

FINAL PRIVATE LETTER RULING

REQUEST LETTER

09-002

November 10, 2008

Private Letter Ruling Commissioners
Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134

Re: Request for Private Letter Ruling clarification pertaining to Public Relations, Advertising/Marketing Firms, Media Buying, PowerPoint Presentations, Creative Design/Graphic Artists and Web Site Design/Programming

To: Whom It May Concern,

Request is being made for rulings regarding when sales and use tax is applicable and/or due under the circumstances described below.

- 1) Public Relations labor retainers. Is the consulting time for planning, management, execution and reporting of all public relations activities on behalf of a client taxable? This could include coordinating press releases, articles, etc. and distribution to many types of media. Pitching and coordinating interviews with media, or coordinating media events for clients to participate in.
- 2) Advertising/Marketing labor retainers. Is the consulting time for account management on behalf of a client taxable? This could include strategic planning, consulting, client/staff meetings, project coordination, senior account management, agency/marketing labor and production coordination/management.
- 3) Media buying. Is the time spent to research, analyze, compile and present a media plan to a client taxable. This could consist of contacting media representatives, negotiating rates and placement, placing schedules and managing ad materials and deadlines.
- 4) Design and Production. Is the design and production time spent to conceptualize and create logo designs, advertising materials, packaging, label designs, etc. taxable? This could include packaging design, copywriting, editing, art direction/design, photography and final art production. This does not include a printing piece or any type of collateral or finished product.
- 5) Web site design. Is the time to conceptualize, design, program or maintain a website taxable?

- 6) PowerPoint presentations. If we conceptualize, design and create a PowerPoint presentation for a client, is that taxable? Does it make difference if we submit to them via the Internet or hand them a disk?

All of the above questions only pertain to labor or time spent on behalf of a client. I understand that printing a final piece would translate to a tangible product and therefore would be taxable. As you can see from all of my questions, the Utah State Sales Tax Code does not always clearly define answers to our questions. If you could please answer the above questions specifically by number and not a general overall answer to the questions it would be greatly appreciated. We just want to make sure that we are taxing the required items but not overtaxing our clients. Please call for any clarification or explanation. We would like to get a quick response to this request.

Sincerely,

NAME
TITLE
COMPANY
ADDRESS
PHONE

RESPONSE LETTER

August 17, 2009

NAME
COMPANY
ADDRESS

RE: Private Letter Ruling Request—Sales and Use Tax Treatment of Services Provided by Company to Utah Customers.

Dear NAME:

Your company COMPANY(COMPANY), has requested a ruling as to the sales and use tax treatment of certain services that it provides. You have enumerated and described six circumstances and have asked us to address each separately. Below, we will first introduce the applicable law and then we will analyze each of your first five circumstances. We will analyze your sixth circumstance in the future with a separate letter.

Applicable Law

Utah Code Ann. § 59-12-103 imposes a sales tax on certain transactions as set forth below in pertinent 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...
 - (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 . . .
 - (n) 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; or
 - (B) of a repair or renovation 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; and
- (ii) regardless of whether the sale provides:
 - (A) a right of permanent use of the product; or
 - (B) a right to use the product that is less than a permanent use, including a right:
 - (I) for a definite or specified length of time; and
 - (II) that terminates upon the occurrence of a condition.

Utah Code Ann. § 59-12-102(108) provides that:

- (b) "Tangible personal property" includes:
 -
 - (v) prewritten computer software.
- (c) "Tangible personal property" does not include a product that is transferred electronically.

Utah Code Ann. § 59-12-102(77) excludes certain software from the definition of “prewritten software” and from tangible personal property:

- (c) Notwithstanding Subsection (77)(b)(iii), "prewritten computer software" does not include a modification or enhancement described in Subsection (77)(b)(iii) if the charges for the modification or enhancement are:
 - (i) reasonable; and
 - (ii) separately stated on the invoice or other statement of price provided to the purchaser.

Two administrative rules, which relate to each other, are provided below. Utah Admin. Code R865-19S-110 (“Rule 110”) states:

A. "Advertiser" means a person that places advertisements in a publication, broadcast, or electronic medium, regardless of the name by which that person is designated.

1. A person is an advertiser only with respect to items actually placed in a publication, broadcast, or electronic medium.

B. All purchases of tangible personal property by an advertiser are subject to sales and use tax as property used or consumed by the advertiser.

C. *The tax treatment of an advertiser's purchase of graphic design services shall be determined in accordance with rule R865-19S-111 .*

D. An advertiser's charges for placement of advertisements are not subject to sales and use tax.
(Emphasis added.)

Utah Admin. Code R865-19S-111 ("Rule 111") states:

- A. Graphic design services are not subject to sales and use tax:
 - 1. if the graphic design is the object of the transaction; and
 - 2. even though a representation of the design is incorporated into a sample or template that is itself tangible personal property.
- B. Except as provided in C., if a vendor provides both graphic design services and tangible personal property that incorporates the graphic design:
 - 1. there is a rebuttable presumption that the tangible personal property is the object of the transaction; and
 - 2. the vendor must collect sales and use tax on the graphic design services and the tangible personal property.
- C. A vendor that provides both graphic design services and tangible personal property that incorporates the graphic design is not required to collect sales tax on the graphic design services if the vendor subcontracts the production of the tangible personal property to an independent third party.
- D. A vendor that provides nontaxable graphic design services and taxable tangible personal property under C. must separately state the nontaxable graphic design services or the entire sale is subject to sales and use tax.

Utah Admin. Code R865-19S-92 ("Rule 92") states:

- (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 exempt from 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.

