

FINAL PRIVATE LETTER RULING

REQUEST LETTER

09-008

March 4, 2009

Mr. Marc B. Johnson
Commissioner
Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134

Re: Taxpayer Request for a Private Letter Ruling

Dear Mr. Johnson:

Pursuant to Utah Adm. Code Rule R861-1A-34, COMPANY submits this Request for a Private Letter Ruling on behalf of its client, respectfully asking whether certain entities have a Utah sales and use tax registration and collection requirement.

I. Facts

Service Company (“Service”) is an out-of-state corporation. It is part of an affiliated group of companies that conduct a variety of different types of businesses. Service operates a network website infrastructure platform that provides customers with a variety of web-based services. Service provides customers with a number of e-commerce services such as compute power, content delivery, web storage, and other services. Service’s infrastructure web services allow companies additional computing power and capacity on demand without additional infrastructure costs. All of these services are provided to customers from outside of Utah.

Service would like to send two or three employees to Utah to visit a potential customer (“Customer”). The purpose of the visit would be to discuss the services that Service provides and how the services could be used by Customer. Any contracts or agreements entered into between Service and Customer would be subsequently executed outside of Utah. All services provided by Service would be provided to Customer from outside of Utah. However, Service personnel may visit Utah up to four times per year for one or two days to meet with Customer primarily to manage the business relationship, and resolve technical and business issues.

Service would also like to open an office in Utah to support and service its Utah customers. It is anticipated that Service would have employees working from its Utah office.

Service is also affiliated with other entities, including Retailer, an Internet seller of tangible property and digital goods to customers around the world, including customers in Utah.

Retailer is located outside of Utah. Retailer would not operate any retail stores, engage in any Utah activities, or own or lease any real property in Utah, and is not registered as a retail merchant in Utah. Retailer would not have any employees in Utah. Service does not provide advertising, marketing or sales services for Retailer nor would Service provide these activities from its proposed Utah office. Service may provide Retailer with certain business services for its backend infrastructure, including content delivery network and storage services. However, these services will not be provided from Utah. Service also provides these services to unrelated third party customers.

i. II. Issue

Assuming Service would be required to collect and remit Utah sales and use tax based on its proposed visits to Utah, would Retailer be required to register to collect and remit Utah sales and tax?

ii. III. Legal Framework for Analysis

A. Sales Tax

1. Registration and Collection Requirement

Utah imposes a sales tax on sellers meeting certain statutory requirements. Utah Code § 59-12-107. A seller is a person that makes a sale, lease or rental of tangible personal property or a service. Utah Code § 59-12-102(89). Sellers are required to register to collect and remit sales and use tax if the seller has or utilizes:

- (a) an office;
- (b) distribution house;
- (c) sales house;
- (d) warehouse;
- (e) service enterprise; or
- (f) place of business

Utah Code § 59-12-107(1)(a)(i).

In addition, a seller is required to register to collect and remit sales and use tax if the seller engages in any of the following activities:

- (a) Maintains a stock of goods within the state;
- (b) Regularly solicits orders in the state, unless the seller's only activity is:
 - (i) advertising or solicitation by:
 - (aa) direct mail;
 - (bb) electronic mail;
 - (cc) the internet;
 - (dd) telecommunications service; or
 - (ee) or another similar means:

- (c) Regularly engages in the delivery of property in the state by means other than common carrier or US Mail; or
- (d) Regularly engages in an activity related to the leasing or servicing of property located within the state.

Utah Code § 59-12-107(1)(a).

a. Affiliate Nexus

Utah tax law also requires sellers that do not have a registration and collection requirement under any of the aforementioned sections to nevertheless register to collect Utah sales and use tax if the seller is considered a related seller. Utah Code § 59-12-107(1)(f)(i)(C). A “related seller” is a seller that does not otherwise have a Utah registration and collection requirement, but is related to a seller, as part of an affiliated group or through common ownership, that has a sales and use tax collection and registration requirement. Utah Code § 59-12-107(1)(f)(C). A seller is also a related seller if it is limited liability company owned by a parent corporation of an affiliated group if the parent corporation of the affiliated group is required to pay or collect and remit sales and use taxes. Utah Code § 59-12-107(1)(f)(i)(C)(II) (Bb).

“Affiliated group” is defined as one or more chains of corporations connected through stock ownership with a common parent corporation that are:

- (1) at least 80% of the stock of each of the corporations in the group, excluding the common parent corporation, is owned by one of more of the other corporations in the group; and
- (2) the common parent directly owns at least 80% of the stock of at least one of the corporations in the group.

Utah Code § 59-7-10192)(a).

