

**FINAL PRIVATE LETTER RULING**

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**REQUEST LETTER**

10-011

COMPANY NAME  
ADDRESS  
ADDRESS 1  
CITY STATE ZIP CODE

October 8, 2010

Utah Tax Commission  
Technical Research Unit  
210 N 1950 West  
Salt Lake City, UT 84134

**Re: Request for Informal Letter Ruling**

To Whom it may concern:

This letter constitutes a request for an informal letter ruling with respect to whether the Company's Web Services (described below) are subject to Utah sales tax.

**STATEMENT OF FACTS**

The Company provides various web-based services ("Web Services") that enable subscribers to have remote computer access, attend and participate in meetings online, attend online webinars, and provide attended or unattended technical support to their internal and external customers. The Company does not sell or license software or other tangible personal property to its customers. Instead, the Company utilizes its proprietary system (hardware and software) to provide the Web Services and charges for these web-based services on a per-user, subscription basis.

Customers can access the Web Services via the Company's websites by downloading an applet that allows them to connect to the Company's proprietary system over the Internet and use the Web Services via the user's computer. Unless connected to the Web Services, the applet has no functionality. Furthermore, the subscribers cannot access the Company's internal software for any functional purpose whatsoever. They cannot modify code, create documents, or manipulate files on the system. The Company does not license any software to its customers for their use.

The main purpose of the applet is to enable a secure connection between the Web Services and the user's computer. The applet is necessary to access the services. The applet is incidental to the service subscription and there is no additional fee charged for the applet. The applet cannot be used without connecting to the Company's proprietary system over the Internet. Thus, it has no value in and of itself.

The Web Services are used by subscribers, participants invited by any subscribers, and trial users. These users do not alter or manipulate the applet at any time. The applet works with the Company's proprietary system to facilitate connections between the subscriber/user and the subscriber's/user's computer, and once a connection is established, an encrypted data stream is passed through the communication servers located in internationally dispersed data centers. The Company's infrastructure for the Web Services includes multiple data centers distributed around the world. No data centers are located in Utah. This infrastructure ensures the highest quality of transmission and connection. The Web Services use end-to-end encryption for all data to ensure security.

The Company generally makes available a 30-day free trial for each of its Web Services. The 30-day free trial provides the same functionality as the paid subscription and includes launching the applet. If the person decides to cancel the trial without purchasing a subscription, the non-functional, unusable applet remains on that person's computer. There is no charge for utilizing the applet and the potential customer is not required to remove the applet from his/her computer at any time. Similarly, even a paid subscriber cannot use the applet for any beneficial purpose unless connected to the Web Services.

To subscribe to the Web Services, a customer creates an account by either entering into a paper contract with the Company or registering online and creating a username and password.

The Company is not an Internet Service Provider, nor does it provide or charge for telecommunication services to its customers. In order to utilize any of the Company's Web Services, subscribers must obtain an Internet connection and/or telecommunications services from a third party.

Outlined below is an overview of the Web Services offered by the Company:

### **Service 1**

This web-based service allows a subscriber's designated customer service technicians and/or internal help desk to remotely assist and provide support to the subscriber's employees and/or customers.

This service does not entail the transfer of any Company software or data to the subscriber. Further, the service does not allow subscribers to access the Company software code or manipulate the software in any way. Rather, the Company uses its own equipment to provide the service. The Company's proprietary software is maintained in a hosted site, on its equipment, and the equipment and software is at all times under the control of the Company.

This service works by allowing a subscriber's employee to access an Internet support portal and create a support request by typing in a URL to allow access to his or her computer. The support request is then queued for the subscriber's next available technical support representative. With the employee's permission, the representative accesses the employee's device through the Internet and begins a remote-support session with the employee.

Alternatively, the employee can move directly from a phone call to a remote-support session. To do so, the representative provides the employee with the web portal URL and a unique connection code to begin the remote-support session. By utilizing this web-based service, a representative can immediately diagnose, troubleshoot, and resolve issues remotely. The Company charges its subscribers for this service on a per user basis. Alternatively, subscribers can purchase a day pass that allows for usage over a 24-hour period. Subscribers can also purchase multiple day passes.

