

FINAL PRIVATE LETTER RULING

21-004

REQUEST LETTER

[THE REQUEST LETTER HAS BEEN REMOVED]

RESPONSE LETTER

2/13/2024

NAME-1, State & Local Tax Partner
COMPANY-1
ADDRESS
CITY, STATE - ZIP
EMAIL-1

Dear NAME-1:

This letter is in response to your request for a private letter ruling for an unnamed corporation (“Company”). Your request concerns the taxability of certain sales by the Company to the Company’s customers (“merchants”). The Company sells an advertising-related item to merchants and provides other services, as well. You specifically presented the following question in your request letter: “Are the Company’s receipts from the services described herein subject to Utah sales tax?” This private letter ruling concludes that the Company’s sales to merchants are not subject to Utah sales and use taxes.

This private letter ruling includes the following sections:

- I. Facts
- II. Issue
- III. Applicable Law
- IV. Analysis
- V. Conclusion

I. Facts

The Company is involved in affiliate marketing. The Company **sells** to merchants advertising space on web pages, emails, or other electronic means, for the display of the

merchants' banner advertisements. The Company **purchases** the advertising space from affiliates/publishers with websites, emails, etc. The Company's customers are the merchants but not also the publishers. Although the Company's customers only include the merchants, the users of the Company's platform include both merchants and publishers, as explained below.

The Company runs an online, third-party performance marketing **platform**, through which merchants and affiliates can sign up to participate by entering into contracts with the Company. Merchants post information or tools that the publishers can use to advertise the merchants' products. The merchants select which publishers they would like to use. Publishers can view the merchants' information, and decide which, if any, of the merchants' information they will publish on their websites.

The Company, through its platform, brings merchants and publishers together, as explained above, and provides the tracking and reporting services needed for calculating the commissions the Company pays to the publishers. According to the contract between the Company and a merchant, the merchant pays to the Company the greater of either **a monthly minimum or the transaction fees** which relate to the commissions the Company pays to the publishers. Commissions paid by the Company to the publishers are based on measurable actions, explained below. If a visitor to an affiliate web page clicks on a merchant's banner advertisement, the visitor is transferred through a link, to the merchant's web page, where the visitor can purchase the merchant's items, complete a lead form, and/or take another specific action defined by the merchant. Measurable actions earning commissions include the visitors' clicks on the merchant's banner advertisements, the visitors' completing purchases or lead forms on the merchant's websites, and the visitors' performing other predefined tasks on the merchant's websites.

According to the contract between the Company and a merchant, a merchant pays other fees to the Company, as well. A merchant must pay **a one time set-up/network-access fee**. The merchant also may pay a **data feed upload fee** if the merchant wants to upload a data feed with more than a specific number of product SKU records. The merchant may pay a **data feed download fee** if the merchant grants permission for an affiliate to download the merchant's data feed from the Company's server.

The services that the Company provides to the merchants include **bringing merchants and publishers together for advertising/marketing services** and providing the **tracking and reporting services** necessary for calculating commissions, as explained previously. Additionally, the tracking and reporting services also allow the Company to collect data. The Company shares with the merchants **data reports/information** that merchants can use to monitor the success of their advertising campaigns that use the Company's platform. You described the information provided to the merchants as follows in part: "The tracking and reporting facilities provided as part of the Company's suite of tools are data analytics services which the Company provides to merchants to enable them to monitor the success of advertising programs." The Company also shares with publishers the data reports/information to allow them to monitor the successfulness of their advertising spaces sold through the Company's platform. Additionally, the Company provides **technical support services** to merchants and publishers, and provides **consultation/support services** to the Company's largest partners. You explained

in an email that “other consultation services offered to merchants include assistance in determining key performance indicators, developing a budget, determining targeted audiences, determining the most appropriate publishers, and calculating a targeted return on investment.” You also mentioned a **payment management service**. Based on the contract between the Company and the merchants, this service may correspond to the “check processing and paying of [publishers],” through which “[the Company] processes and writes [the checks for a merchant’s publishers] free of charge each month.”

II. Issue

You presented the following question in your request letter: "Are the Company's receipts from the services described herein subject to Utah sales tax?" This private letter ruling concludes that the Company's sales to merchants are not subject to Utah sales and use taxes.¹

III. Applicable Law

Utah Code Ann. § 59-12-103(1) imposes Utah sales and use taxes on purchasers for certain transactions including the following:

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;
-
- (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;
- (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

¹ In your request letter for this private letter ruling, you explained that the Company requested a voluntary disclosure agreement. The Tax Commission denied that request for a voluntary disclosure agreement before the Commission issued this private letter ruling.

