Company with the menu items to be shown on the website, and the prices for the various items. A customer visiting the website chooses the restaurant they want to order from. They click on the particular menu items they want from the restaurant, and then “checkout” when they finish ordering the items. The Company’s terms and conditions make it clear that the restaurant is the seller of the food and responsible for its

preparation and quality. The Company is only providing order processing services for a fee. The Company's system then [. . .] provides an electronic customer receipt which shows the Company's name, the restaurant's name, the prices for the items ordered, sales tax on the total food amount, a delivery charge (if applicable), and a tip (if applicable).

The Company earns a fee equal to a set percentage ("commission") of the dollar amount of the order placed by the customer. The customer generally pays the amount due by credit or debit card when they place their order through the Company, in which case the Company withholds a commission before providing the funds to the restaurant (remitting the net food receipts and the sales tax collected from the customers to the restaurants). However, the customer also has the option to pay the restaurant directly. When a customer pays the restaurant directly, the Company invoices restaurant for its commission in arrears.

When an order is placed, the Company promptly forwards the customer's order to the designated restaurant. Once the restaurant confirms, accepts and prepares the order, the orders are typically either picked up by the customer or delivered by the restaurant's employees. If a customer did not pay when the food was ordered, they may pay the restaurant upon pick-up or the delivery person upon delivery. In extremely rare cases, the Company may subcontract with delivery service providers to deliver the food, in which case they retain the charge for delivery. The Company never takes possession nor title of the food at any point during the transaction.

If a customer is dissatisfied with the food or delivery service, the customer may contact the Company or the restaurant for assistance. If the Company is contacted, it will try to coordinate a solution between the customer and the restaurant. In other words, the Company sometimes acts as a go-between with the customer and the restaurant to help facilitate any issues with orders. However, the restaurant is responsible for remedying the problem.

At times, the Company may provide restaurants with a mobile device free of charge to be used by restaurants solely for the purpose of confirming orders and payments for food. The Company retains ownership of the mobile device, and the restaurant must return the mobile device to Company when requested by Company.

### **III. Applicable Sales and Use Tax Authority**

A. Utah Code Ann. § 59-12-103 imposes tax as follows:

(1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:

(a) retail sales of tangible personal property made within the state;

- B. Utah Code Ann. § 59-12-102(107) defines “retail sale” or “sale at retail” as follows:
- A sale, lease, or rental for a purpose other than (a) resale; (b) sublease; or (c) subrent.
- C. Utah Code Ann. § 59-12-102(109) defines “sale” as:
- (a) Any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable transaction under Sub section 59-12-103(1), for consideration.
- D. Utah Code Ann. 59-12-102(115) defines “seller” as follows:
- [A] person that makes a sale, lease, or rental of (a) tangible personal property; (b) a product transferred electronically; or (c) a service.
- E. Utah Code Ann. § 59-12-107(2), in pertinent part, indicates the collection responsibility of a seller as follows:
- (a) [E]ach seller shall pay or collect and remit the sales and use taxes imposed by this chapter...
- F. Utah Admin. R. R865-19S-2 states the nature of the tax as follows:
- A. The sales and use taxes are transaction taxes imposed upon certain retail sales and leases of tangible personal property, as well as upon certain services.
- B. The tax is not upon the articles sold or furnished, but upon the transaction, and the purchaser is the actual taxpayer. The vendor is charged with the duty of collecting the tax from the purchaser and of paying the tax to the state.

#### **IV. Sales and Use Tax Analysis**

Pursuant to Utah Code Ann. § 59-12-103(1)(a), tax is imposed upon the purchaser for amounts paid for retail sales of tangible personal property made within Utah. Each seller has the responsibility to collect and remit the sales and use tax pursuant to Utah Code Ann. § 59-12-107(2). Pursuant to Utah Code Ann. 59-12-102(115) a person is a “seller” if they makes sales of tangible personal property, a product transferred electronically, or a service.

Based on the factual background as outlined in Section II, Company simply acts as a middle man between the customer and restaurant and does not make sales of tangible personal property. Company does not have authority to pass title to the meals being sold by the restaurant. When an order is placed through Company’s website, Company sends a written confirmation of the order to the respective restaurant. Only after the restaurant confirms and accepts the order and prepares the food in connection therewith, can the food be delivered to or picked-up by the customer. It is

at this point that the title of the food transfers to the customer. In other words, the restaurants, and only the restaurants, have the authority to pass title of the food to the customers. Additionally, Company never takes possession of the food.