Simply stated, the service provides subscribers with a tool that allows for their own technicians to gain remote access to their employees' or customers' computers, giving them the ability to view an employee's or customer's computer to fix the computer. The Company does not provide any troubleshooting beyond ongoing support for the service itself; it only provides access for the subscriber's technician to perform the troubleshooting. All troubleshooting and support is performed by the subscribers' own technicians.

The Company's subscribers who purchase Service 1 may also purchase a complimentary service ("Service 1A"). Subscribers use Service 1A for the purpose of monitoring their information technology networks, devices, and servers, maintaining inventory management of such devices and servers, and performing associated analysis and reporting. Service 1A utilizes the same technology as that of Service 1.

## **Service 2**

This service deploys a similar technology to Service 1, except that it allows a subscriber to access their own computer remotely. Again, the service does not entail the transfer of any Company software to the subscriber (other than an applet necessary to access the service) and does not allow subscribers to access the Company software code or manipulate the software in any way. Rather, the service is provided through the Company's own data centers on its proprietary equipment and software, which is at all times under the control of the Company.

This service allows a user access to a user's computer from any other Internet-connected computer in the world through a private, secure connection. In order to facilitate this ability, the service navigates through the user's firewalls to enable communication without compromising security. This service is predominantly used for home/office applications. It is sold mainly to individuals who wish to access their office PC from home or vice versa. While it is possible that a subscriber could allow a third party to use this service to view the subscriber's computer records, this scenario is highly unlikely due to the potential breaches in confidentiality and privacy that could occur. The third party viewer would receive unlimited access to the subscriber's computer (the third party could access the entire C drive or network drive on the remote computer).

This service encompasses four components: a remote (or client) computer, communication servers/brokers, any firewall, and permitted host computers. A subscriber can register up to x number of host computers, depending upon the level of service it purchases and can access these host computers remotely once the host computer is set up with an account name.

When a user attempts to access a host computer remotely from a client computer, the user visits the service website, enters a username and password, and clicks on a connect button for the desired host computer. The user is then authenticated through the web-based broker operated separately from the user's computer. This broker, located at the Company's server site and part of the Company's proprietary system, acts as an authorizer/traffic controller and grants permission for the users to access the service/host computers based on a verified user name and password. For network address and firewall independence, the remote user initiates all communication with the broker via URL. All transmissions are encrypted and only those subscriber computers previously configured will be displayed and accessed remotely.

### **Service 3**

This service utilizes a similar technical infrastructure as previously described to allow multiple users to view a presenter's computer screen. The Company does not transfer any software (other than an applet necessary to access the service), and subscribers/users cannot access the Company software code or manipulate the software resident on the Company's equipment in any way. Once a connection is made, the service is provided by the Company through one of its data centers. The Company does not have a data center in Utah.

This service makes it easy for subscribers (individuals and organizations) to meet with anyone and present information securely online. Subscribers are able to present an unlimited number of Internet meetings for a flat monthly or annual fee and invite anyone (up to 25 meeting participants) to attend and view the meeting material displayed during the meeting. This service also enables individuals and organizations to easily, securely, and cost-effectively screenshare information online to a broader audience. Subscribers may hold unlimited seminars ("webinars") on the Internet with up to 1,000 attendees. There is no charge to the meeting or webinar attendees and they do not have to be registered users

To participate, organizers send participants a URL, which enables them to launch a separate software applet to support the connection which allows them to view the organizer's computer. There is no charge to the participants and they do not have to be registered users or subscribers. They are only required to enter the access code provided by the organizer. The online presentation is viewed by the participant from the participant's computer, but the content and application used to display the content remain resident on the presenter's computer at all times. The Company does not provide or transmit any application software used by the presenter.

This service offering has a recording feature by which the organizer has sole authority to initiate recordings. The recording is generally saved to the organizers' desktop; therefore, the Company does not have access to these recordings. Also, the organizer can post the webinar to a web server and can email a URL designation to participants/others for review.

## **Service 4**

This service enables subscribers to conduct online training sessions with their respective invited attendees. Service 4 allows online training sessions, distribution of course materials, testing and assessments, publishing upcoming courses to a catalog, and maintaining a reusable content library.

### **ISSUE**

Whether the Company's Web Services are subject to Utah sales tax as sales of taxable tangible personal property, prewritten computer software, or telecommunications services.