Analysis

Below, your first five circumstances are listed and then analyzed.

1. Public Relations labor retainers. Is the consulting time for planning, management, execution and reporting of all public relations activities on behalf of a client taxable? This could include coordinating press releases, articles, etc. and distribution to many types of media. Pitching and coordinating interviews with media, or coordinating media events for clients to participate in.

Utah law does not impose sales or use tax on consulting services for planning, management, execution and reporting of public relations activities. Although sales and use tax is imposed on the services set forth in § 59-12-103, the consulting services for planning, management, etc. of public relations activities are not included in that statute. *See also* Private Letter Ruling (“PLR”) 95-075 (“Services to design multi-media advertising programs are not subject to Utah sales tax”).¹ In this case, your sales of consulting time are nontaxable. Your consulting services are not listed in § 59-12-103 and, according to your facts, do not include the transfer or sale of any tangible personal property or a product transferred electronically. However, you should still remit sales or use taxes on all of your purchases of materials and supplies used in providing these services.

2. Advertising/Marketing labor retainers. Is the consulting time for account management on behalf of a client taxable? This could include strategic planning, consulting, client/staff meetings, project coordination, senior account management, agency/marketing labor and production coordination/management.

Just as with 1 above, the services in your second circumstance are nontaxable and, according to your facts, do not include tangible personal property or a product transferred electronically. Also, as with 1 above, you should still remit sales or use taxes on all of your purchases of materials and supplies used in providing the services.

3. Media buying. Is the time spent to research, analyze, compile and present a media plan to a client taxable. This could consist of contacting media representatives, negotiating rates and placement, placing schedules and managing ad materials and deadlines .

Just as with 1 above, the services in your third circumstance are nontaxable and, according to your facts, do not include tangible personal property or a product transferred electronically. Also, as with 1 above, you should still remit sales or use taxes on all of your purchases of materials and supplies used in providing the services.

4. Design and Production. Is the design and production time spent to conceptualize and create logo designs, advertising materials, packaging, label designs, etc. taxable? This could include packaging design, copywriting, editing, art direction/design, photography and final art production. This does not include a printing piece or any type of collateral or finished product.

Under Rule 111, graphic design services are not subject to Utah sales and use tax if the services are the object (or essence) of the transaction, even if the design is incorporated into a sample or template that is itself tangible personal property. Rule 111, subsection A. Also, graphic design services are still nontaxable even if the design is incorporated into a sample or template that is a “product transferred electronically.” The term, product transferred electronically, was recently added to the Utah Code effective January 1, 2009. Prior to January 1, 2009, such products were included in the definition of tangible personal property; now, they

¹ The basis of PLR 95-075 is now covered in Rules 110 and 111.

are excluded. Subsections B.-D. of Rule 111 provide additional guidance to vendors that provide both graphic design services and tangible personal property that incorporates the graphic design.

The answer to your fourth circumstance is not as clear as those for the first three. You state that this situation does not include a printing piece or any type of collateral or finished product. However, you also use such terms as “production,” “conceptualize,” “create,” and advertising “materials.”

On the one hand, if, as stated in your request letter, there is not a finished product, then the design service is the essence of the transaction and under Rule 111 it would not be taxable. (Again, sales or use tax must be remitted on all materials and supplies purchased for use in providing the service.)

On the other hand, if there is sold tangible personal property or a product transferred electronically that is more than an item such as a sample or template and the production of the tangible personal property is not subcontracted out to an independent third party, then there is a rebuttable presumption that the property is the essence of the transaction and is taxable. Rule 111, subsection B.-D. In that case, the company must collect sales tax on the entire transaction. Rule 111, subsection B.2.

5. Web site design. Is the time to conceptualize, design, program or maintain a website taxable?

The time to conceptualize, design, program or maintain a website is not subject to Utah sales and use tax provided the object of the transaction is the company’s expertise in knowing what works best and how to incorporate designs into a website and the object is not the purchase of the website with the design services being secondary.

PLR 01-030 dealt in part with the taxability of website design. It states:

A customer who receives a website designed by the Company is in possession of tangible personal property.² Accordingly, whether the graphic design services are taxable depends on whether the customer is primarily purchasing the Company’s expertise in knowing what designs work best on a website and how to incorporate the various designs into a website, or whether it is primarily purchasing a website with the Company’s design services being a secondary concern. Naturally, such a determination would be dependent upon the facts surrounding each transaction. However, we would consider the Company’s expertise in designing the content of a website to be of paramount importance in the success and function of a website. So, although the customer is receiving tangible personal property in the form of a website, we would, without further information convincing us otherwise, determine that the customer was purchasing nontaxable graphic design services, not taxable tangible personal property.³

² In . . . *Utah Tel. Ass’n v. Auditing Div. Of the Utah State Tax Comm’n*, 951 P.2d 218 (Utah 1997), the Utah Supreme Court determined that the electronic signals

of installed software are tangible. Accordingly, a customer who receives computer software is in possession of tangible personal property.

³ On the other hand, should the design of a website entail only the bundling of pre-existing programs into a unique website for a specific client, we would probably consider this purchase the sale of canned computer software, not design services. Under such circumstances, the purchase would be taxable.

Conclusion

Based on the above analysis, your first five circumstances are not subject to Utah sales tax, but are subject to use tax on the cost of materials and supplies consumed in providing the services. Our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, if you have additional facts that may be relevant, or if you have any other questions, please contact us.

For the Commission,

Marc B. Johnson
Commissioner

MBJ/aln
09-002