In addition, Company does not set the price at which the food from the respective restaurants is sold. Restaurants provide Company with a current menu, including any updates or modifications to the items offered for sale or the sale price of the items. It should be noted that restaurants must provide Company fees and pricings for orders or delivery specifications that are no less favorable to customers than that available through the restaurant's own delivery or takeout menu or any third party service.

It should also be noted that orders purchased via Company website are billed through Company. Thus, in instances where the customer opts to prepay for the food ordered through Company website, Company issues the bill directly to customers. This bill contains the restaurant's name and logo (if available). While the "Company" name appears on the customer's respective credit card or online payment processing services statements, Company is not in any manner the seller of the food items ordered. Conversely, if customers choose to pay for the order in-person at the restaurant for pick-up orders, the restaurants will issue the bill to the customer.

Company does not at any time or in any manner control the restaurants or the production of food. Company does not in any way guarantee the quality of food supplied by the restaurants. Company does not bear any risk on the food. Company does not choose the food that is sold through the Company's website, does not set the price at which the food is sold, does not own or purchase the food from the restaurant, does not have the ability to establish which food orders are processed first, does not establish when the food will be ready for delivery, and does not have a say in how the food is prepared and what ingredients are included. The restaurant can refuse to take orders and it is the restaurant that has the final say on completing an order.

As a provider of nontaxable order placement services, Company does not appear to meet the definition of a "seller" of tangible personal property pursuant to Utah Code Ann. 59-12-102(115). Company is not exercising the taxable privilege of selling tangible personal property at retail. It does not sell any food. It does not markup any food and it does not purchase from the restaurants any of the food that is provided through the Company's website. Simply put, Company and its services function as a facilitator between the restaurants and the customers who place the orders on Company's website. Restaurants should be considered the seller of the food sold through Company's website as they possess the authority to pass title to goods being sold, to set the price at which it will be sold, and exercise control over the goods until they are sold (i.e., in instances where order is for pick-up or the restaurant provides the delivery services). Because of the factors discussed above, Company should not be considered a seller of food prepared by restaurants pursuant to Utah Code Ann. 59-12-102(115) and should not be responsible to collect and remit sales and use taxes on such transactions pursuant to Utah Code Ann. § 59-12-107(2) and Utah Admin. R. R865-19S-2. Rather, restaurants should be considered the seller of food and therefore responsible to collect and remit sales and use tax on orders processed through Company's website.

## **V. Conclusion**

Company's offerings are nontaxable order placement services. Company does not have authority to pass title to the food being sold, does not set the price at which the food will be sold, and never has possession of the food. Company and its services function as a facilitator between the restaurants and the customers who place the orders through Company's website. Restaurants should be considered the seller of the food sold through Company's website as they possess the authority to pass title to food being sold, to set the price at which it will be sold, and exercise control over the food until it is sold.

For the reasons set forth above, we respectfully request that you agree with the opinions presented herein. A conference is respectfully requested to discuss this ruling request. We look forward to discussing this request with you and providing any additional information that would be helpful in evaluating our request. If you have any questions, please contact NAME 1 at PHONE NUMBER 1.

Very truly yours,

NAME 1  
TITLE 1  
COMPANY 1

cc: NAME 2 – COMPANY 1 /CITY 1

**RESPONSE LETTER**  
**PRIVATE LETTER RULING 17-001**

March 23, 2018

Mr. NAME 1  
TITLE 1  
COMPANY 1  
ADDRESS 1  
CITY 2, STATE 1 ZIP CODE 1

Dear Mr. NAME 1:

This letter is in response to your request for a private letter ruling for an unnamed company (“Company”), which operates a website that restaurant customers use to order prepared food from participating restaurants. You asked the following: “[w]hether the Company is the seller of [this] food prepared and sold by [the] restaurants, and as such, is responsible to collect and remit [Utah] sales tax[es] . . . on orders processed through [the] Company’s website.” You indicated that “in the vast majority of times,” the restaurants arrange for delivery of the food to the restaurant customers and the Company does not take possession of the food. You also indicated that “[i]n extremely rare cases, the Company may subcontract with delivery service providers to deliver the food, in which case they retain the charge for delivery.” Additionally, you indicated that the Company might “employ its own drivers [in the future] to make the deliveries, using [the] Company’s employees to deliver orders or arranging order delivery with a delivery service provider.” You asked how the Company’s delivery of the food might affect the Commission’s conclusions about whether the Company would be the seller of that food.