### **LAW**

Utah Code Ann. § 59-12-103 provides in part:

(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) amounts paid for:

(i) telecommunications service ... that originates and terminates within the boundaries of this state;

(iii) an ancillary service associated with a:

(A) telecommunications service described in Subsection (1)(b)(i)....

(m) amounts paid or charged for a sale:

(i)

(A) of a product that:

(I) is transferred electronically; and

(II) would be subject to a tax under this chapter if the product was transferred in a manner other than 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.

Utah Code Ann. § 59-12-102 provides in part:

(10)

(a) “Ancillary service” means a service associated with, or incidental to, the provision of telecommunications service.

(b) “Ancillary service” includes:

(i) a conference bridging service;

(ii) a detailed communications billing service;

(iii) directory assistance;

(iv) a vertical service; or

(v) a voice mail service.

(16)

(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:

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

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

(e)

(i) For purposes of Subsection (16)(b)(vi), the sales price of tangible personal property or a product subject to taxation under this chapter is de minimis if:

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

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

(85)

(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:

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

(111)

(a) Except as provided in Subsection (111)(d) or (e), "tangible personal property" means personal property that:

(i) may be:

(A) seen;

(B) weighed;

(C) measured;

(D) felt; or

(E) touched; or

(ii) is in any manner perceptible to the senses.

(b) “Tangible personal property” includes:...

(v) prewritten computer software....

(d) “Tangible personal property” does not include a product that is transferred electronically....

(116)

(a) “Telecommunications service” means the electronic conveyance, routing, or transmission of audio, data, video, voice, or any other information or signal to a point, or among or between points....

(c) “Telecommunications service” does not include:

(ii) an ancillary service;

(vi) Internet access service....

Utah Private Letter Rulings No. 08-012, 01/21/2009 provides in part:

... Corporation A sells the prewritten computer software, which its customers access remotely. Following the logic of PLR 01-027, Corporation A's customers possess the software when the software is downloaded onto the ASP server, which the customers are leasing. However, because the ASP's server is not located in Utah, the customers do not possess the software in Utah and the sales transactions are not taxable by Utah. The customers' remote access of the software without downloading the software onto a computer located in Utah does not create possession of the software in Utah. Instead, such access is akin to merely going to an internet site and viewing a database without downloading the software, as discussed in PLR 01-027.... (emphasis supplied)



Utah Private Letter Rulings No. 07-013, 12/21/2007 provides in part:

... Company A also provides pre-written software to its customers that allows them to access and utilize the Backup Service. There is no separate charge for that software. We believe the provision of that software is merely incidental to the provision of the service. Accordingly, that software is deemed to be consumed by Company A in providing its service, rather than being “resold” to Company A's customers in a taxable transaction. See Rule R865-19S-70....

Utah Admin. R. R865-19S-70 provides in part:

A. Persons engaged in occupations and professions that primarily involve the rendition of services upon the client's person and incidentally dispense items of tangible personal property are regarded as the consumers of the tangible personal property dispensed with the services....

### **TAXPAYER’S POSITION**

#### A. The Company’s Sales of Web Services Do Not Constitute Taxable Sales of Tangible Personal Property or Electronic Prewritten Computer Software.

Utah law provides that the retail sale of taxable tangible personal property in this state is subject to tax.<sup>1</sup> The total taxable sales price includes any services that are a part of the sale of the tangible personal property.<sup>2</sup>

The term “tangible personal property” is defined as personal property that can be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.<sup>3</sup> The term “tangible personal property” includes prewritten computer software.<sup>4</sup> Although Utah law provides that prewritten electronic computer software does not constitute taxable tangible personal property, the retail sale or license of such electronic software is specifically subject to tax.<sup>5</sup>

There are certain limitations to the taxability of prewritten electronic computer software. The Commission has provided that, under certain circumstances, the sale of prewritten electronic computer software is not subject to tax when it is accessed remotely by customers of the software provider.<sup>6</sup> In order for the transaction to be exempt from tax, the server which provides access to the remote software must be located outside Utah.<sup>7</sup> When a customer remotely accesses the software without downloading the software on a computer located in Utah, the transaction does not create possession of the software in Utah. Instead, the Commission has provided that “such

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<sup>1</sup> Utah Code Ann. § 59-12-103(1)(a).