In addition, “affiliated group” includes a corporation that is qualified to do business, but is not otherwise doing business in the state. Utah Code § 59-12-107(1)(e)(i)(A).

“Common ownership” is defined as direct or indirect control or ownership of more than 50% of the outstanding voting stock of:

- (1) a parent-subsidary controlled group as defined under IRC Sec. 1563, except that 50% shall be substituted for 80%;
- (2) a brother-sister controlled group as defined under IRC Sec. 1563, except that 50% shall be substituted for 80%; or
- (3) three or more corporations each of which is a member of an affiliated group of corporations, as defined above, and one of which is:

- (a) a common parent corporation included in a group of corporations in which 80% of the stock of each corporations is owned by one of more of the other corporations; and
- (b) included in a group of corporations where the common parent directly owns at least 80% of the stock of at least one of the corporations in the group.

Utah Code § 59-7-101(7)

b. Affiliate Nexus Exception

Utah law provides an exception from registration and collection of Utah sales and use tax for related sellers (“Affiliate Nexus Exception”). Utah Code §59-12-107(1)(f)(ii). Utah law provides that if a seller is a related seller and the seller to which the related seller is related does not engage in any of the following activities on behalf of the related seller then the related seller is not required to register to collect and remit Utah sales tax. Utah Code §59-12-107(1)(f)(ii). The activities in which the seller may not engage on behalf of the related seller include:

- (1) advertising;
- (2) marketing;
- (3) sales; or
- (4) other services.

Utah Code § 59-12-107(1)(f)(ii)(B).

In addition, the seller to which the related seller is related may not accept returns of tangible personal property unless it accepts returns of items sold by a seller that is not related on the same terms as offered to the related seller. Utah Code § 59-12-107(1)(F)(ii)(C).

IV. Legal Analysis of Questions Presented

A. Sales Tax

1. Retailer Does Not Have a Utah Sales and Use Tax Registration or Collection Requirement Based on Utah’s Statutory Provisions

Even if Service has a Utah sales and use tax registration requirement, its affiliate, Retailer, would not be required to register to collect and remit Utah sales and use tax because: it does not meet any of Utah’s statutory doing business requirements; and Retailer satisfies the requirements of the Affiliate Nexus Exception.

Retailer would not be subject to Utah’s requirement to register and collect Utah sales and use tax because it does not satisfy Utah’s statutory doing business standard. Retailer would not maintain an office, distribution house, sales house, warehouse, service enterprise or place of

business in Utah. In addition, Retailer would not maintain a stock of goods in the state, regularly solicit orders in the state other than the Internet, regularly engage in the delivery of property in the state by other than common carrier or regularly engage in an activity related to the leasing or servicing of property in the state. Retailer’s business is limited to sales of tangible personal property and digital goods. Retailer is located outside Utah and does not operate any retail stores, own any real or tangible property or have employees in the state. Thus, Retailer would not be required to register to collect and remit Utah sales and use tax.

In addition, Retailer is not subject to the “related seller” requirements because it meets both requirements of the Affiliate Nexus Exception. Retailer meets the first requirement of the Affiliate Nexus Exception because Service does not perform any advertising, marketing or sales services for Retailer in or outside of Utah. While Service does perform some backend infrastructure services for Retailer (e.g., content delivery and storage services), these services are not performed in Utah and are not directly related to helping Retailer advertise, market or target Utah customers. The services Service does perform for Retailer are intended to help Retailer perform its business functions. The services are not directly intended to help Retailer establish and maintain a market in Utah for new customers. Thus, Retailer will meet the first requirement of the Affiliate Nexus Exception.

Retailer satisfies the second requirement of the Affiliate Nexus Exception because Service does not accept returns of tangible personal property for Retailer or any unrelated third parties.

As a result, Retailer should not be considered a “related seller” with a Utah sales and use tax registration and collection requirement.

III. V. Conclusion

Taxpayer seeks confirmation of the Commissioner’s agreement that Retailer does not have a Utah sales and use tax registration and collection requirement because it does not meet Utah’s statutory doing business standard. In addition, Retailer should not be considered a “related seller” with a Utah sales and use tax registration and collection requirement because it meets both requirements of the Utah Affiliate Nexus Exception.

In advance of the issuance of a response to this request for a ruling, we respectfully request that the Commission contact us to discuss any facts or questions that may potentially result in an adverse ruling.

Please feel free to contact NAME at (###) ###-#### or 2ND NAME at (###) ###-#### if you have any questions.