Through later communications, your associate, Mr. NAME 2, explained that the Company’s business model has changed and the Company no longer needs or wants an answer for the situation in which the Company will employ its own drivers in the future to make deliveries. Mr. NAME 2 also explained that the Company still wants an answer to its primary question about whether the Company is the seller of the food sold by the restaurants on orders processed through the Company’s website. ***Thus, this private letter ruling will not address the situation in which the Company will employ its own drivers in the future to make deliveries.***

This private letter ruling finds that if the Company does not deliver the food to the restaurant customers, the Company is not a seller of that food.<sup>1</sup> This private letter ruling also finds that for the “extremely rare cases [in which] the Company may subcontract with delivery service

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<sup>1</sup> This conclusion is consistent with the conclusions of Private Letter Ruling 16-003 (“PLR 16-003”), a redacted copy of which is available through the search field found on the home page of the *tax.utah.gov* website. PLR 16-003 addressed a situation involving a website of a company that is unrelated to the Company of this private letter ruling.

providers to deliver the food,” the Company could be a seller of that food *if the Company makes an “exchange” of that food for the customers’ money*. Subsection III. of this private letter ruling contains the analyses for these conclusions.

## I. Facts

In your request letter, you provided the following facts:

Company maintains and operates a website that anyone can visit to order food items from participating restaurants. The restaurants provide the Company with the menu items to be shown on the website, and the prices for the various items. A customer visiting the website chooses the restaurant they want to order from. They click on the particular menu items they want from the restaurant, and then “checkout” when they finish ordering the items. The Company’s terms and conditions make it clear that the restaurant is the seller of the food and responsible for its preparation and quality. The Company is only providing order processing services for a fee. The Company’s system then [ . . . ] provides an electronic customer receipt which shows the Company’s name, the restaurant’s name, the prices for the items ordered, sales tax on the total food amount, a delivery charge (if applicable), and a tip (if applicable).

The Company earns a fee equal to a set percentage (“commission”) of the dollar amount of the order placed by the customer. The customer generally pays the amount due by credit or debit card when they place their order through the Company, in which case the Company withholds a commission before providing the funds to the restaurant (remitting the net food receipts and the sales tax collected from the customers to the restaurants). However, the customer also has the option to pay the restaurant directly. When a customer pays the restaurant directly, the Company invoices restaurant for its commission in arrears.

When an order is placed, the Company promptly forwards the customer’s order to the designated restaurant. Once the restaurant confirms, accepts and prepares the order, the orders are typically either picked up by the customer or delivered by the restaurant’s employees. If a customer did not pay when the food was ordered, they may pay the restaurant upon pick-up or the delivery person upon delivery. In extremely rare cases, the Company may subcontract with delivery service providers to deliver the food, in which case they retain the charge for delivery. The Company never takes possession nor title of the food at any point during the transaction.

If a customer is dissatisfied with the food or delivery service, the customer may contact the Company or the restaurant for assistance. If the Company is contacted, it will try to coordinate a solution between the customer and the restaurant. In other words, the Company sometimes acts as a go-between with the customer and the restaurant to help facilitate any issues with orders. However, the restaurant is responsible for remedying the problem.

At times, the Company may provide restaurants with a mobile device free of charge to be used by restaurants solely for the purpose of confirming orders and payments for food. The Company retains ownership of the mobile device, and the restaurant must return the mobile device to Company when requested by Company.

## II. Applicable Law

Utah Code Ann. § 59-12-103(1) imposes tax “on the purchaser” for certain transactions including “on the purchase price or sales price for amounts paid or charged for . . . (a) retail sales of tangible personal property made within the state.”