<sup>2</sup> Utah Code Ann. § 59-12-102(85)(a) and (b).

<sup>3</sup> Utah Code Ann. § 59-12-102(111)(a).

<sup>4</sup> Utah Code Ann. § 59-12-102(111)(b).

<sup>5</sup> Utah Code Ann. § 59-12-103(1)(m); Utah Code Ann. § 59-12-102(111)(d).

<sup>6</sup> Utah Private Letter Rulings No. 08-012, 01/21/2009.

<sup>7</sup> Utah Private Letter Rulings No. 08-012, 01/21/2009.

access is akin to merely going to an internet site and viewing a database without downloading the software....”<sup>8</sup>

The Company’s Web Services are utilized by customers exclusively through remote access to the Company’s servers located outside Utah. The Company does not transfer any taxable tangible personal property to the Company’s customers, other than the download of a required applet that enables the Company’s subscribers to connect to the Company’s proprietary system over the Internet and use the Web Services via the subscribers’ computers. Since the Company’s customers utilize the Web Services exclusively through remote access to the Company’s proprietary system located outside Utah, and since the customers do not download any software (other than the required applet) on their computers located in Utah, the sale of the Web Services does not constitute a taxable sale of prewritten electronic computer software.

With regards to the required applet, the Company’s customers cannot use the applet without connecting to the Company’s proprietary system over the Internet, and the Company does not charge a fee for the transfer and use of the applet. Even if the applet is considered to be a separate and distinct product from the provision of the Web Services, the applet will not subject the sales of Web Services to tax in Utah. Utah law provides that when two distinct and identifiable products or services are “bundled” and sold for one nonitemized price, and the sales transaction includes a product subject to taxation and a product that is not subject to taxation, the product normally subject to taxation is exempt from tax, when the seller's sales price of the product subject to taxation is 10% or less of the seller's total sales price of the bundled transaction.<sup>9</sup> Under such circumstances, the sales price of the taxable product is deemed to be “de minimis.”<sup>10</sup>

In the present case, the Company provides the applet free of charge to its customers. Accordingly, the transfer of the applet is specifically exempt from tax, since it constitutes a “de minimis” portion of the total sales price of the Company’s Web Services.

Utah law further provides that persons engaged in occupations that primarily involve the rendition of services and incidentally dispense items of tangible personal property are regarded as the consumers of the tangible personal property dispensed with the services.<sup>11</sup> The Commission has determined that the provision of pre-written software by a company to its customers is not subject to tax when:

- 1) The software is merely incidental to the provision of the nontaxable services; and
- 2) There is no separate charge for the software.<sup>12</sup>

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<sup>8</sup> Utah Private Letter Rulings No. 08-012, 01/21/2009.

<sup>9</sup> Utah Code Ann. § 59-12-102(16)(a) and (b).

<sup>10</sup> Utah Code Ann. § 59-12-102(16)(a) and (b).

<sup>11</sup> Utah Admin. R. R865-19S-70.

<sup>12</sup> Utah Private Letter Rulings No. 07-013, 12/21/2007.

Under such circumstances, the Commission has stated that the software “is deemed to be consumed by [the company] in providing its service, rather than being ‘resold’ to [the company’s] customers in a taxable transaction.”<sup>13</sup>

The transfer of the applet from the Company to its customers is merely incidental to the true focus of the transaction: the provision of nontaxable Web Services. The applet is not available for sale without the purchase of the Web Services, and the applet holds no value in and of itself; it is only useful in conjunction with the purchase of the Web Services provided by the Company.

For the forgoing reasons, we have concluded that the Company’s sales of Web Services do not constitute taxable sales of tangible personal property or prewritten computer software.

#### B. The Company’s Sales of Web Services Do Not Constitute Taxable Sales of Telecommunications Services.

Utah imposes tax on sales of telecommunication services that originate or terminate within the state.<sup>14</sup> The term “telecommunications service” is defined as “the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points.”<sup>15</sup>

The term “telecommunications service” is noticeably limited to the actual “transmission, conveyance, or routing” of such services.<sup>16</sup> Here, the Company provides a service other than the actual conveyance of telecommunications services, thus, the service is not subject to tax as a telecommunications service. The Company does not transmit, convey, or provide in any other way taxable telephone services, wireless communication services, or any other taxable telecommunication services to its customers. In the same manner, the Company does not charge for the transmission or conveyance of any telephone services, wireless communication services, or any other telecommunication services to its customers as part of its Web Services.