(II) that terminates upon the occurrence of a condition.

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

As used in this chapter:

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

- (i) distinct and identifiable; and
- (ii) sold for one nonitemized price.

(b) "Bundled transaction" does not include:

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

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

(A) the tangible personal property:

- (I) is essential to the use of the service; and
- (II) is provided exclusively in connection with the service; and

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

(v) the retail sale of two services if:

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

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

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

(29) "Computer" means an electronic device that accepts information:

(a) (i) in digital form; or

(ii) in a form similar to digital form; and

(b) manipulates that information for a result based on a sequence of instructions.

(30) "Computer software" means a set of coded instructions designed to cause:

(a) a computer to perform a task; or

(b) automatic data processing equipment to perform a task.

(35) (a) "Delivery charge" means a charge:

(i) by a seller of:

(A) tangible personal property;

(B) a product transferred electronically; or

(C) a service; and

- (ii) for preparation and delivery of the tangible personal property, product transferred electronically, or services described in Subsection (35)(a)(i) to a location designated by the purchaser.
- (b) "Delivery charge" includes a charge for the following:
 - (i) transportation;
 - (ii) shipping;
 - (iii) postage;
 - (iv) handling;
 - (v) crating; or
 - (vi) packing.

.....

- (101)(a) Except as provided in Subsection (101)(b)(ii) or (iii), "prewritten computer software" means computer software that is not designed and developed:
 - (i) by the author or other creator of the computer software; and
 - (ii) to the specifications of a specific purchaser.

.....

- (103)(a) Except as provided in Subsection (103)(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.

.....

- (107)(a) "Purchase price" and "sales price" mean the total amount of consideration:
 - (i) valued in money; and
 - (ii) for which tangible personal property, a product transferred electronically, or services are:
 - (A) sold;
 - (B) leased; or
 - (C) rented.
- (b) "Purchase price" and "sales price" include:
 - (i) the seller's cost of the tangible personal property, a product transferred electronically, or services sold;
 - (ii) expenses of the seller, including:
 - (A) the cost of materials used;
 - (B) a labor cost;
 - (C) a service cost;
 - (D) interest;
 - (E) a loss;
 - (F) the cost of transportation to the seller; or
 - (G) a tax imposed on the seller;

(iii) a charge by the seller for any service necessary to complete the sale;

(c) "Purchase price" and "sales price" do not include:

(ii) . . . the following if separately stated on an invoice, bill of sale, or similar document provided to the purchaser at the time of sale or later, as demonstrated by the books and records the seller keeps at the time of the transaction in the regular course of business, including books and records the seller keeps at the time of the transaction in the regular course of business for nontax purposes, by a preponderance of the facts and circumstances at the time of the transaction, and by the understanding of all of the parties to the transaction:

(B) a delivery charge;

(118)(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:

(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.

(136)

(b) "Tangible personal property" includes:

(v) prewritten computer software, regardless of the manner in which the prewritten computer software is transferred.

(140)

(c) "Telecommunications service" does not include:

(iv) a data processing and information service if:

(A) the data processing and information service allows data to be:

(I) (Aa) acquired;
(Bb) generated;
(Cc) processed;
(Dd) retrieved; or
(Ee) stored; and

(II) delivered by an electronic transmission to a purchaser; and

(B) the purchaser's primary purpose for the underlying transaction is the processed data or information;

....

Utah Code Ann. § 59-12-104(78) provides an exemption for remote access to certain databases, as follows:

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

....

(78) amounts paid or charged to access a database:

- (a) if the primary purpose for accessing the database is to view or retrieve information from the database; and
- (b) not including amounts paid or charged for a:
 - (i) digital audio work;
 - (ii) digital audio-visual work; or
 - (iii) digital book;

Utah Administrative Code R865-19S-92 states the following in part:

- (1) "Computer-generated output" means the microfiche, microfilm, paper, discs, tapes, molds, or other tangible personal property generated by a computer.
- (2) The sale, rental or lease of custom computer software constitutes a sale of personal services and is not subject to the sales or use tax, regardless of the form in which the software is purchased or transferred. Charges for services such as software maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of custom software are not taxable.
- (3) The sale of computer-generated output is subject to the sales or use tax if the primary object of the sale is the output and not the services rendered in producing the output.