Utah Code Ann. § 59-12-107(2)(a) imposes collection and remittance requirements on a “seller,” with this code section stating in relevant part:

Except as provided in Subsection (2)(e), Section 59-12-107.1, or Section 59-12-123, and subject to Subsection (2)(f), 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 (2)(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 (2)(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
- (v) regularly engages in an activity directly related to the leasing or servicing of property located within the state.

In conjunction with § 59-12-107(2)(a), Utah Code Ann. § 59-12-103.1(1) provides:

Except as provided in Section 59-12-107.1, a seller shall remit a tax to the commission as provided in Section 59-12-107 if:

- (a) the Supreme Court of the United States issues a decision authorizing a state to require the following sellers to collect a sales or use tax:
  - (i) a seller that does not meet one or more of the criteria described in Subsection 59-12-107(2)(a); . . .

Utah Code Ann. § 59-12-102(110) and (116), define “sale” and “seller,” respectively, as follows:

- (110)(a) "Sale" means any transfer of title, exchange, or barter, conditional or otherwise, in any manner, of tangible personal property or any other taxable transaction under Subsection 59-12-103(1), for consideration.
- (b) "Sale" includes:
  - (i) installment and credit sales;
  - (ii) any closed transaction constituting a sale;
  - (iii) any sale of electrical energy, gas, services, or entertainment taxable under this chapter;
  - (iv) any transaction if the possession of property is transferred but the seller retains the title as security for the payment of the price; and
  - (v) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.

- . . . .
- (116) "Seller" means a person that makes a sale, lease, or rental of:
    - (a) tangible personal property;
    - (b) a product transferred electronically; or
    - (c) a service.

### III. Analysis

This analysis section explains that the Company is not a seller of the food if the Company does not deliver that food to the restaurant customers. This analysis section also explains that the Company could be a seller of the food in the “extremely rare cases” in which “the Company may subcontract with delivery service providers to deliver the food,” *if the Company makes an “exchange” of that food for the customers’ money.*

#### **A. The Company is Not a Seller of the Food if the Company does Not Deliver that Food to the Restaurant Customers.**

Under § 59-12-103(1), Utah sales and use taxes are imposed “on the purchaser” for “retail sales of tangible personal property made within [Utah].” For the Company’s situation, some restaurant customers are located in Utah. Thus, some sales of food through the Company’s website would be subject to Utah sales and use taxes.

Sections 59-12-107(2) and 59-12-103.1(1) impose a collection and remittance obligation on “sellers” who have certain activities within the state. The Company’s activities within the state are sufficient for the Company to have collection and remittance obligations if the Company is a “seller.” The Company’s activities within the state include having the Company’s mobile devices at restaurants’ locations within this state. Additionally, the Company’s activities likely include those activities related to the set up, maintenance, and repair of the mobile devices. The Company might have additional activities within the state, as well.

Section 59-12-102(116) defines “seller” as follows:

“Seller” means a person that makes a sale, lease, or rental of: (a) tangible personal property; (b) a product transferred electronically; or (c) a service.

Section 59-12-102(110)(a) defines “sale” as follows:

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

The Company will be found to be a “seller” if the Company “makes a sale” of the food. The Company “makes a sale” of the food if the Company makes a “transfer of title, exchange, or barter . . . of [the food] . . . for consideration.”

If the Company does not deliver the food, the Company is not a seller of the food. As explained below, the Company does not make a transfer of title, an exchange, or a barter of the food in that situation.

For transfer of title, you explained that “[t]he Company never takes possession nor title of the food at any point during the transaction.” You also explained that the restaurants prepare the food and that either the restaurant customers pick up the food from the restaurants or the restaurants deliver the food to the customers. Thus, except in the “extremely rare cases,” the Company does not possess or deliver the food. The Company makes no transfer of title of the food in this situation.

For “exchange,” *Black’s Law Dictionary* defines “exchange” as “[t]he act of transferring interests, each in consideration for the other.” *Black’s Law Dictionary*, 645 (9<sup>th</sup> ed. 2009). If the Company were to physically transfer the food to the restaurant customers in exchange for the restaurant customers’ payments for the food, the Company would make an “exchange.” However, the Company does not physically transfer the food if the Company does not deliver the food to the restaurant customers. Thus, if the Company does not deliver the food, the Company makes no exchange of that food.