In order to access and utilize any of the Company’s Web Services, subscribers must obtain an Internet connection from a third party. Utah law specifically excludes the provision of Internet access services from the definition of “telecommunications service”.<sup>17</sup> The Company’s Web Services are exclusively accessed through the use of Internet connections established by the Company’s customers; as such, the Web Services do not constitute (and are in no way related to) the provision of taxable telecommunications services. Moreover, the Company itself does not provide any Internet access services to its customers. Since the provision of Internet access service is not subject to tax in Utah, the utilization of the Internet by the Company’s customers to access the Company’s Web Services likewise is not subject to tax as a telecommunication service.

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<sup>13</sup> Utah Private Letter Rulings No. 07-013, 12/21/2007.

<sup>14</sup> Utah Code Ann. § 59-12-103(1)(b)(i).

<sup>15</sup> Utah Code Ann. § 59-12-102(116)(a).

<sup>16</sup> Utah Code Ann. § 59-12-102(116)(a).

<sup>17</sup> Utah Code Ann. § 59-12-102(116)(c)(vi).

For the forgoing reasons, we have concluded that the Company's sales of Web Services do not constitute sales of taxable telecommunications services.

### **CONCLUSION**

In conclusion, we respectfully request guidance that our understanding of the taxability of the Company's Web Services is correct.

We respectfully request an opportunity for a conference at a mutually acceptable time prior to the issuance of this LTA. If I may be of further assistance, please do not hesitate to contact me at PHONE NUMBER.

Sincerely,

NAME  
*TITLE*

## RESPONSE LETTER

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February 24, 2012

NAME, TITLE  
COMPANY NAME  
ADDRESS  
ADDRESS 1  
CITY, STATE ZIP CODE

RE: Private Letter Ruling Request–Sales Tax Treatment of Web-Based Remote Access Services

Dear NAME:

You have requested a ruling on the sales tax treatment of various web-based services (“Web Services”) offered by your client (“Company”) to the Company’s subscribers and free-trial users (jointly called “Subscribers”), some of which are located in Utah. You have explained that the Company is not an Internet Service Provider and does not provide or charge for telecommunication services.<sup>1</sup>

For the Web Services provided, you explained that the Web Services generally enable Subscribers to have various forms of remote access to their own computers or to their customers’ computers. Subscribers, including employees, access the Web Services via the Company’s websites, using an applet. The Company provides the applet to its Subscribers at no charge, and the applet only works with the Web Services.<sup>2</sup> Through your request letter and subsequent communications, you explained Web Services 1 through 4 to be as follows.

**Service 1** allows the customer service technicians or the internal help desks of Subscribers to remotely assist and support, via the Internet, their employees and/or customers. There are two means to use Service 1. First, the Subscriber can access an Internet support portal directly and create a support request by typing a Uniform Resource Locator or URL to allow another person to access his or her computer. The support request is queued for the next available technician. A technician can then access the employee’s computer through the Internet after receiving the employee’s permission, thus beginning a remote-support session. The second method is for the Subscriber to call for assistance by phone. The technician then provides the Subscriber with the web portal URL and a unique connection code to begin the remote-support

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<sup>1</sup> As you have asserted, the Web Services are not telecommunications services as defined in § 59-12-102(118) and taxed under § 59-12-103(1)(b).

<sup>2</sup> Because the applet is connected to and part of the Web Services and lacks any other value, the transfer of the applet does not create a bundled transaction under Utah Code § 59-12-102(16); the applet is not distinct.

session. Subscribers can purchase Service 1 either on a per-use basis or through a 24-hour day pass or a multiple day pass. The Company provides troubleshooting to the Subscribers on Service 1 but not on any computer problems being solved by the technicians using Service 1.