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IV. Analysis

This Analysis Section includes the following subsections:

- A. Summary of this Analysis Section's conclusion.
- B. The optional data feed upload and download fees are not subject to Utah sales and use taxes.
- C. Both the required one time set-up fee and the greater of the monthly minimum or the transaction fees are included in the purchase price of the item the Company sells to the merchants.
- D. The Company's sale of the item to the merchants is not a bundled transaction.

E. The essence or primary object of the transaction is for the nontaxable advertising/marketing services.

A. Summary of this Analysis Section's conclusion.

You presented the following question in your request letter: "Are the Company's receipts from the services described herein subject to Utah sales tax?" This private letter ruling concludes that the Company's sales to merchants are not subject to Utah sales and use taxes, as explained below.

B. The optional data feed upload and download fees are not subject to Utah sales and use taxes.

The merchants compensate the Company through:

- The greater of either a monthly minimum or the transaction fees which relate to the commissions the Company pays to the publishers
- A required one time set-up/network-access fee
- An optional data feed upload fee
- An optional data feed download fee

The optional data feed upload fee and optional data feed download fee are specifically for the delivery of the merchant's data from the merchant to the Company and from the Company to publishers. Delivery charges are generally not subject to Utah sales and use taxes; they are not among the taxable transactions listed in § 59-12-103(1).² Furthermore, under § 59-12-102(107)(c)(ii)(B), delivery charges are not part of the purchase price of an item if the delivery charges are separately stated on an invoice, bill of sale, or similar document. Thus, the optional data feed upload and download fees are not subject to Utah sales and use taxes.

C. Both the required one time set-up fee and the greater of the monthly minimum or the transaction fees are included in the purchase price of the item the Company sells to the merchants.

The remaining components of compensation paid by the merchants to the Company include the following:

- The greater of either a monthly minimum or the transaction fees which relate to the commissions the Company pays to the publishers
- A required one time set-up/network-access fee

By paying these fees, the merchants receive the following components from the Company:

² "Delivery charge" is defined in § 59-12-102(35).

- Advertising/marketing space
- Use of the Company's software in the form of the online, third-party performance marketing platform
- Data reports/information to help monitor the success of advertising campaigns that use the advertising/marketing space purchased from the Company
- Technical support services
- Consultation/support services for the Company's largest partners
- A payment management service

Subsection 59-12-102(107) defines, in part, "purchase price" as "(a) . . . the total amount of consideration . . . for which tangible personal property, a product transferred electronically, or services are: . . . sold; . . . leased; or . . . rented. . . . (b) 'Purchase price' . . . include[s]: . . . (iii) a charge by the seller for any service necessary to complete the sale" Applying § 59-12-102(107)(a), the greater of the monthly minimum or the transaction fees is part of the purchase price of the Company's item sold, which has the components listed previously. Applying § 59-12-102(107)(b)(iii), the required one time set-up/network-access fee is also part of that purchase price. Thus, if the Company's item sold is subject to Utah sales and use taxes, both the required one time set-up fee and the greater of the monthly minimum or the transaction fees are included in the taxable purchase price. Alternatively, if the Company's item is not subject to Utah sales and use taxes, both the required one time set-up fee and the greater of the monthly minimum or the transaction fees are included in the purchase price of the nontaxable service.

D. The Company's sale of the item to the merchants is not a bundled transaction.

This private letter ruling next considers whether the Company's item sold involves a bundled transaction. Subsection 59-12-102(19)(a) defines "bundled transaction" as "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." As listed previously, the components of the item sold by the Company include the following:

- Advertising/marketing space
- Use of the Company's software in the form of the online, third-party performance marketing platform
- Data reports/information to help monitor the success of advertising campaigns that use the advertising/marketing space purchased from the Company
- Technical support services
- Consultation/support services for the Company's largest partners
- A payment management service

The components listed above are not distinct; instead they work together as a single item sold by the Company to the merchants. The Company's sales to the merchants are not bundled transactions.³

E. The essence or primary object of the transaction is for the nontaxable advertising/marketing services.

This private letter ruling next considers whether the essence or primary object of the transaction is for nontaxable services or for a taxable item. The Utah Supreme Court has explained the essence of the transaction as follows:

[T]he essence of the transaction theory[] focuses on the nature of what was sold and whether it primarily entails tangible personal property. . . . This theory examines the transaction as a whole to determine whether the essence of the transaction is one for services or for tangible personal property. The analysis typically requires a determination either that the services provided are merely incidental to an essentially personal property transaction or that the property provided is merely incidental to an essentially service transaction. . . .