For “barter,” *Black’s Law Dictionary* defines “barter” as “[t]he exchange of one commodity for another without the use of money.” *Black’s Law Dictionary*, 171 (9<sup>th</sup> ed. 2009). All sales for this private letter ruling involve the use of money. Therefore, “barter” does not apply to the situation presented.

Overall, if the Company does not deliver the food, the Company is not a seller of the food; the Company does not make a transfer of title, an exchange, or a barter of the food for consideration. Likewise, the Company does not have collection and remittance obligations for these sales. However, in the “extremely rare cases” in which “the Company may subcontract with delivery service providers to deliver the food,” the results might be different, as explained below.

**B. The Company might be a Seller of the Food in the “Extremely Rare Cases” in which “the Company may Subcontract with Delivery Service Providers to Deliver the Food.”**

You explained that “[i]n extremely rare cases, the Company may subcontract with delivery service providers to deliver the food, in which case they retain the charge for delivery.” You did not provide further information about any delivery agreements between or among the Company, the delivery service providers, the restaurants, and the restaurants’ customers. Based on the limited information provided, it cannot be determined whether the delivery service providers are acting on behalf of the Company in delivering the food and whether the Company is acting on behalf of the restaurants in making exchanges of food for the customers’ money.

As explained previously in this private letter ruling, under § 59-12-102(116), a “seller” is “a person that makes a sale . . . of tangible personal property,” and under § 59-12-102(110)(a), a sale includes “any . . . exchange . . . , in any manner, of tangible personal property . . . for consideration.” Also as previously explained, an “exchange” is “[t]he act of transferring interests, each in consideration for the other.” *Black’s Law Dictionary*, 645 (9th ed. 2009). Thus, the Company could be a “seller” of certain food if the Company makes an “exchange” of that food for the customers’ money, with the food and the customers’ money being transferred in consideration for the other. The Company could make that possible exchange by acting on behalf of a restaurant when both receiving a customer’s money and delivering the food to that customer. The fact that the Company might further subcontract the delivery would not prevent the Company from making that possible exchange on behalf of a restaurant.

As stated in the paragraph above, the Company could be a “seller” of certain food if the Company makes an “exchange” of that food for the customers’ money. This conclusion is consistent with the conclusion of PLR 05-001, an unrelated prior private letter ruling.

PLR 05-001 concerned two companies, Company A and Company B, that worked together to sell Company B’s merchandise. Company B hired Company A as an independent contractor. For Company B, Company A “accept[ed] and process[ed] orders of Company B’s merchandise” “by invoicing, collecting the purchase price and shipping the merchandi[s]e to the customer.” Company A also “store[d], care[d] for, warehouse[d] and provide[d] inventory management” for Company B’s merchandise. Company B never transferred title to the merchandise to Company A, and Company B was “responsible for insuring the merchandise while it [was] located in Company A’s warehouse.” In PLR 05-001, “Company A’s fee for the services [was] a percentage of net sales of Company B’s merchandise. Company B determine[d] the pricing.”

In PLR 05-001, the representative of Company A asked whether Company A or Company B “would . . . be the retailer [seller] and thus subject to a sales and use tax registration and filing requirement . . .” *The Commission found that both Company A and Company B were sellers and both companies were subject to the Utah filing and payment requirements.* More specifically, PLR 05-001 states the following, in part:

If either Company A or Company B has nexus, Company B is liable for the sales tax and Company A acting on behalf of Company B must collect sales tax on Company B’s Utah sales.

. . . . As we discuss further below, *both companies are equally liable for the collection and remittance of sales taxes.* Company A would be required to register since it solicits orders, and might possibly take payments, on behalf of Company B. Company B is required to register since it is ultimately the seller.

However, despite that *both Company A and Company B are equally liable for collection and remittance of the sales tax and should register, only one should report the transactions.* Which of the two companies remits the tax on these transactions to the Tax Commission may depend on the contract or agreement between the two companies. The Tax Commission would recommend that the companies delineate in their agency relationship agreement which company will report and remit the sales tax for the transactions.

(Emphasis added.)