**Service 1A** is only sold to Subscribers who also purchase Service 1. This service allows Subscribers to monitor their information technology networks, devices, and servers; maintaining inventory management of such devices and performing associated analyses and reporting. Service 1A uses the same technology as Service 1.

**Service 2** allows Subscribers to access their own computers remotely through any other Internet-connected computer through a private, secure connection. Subscribers are predominantly individuals wanting to access their office PC from home or vice versa. To use Service 2, a Subscriber first registers and names a set number of her host computers. Then to access those computers remotely, the Subscriber visits the Service 2 website, enters a user name and password, and selects the connect button for the desired host computer, which was previously registered. If the user name and password are correct, a web-based broker of the Company authorizes the connection and controls the communication between the remote and host computers; all communications go through the broker by way of the URL and are encrypted.

**Service 3** allows multiple users to view a presenter's computer screen. Subscribers are individuals and organizations who want to meet anyone and present information securely. Subscribers can conduct Internet meetings and share meeting materials with up to twenty-five participants and also conduct web seminars with up to 1,000 attendees. The Company does not charge participants or attendees or require them to register with the Company. To use Service 3, the Company's software generates a URL and the Subscriber sends participants or attendees the URL and password, which the participants or attendees enter on their computers, allowing them to view the Subscriber's computer screen or, alternatively, to access a Subscriber's stored web seminar. Service 3 also has a recording feature that Subscribers can use to create recordings which are saved to their desktops.

The Company's employees are not involved in the Internet meetings. Instead, their role is limited to setting up customers' accounts and providing account maintenance requested by the customers. The Subscribers schedule and organize their own meetings and web seminars.

Finally, **Service 4** allows Subscribers to conduct online training sessions, distribute course materials, provide testing and assessments, publish upcoming courses to a catalog, and maintain a reusable content library. The library allows a Subscriber to post and store tests, polls, and similar training materials online for the use of the web training participants. Following the training session, the participants can refer back to the materials stored to increase their training efficiency.

For all of these Web Services, you have emphasized that the Company does not sell or license software or other tangible personal property to its Subscribers and that Subscribers cannot access the Company's internal software for any functional purpose, including modifying code, creating documents, or manipulating files. You explained that the Company instead uses its proprietary system of hardware and software to provide the Web Services on a subscription basis. You further explained that the Company's infrastructure for the Web Services includes

multiple data centers distributed around the world, none of which are located in Utah. You explained that the software component of the infrastructure ensures the highest quality for transmissions and connections. You also explained the proprietary software that runs all Web Services has the same basic platform even though the code for each service is unique. You also mentioned that the Web Services ensure security by using end-to-end encryption for all data.

You have asked the Commission to rule on the sales tax treatment of the various Web Services. We begin with the Applicable Law section below.

## I. Applicable Law

Utah Code § 59-12-103(1) states in part:

A tax is imposed on the purchaser . . . for amounts paid or charged for the following transactions:

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

Utah Code § 59-12-102(97) defines retail sale as follows:

"Retail sale" or "sale at retail" means a sale, lease, or rental for a purpose other than:

- (a) resale;
- (b) sublease; or
- (c) subrent.

Utah Code § 59-12-102(99) defines sale as follows in part:

- (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.

Utah Code § 59-12-102(113), which was recently amended, defines tangible personal property and states in part:

- (a) Except as provided in Subsection (113)(d) . . . , "tangible personal property" means personal property that:
  - (i) may be:
    - (A) seen;
    - (B) weighed;

- (C) measured;
  - (D) felt; or
  - (E) touched; or
  - (ii) is in any manner perceptible to the senses.
  - (b) "Tangible personal property" includes:
    - ....
    - (v) prewritten computer software, ***regardless of the manner in which the prewritten computer software is transferred.***
    - ....
    - (d) "Tangible personal property" does not include a product that is transferred electronically.
    - ....
- (Emphasis added.)

Utah Code § 59-12-102(81) defines prewritten computer software as follows in part:

- (a) .... "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.
- ....

Utah Code § 59-12-211(12), which was recently amended, provides the location of certain sales of the use of computer software as follows:

- (a) Notwithstanding any other provision of this section and except as provided in Subsection (12)(b), ***if a purchaser uses computer software and there is not a transfer of a copy of that software to the purchaser***, the location of the transaction is determined in accordance with Subsections (4) and (5).
- (b) If a purchaser uses computer software described in Subsection (12)(a) at more than one location, the location of the transaction shall be determined in accordance with rules made by the commission in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(Emphasis added.)