B.J.-Titan Services v. State Tax Comm'n, 842 P.2d 822, 825 (Utah 1992) (internal citations removed). To decide whether the essence of the transaction is for nontaxable services or for taxable products or services, the Commission must consider the nature and extent of both the nontaxable services and the taxable products or services.

As listed previously, the components of the item sold by the Company include the following:

- Advertising/marketing space
- Use of the Company's software in the form of the online, third-party performance marketing platform
- Data reports/information to help monitor the success of advertising campaigns that use the advertising/marketing space purchased from the Company
- Technical support services
- Consultation/support services for the Company's largest partners
- A payment management service

The general taxability of the six components listed above is considered below. First, sales of advertising/marketing space alone are generally not taxable. Second, the sales of remote use of a

³ In your request letter, you had mentioned § 59-12-102(19)(b). If the components had been distinct and identifiable, then the private letter ruling next would have considered § 59-12-102(19)(b)(iv) and (v). Subsections 59-12-102(19)(b)(iv) and (v) consider situations involving a main service and other property or service components sold. Under those subsections, there is no bundled transaction if the other components sold are essential to the use of the main service, provided exclusively in connection with the main service, and the main service is the true object of the transaction.

seller's prewritten computer software alone is generally taxable.⁴ Third, the sales of data processing and information services alone are generally not taxable.⁵ Fourth, the sales of technical support services that do not include repair services are generally not taxable. Fifth, the sales of consultation/support services are also generally not taxable. Sixth, the payment management service of the Company is not a taxable service.

The nontaxable sale of the service of selling advertising/marketing space is a key component of the transaction. The data reports/information and the consultation/support services provide information and guidance on how to best utilize the advertising/marketing space purchased from the Company. The payment management service is essential for the Company to acquire and sell the advertising space to the merchants.

The potentially taxable sale of the remote use of the Company's computer software is an essential component of the transaction. However, the software primarily supports the sales of the advertising space, and the software does not have a purpose independent of the sales of advertising space. The technical support services support the Company's computer software, and as stated previously, the computer software supports the Company's sales of advertising space.

After considering the nature and extent of nontaxable services and the taxable products or services, this private letter ruling concludes that the essence or primary object of the transaction is for the nontaxable advertising/marketing services.

⁴ "Computer" and "computer software" are defined in § 59-12-102(29) and § 59-12-102(30), respectively. "Prewritten computer software" is defined in § 59-12-102(101). "Tangible personal property" is defined in part in § 59-12-102(136)(b)(v) to include prewritten computer software. "Sale" is defined in part in § 59-12-102(118)(b)(v) to include "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." Sales of the remote use of prewritten computer software are generally taxable under § 59-12-103(1)(a), (k), and (l) as "amounts paid or charged for . . . retail sales of tangible personal property made within the state . . ." (under Subsection (1)(a)); as "amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is . . . used . . . or . . . otherwise consumed" (under Subsection (1)(k)); and as "amounts paid or charged for tangible personal property if within this state the tangible personal property is . . . used . . . or . . . consumed . . ." (under Subsection (1)(l)).

⁵ In the definition of "telecommunications service" found in § 59-12-102(140), data processing and information services are recognized as a specific type of service. Furthermore, in § 59-12-103(1), sales of data processing and information services are not listed as being taxable. The generally nontaxable nature of sales of information is also seen in the exemption found in § 59-12-104(78). That exemption provides that sales of access to a database is not subject to sales and use taxes "(a) if the primary purpose for accessing the database is to view or retrieve **information** from the database; and (b) not including amounts paid or charged for a: (i) digital audio work; (ii) digital audio-visual work; or (iii) digital book" (emphasis added). Furthermore, Utah Administrative Rule R865-19S-92(1) discusses "computer-generated output," which potentially could include reports on paper or on tangible storage media. The rule explains in Subsection (3), "The sale of computer-generated output is subject to the sales or use tax if the primary object of the sale is the output and not the services rendered in producing the output." For the unique information generated for particular clients, the primary object of a report with that information would generally be the information rather than the media upon which the information is stored. In your request letter, you asserted that the Company did not sell a product transferred electronically, taxable under § 59-12-103(1)(m), when the company provided certain analytical data to its clients in order to help them with their advertising efforts utilizing the Company's platform. This private letter ruling agrees with that conclusion.

V. Conclusion

This private letter ruling concludes that the Company's sales to merchants are not subject to Utah sales and use taxes.

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. and in Utah Administrative Code R861-1A-31. The Utah Administrative Code is currently available at <https://adminrules.utah.gov>.

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,

Jennifer N. Fresques
Commissioner

JNF/ln

21-004