In PLR 05-001, Company A acted on behalf of Company B in ways that are similar to how the Company might be acting on behalf of the restaurants in the “extremely rare cases.” In PLR 05-001, Company A held Company B’s merchandise in Company A’s possession. Then, for a customer order, Company A collected the purchase price from Company B’s customer and Company A transferred Company B’s merchandise to Company B’s customers. Similarly, in the “extremely rare cases,” the Company for this private letter ruling might be receiving possession or control of the restaurant’s food, the Company might be collecting the purchase price from the restaurant’s customer, and the Company might be transferring or controlling the transfer of the restaurant’s food to the restaurant’s customer.

In PLR 05-001, both Company A and Company B were sellers with collection and remittance requirements. Similarly, in the “extremely rare cases,” both the Company and the restaurants might be sellers with collection and remittance requirements for certain, delivered food. More specifically, PLR 05-001 states that “both Company A and Company B [were] equally liable for collection and remittance of the sales tax[es] and should register.” Company B had a registration requirement because “it [was] ultimately the seller.” Company A had a registration requirement “since it solicit[ed] orders, and might possibly [have] take[n] payments, on behalf of Company B.” Similarly, in the “extremely rare cases,” both the Company and the restaurants might be equally liable for the collection and remittance of the sales taxes on certain, delivered food. The restaurants have a registration requirement because they are sellers that transfer title to the food to the restaurant customers; the restaurants are “ultimately the seller(s).” The Company

could have a registration requirement *if the Company is acting on behalf of the restaurants in both delivering the food and receiving the customers' payments*. As explained previously in this private letter ruling, the Company is a seller of any food for which the Company makes the exchange of the food for the customers' money.<sup>2</sup>

### **C. Direct Answer to Your Issue as You Stated It.**

As explained near the beginning of this private letter ruling, you asked the following: “[w]hether the Company is the seller of [the] food prepared and sold by [the] restaurants, and as such, is responsible to collect and remit [Utah] sales tax[es] . . . on orders processed through [the] Company’s website.”

Generally, the Company is not a seller of the food prepared and sold by the restaurants.

However, in the “extremely rare cases” in which “the Company may subcontract with delivery service providers to deliver the food,” the Company could be a seller of that food and have collection and remittance obligations on those sales *if the Company is acting on behalf of the restaurants in both delivering the food and receiving the customers' payments*. The fact that the restaurants are sellers of that food does not prevent the Company from being a seller of that same food, also. If the Company is a seller of that food, the Company and the restaurants should ensure that either the Company or the restaurants collect and remit the sales and use taxes collected from the restaurant customers for those sales.

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<sup>2</sup> The conclusions of Subsection III.B. of the analysis section are also consistent with the analysis of Subsection III.A.iii. of PLR 16-003.

Subsection III.A.iii. of PLR 16-003 discusses the meanings of “retailer,” “commission merchant,” and “broker.” Section III.A.iii. of PLR 16-003 explains how the term “retailer,” as defined in § 59-12-102(108), includes “commission merchants” but not “brokers.” Section III.A.iii.a. of PLR 16-003, explains that “the commission merchant possesses or controls the property and differs from a broker because the commission merchant possesses or controls the property” (internal quotes removed). As explained in Section III.A.iii.a. of PLR 16-003, a broker usually does not have possession of the property. Section III.A.iii.a. of PLR 16-003 also explains that “[b]ased on the definitions of ‘broker’ and ‘commission merchant,’ possession or control of the property is a key difference.” The Commission concluded in section III.A.iii.a. of PLR 16-003 that the company in PLR 16-003 was not a commission merchant because that company did not possess or control the products sold.

Unlike the company in PLR 16-003, in the “extremely rare cases” in which “the Company may subcontract with delivery service providers to deliver the food,” the Company might be in possession or control of the food. Likewise, the Company might be a commission merchant, and thus, a retailer for the sale of that food.

#### IV. Conclusions

If the Company does not deliver the food to the restaurant customers, the Company is not a seller of that food. In the “extremely rare cases” in which “the Company may subcontract with delivery service providers to deliver the food,” the Company could be a seller of that food and have collection and remittance obligations on those sales *if the Company is acting on behalf of the restaurants in both delivering the food and receiving the customers’ payments.*

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](mailto: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  
17-001