When Subsection (12) applies, subsections (4) and (5) locate transactions based on the purchaser's address or other similar information.<sup>3</sup>

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<sup>3</sup> For more direction on the application of § 59-12-211 to the Company's situation, you may contact the Taxpayer Services Division, Technical Research Unit by phone at 801-297-7705, by email at taxmaster@utah.gov or by mail at 210 N 1950 W, Salt Lake City UT 84134.



## II. Analysis

The Web Services sold for fees to Subscribers located in Utah are subject to Utah sales tax under § 59-12-103(1)-(1)(a), as “retail sales of tangible personal property made within the state.”

The Company’s proprietary software meets the definition of prewritten computer software, found in § 59-12-102(81). There is no indication that the Company’s proprietary software is developed or modified for specific Subscribers. Instead, the Company appears to have developed a highly-technical, flexible product that meets diverse Subscribers’ needs with minimal involvement by the Company’s employees.

All prewritten computer software, including the Company’s, is tangible personal property, according to § 59-12-102(113)(b)(v). The Utah Legislature recently amended the statute to read: “‘Tangible personal property’ includes: . . . (v) prewritten computer software, *regardless of the manner in which the prewritten computer software is transferred*” (emphasis added). Thus, the software you named “prewritten electronic computer software” in your request letter is tangible personal property. Our previous private letter rulings that treated certain prewritten computer software as products transferred electronically no longer apply because of the change to § 59-12-102(113)(b)(v).

The transfer of the Web Services for a fee meets the broad definition of sale found in § 59-12-102(99), which states, “[A]ny transaction under which right to . . . 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.” When the Company sells Web Services, it in substance grants Subscribers the right to use the Company’s proprietary software under a lease or contract. The Company is not using the proprietary software to sell services. The involvement of the Company’s employees appears to be limited to setting up and maintaining the Subscriber accounts, which allow usage of the proprietary software. The facts presented show no further intervention by the Company’s employees in providing the Web Services. The Company does not customize the proprietary software or personally interact with the Subscribers to meet Subscribers’ needs for remote access, etc.; instead, the Subscribers meet their own needs by using the proprietary software. Under the facts presented, the Subscribers are paying for the use of the proprietary software not for services provided by the Company. Furthermore, if the Company were to transfer the possession of the proprietary software outright, that transaction would be taxable. Thus, when applying § 59-12-102(99) to the facts presented, the Company’s transfer of use of the proprietary software is still a sale of that software under Utah law. Additionally, the sales of the Web Services are retail sales under § 59-12-102(97) because there is no indication that the Subscribers resell, sublease, or subrent the Web Services purchased.

The transfers of the Web Services are made within the state when the Subscribers are located in Utah. Subsection (12), which was recently added to § 59-12-211, applies § 59-12-211 to transactions involving computer software used by but not transferred to a purchaser. Under § 59-12-211, the locations of the sales of the Web Services are based on the addresses of the purchasers. Thus, for Subscribers located in Utah, the sales to those Subscribers are also within Utah. **Our previous private letter rulings locating the sales based on the locations of the**

**sellers' servers are no longer applicable because of the addition of Subsection (12) to § 59-12-211.**

Our conclusion is not based on your position that the Company does not sell or license software or other tangible personal property to its Subscribers, and that Subscribers cannot access the Company's internal software for any functional purpose, including modifying code, creating documents, or manipulating files. The Company is still selling the use of the proprietary software even though it is not transferring that software to the Subscribers. Utah Code § 59-12-211 was enacted to address situations such as the one presented for this ruling.

### III. Conclusion

As explained above, the Company's sales of Web Services to Subscribers located in Utah are subject Utah sales tax under § 59-12-103(1)-(1)(a), as "retail sales of tangible personal property made within the state."

This ruling is based on current law and could be changed by subsequent legislative action or judicial interpretation. Also, our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, you have additional facts that may be relevant, or you have any other questions, you are welcome to contact the Commission.

For the Commission,

Marc B. Johnson  
Commissioner

MBJ/aln  
10-011