Very truly yours,

NAME

2ND NAME

Cc: Mr. Bruce Johnson, Commissioner, Utah State Tax Commission

RESPONSE LETTER

July 28, 2009

NAME
2ND NAME
COMPANY
ADDRESS

Sent via e-mail

Original to follow in U.S. Mail

Re: Private Letter Ruling Request—Sales and Use Tax, Affiliate Analysis under Utah Code Ann. § 59-12-107(1)(f)

Dear NAME and 2ND NAME:

You have requested a ruling as to whether a company (Retailer) would be required to collect and remit Utah sales and use tax because a related company (Service) is required to collect and remit Utah sales and use taxes based on its proposed visits to Utah.

I. Facts

Retailer is an Internet seller of tangible property and digital goods to customers around the world, including customers in Utah. Retailer is located outside of Utah. Retailer would not operate any retail stores, engage in any Utah activities, or own or lease any real property in Utah, and is not registered as a retail merchant in Utah. Retailer would not have any employees in Utah.

Service is an out-of-state company that is affiliated with other entities including Retailer. Service operates a network website infrastructure platform that provides customers with a variety of web-based services, including e-commerce services such as computing power, content delivery, web storage, and other services and also including infrastructure web services that allow companies to have additional computing power and capacity on demand without additional infrastructure costs. All of the services are provided to customers located outside of Utah. Service does not provide advertising, marketing or sales services for Retailer. However, Service may provide Retailer with certain business services for its backend infrastructure, including content delivery, network, and storage services. You have represented that these services are not directly intended to help Retailer establish and maintain a market in Utah for its new customers. Furthermore, Service also provides these services to unrelated third-party customers. Service would like to open an office in Utah to service and support Utah customers. However, Service would still not provide any advertising, marketing, or sales services or business services for backend infrastructure for Retailer from this proposed Utah office.

For the purposes of this private letter ruling, you have asked us to assume that Service would be required to register to collect and remit sales and use tax to Utah. You explained that in the future Service proposes to regularly visit Utah up to four times per year and proposes to open a Utah office, as described above.

II. Issues

You have asked:

Assuming Service would be required to register to collect and remit Utah sales and use tax based on its proposed visits to Utah, would Retailer be required to register to collect and remit Utah sales and [use] tax?

III. Applicable Law

Under Utah Code Ann. § 59-12-107, Utah imposes a sales and use tax on sellers meeting certain statutory requirements. Utah Code Ann. § 59-12-107(1)(a) states:

- (1)(a) Except as provided in Subsection (1)(d) . . . , 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 (1)(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 (1)(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.

Utah Code Ann. § 59-12-102(100) defines “seller” as “a person that makes a sale, lease, or rental of: (a) tangible personal property; (b) a product transferred electronically; or (c) a service.”

Under Utah Code Ann. § 59-12-107(1)(f), an out-of-state seller may have Utah nexus based on being related to another seller with Utah nexus. Section 59-12-107(1)(f) states:

- (i) As used in this Subsection (1) (f):
 - (A) "affiliated group" is as defined in Section 59-7-101, except that "affiliated group" includes a corporation that is qualified to do business but is not otherwise doing business in this state;
 - (B) "common ownership" is as defined in Section 59-7-101;
 - (C) "related seller" means a seller that:
 - (I) is not required to pay or collect and remit sales and use taxes under Subsection (1)(a) or Section 59-12-103.1;
 - (II) is:
 - (Aa) related to a seller that is required to pay or collect and remit sales and use taxes under Subsection (1) (a) as part of an affiliated group or because of common ownership; or
 - (Bb) a limited liability company owned by the parent corporation of an affiliated group if that parent corporation of the affiliated group is required to pay or collect and remit sales and use taxes under Subsection (1)(a); and
 - (III) does not voluntarily collect and remit a tax under Subsection (1)(b)(i).
- (ii) A seller is not required to pay or collect and remit sales and use taxes under Subsection (1)(a):
 - (A) if the seller is a related seller;
 - (B) if the seller to which the related seller is related does not engage in any of the following activities on behalf of the related seller:
 - (I) advertising;
 - (II) marketing;
 - (III) sales; or
 - (IV) other services; and
 - (C) if the seller to which the related seller is related accepts the return of an item sold by the related seller, the seller to which the related seller is related accepts the return of that item:
 - (I) sold by a seller that is not a related seller; and
 - (II) on the same terms as the return of an item sold by that seller to which the related seller is related.

Consistent with § 59-12-107(1)(f), Utah Tax Commission Publication 37 titled “Business Activity and Nexus in Utah” and revised 5/04 (“Pub. 37”), a copy of which is enclosed¹, briefly explains:

A “related seller” is a seller related to a nexus seller, but by itself does not have sufficient activity in Utah to establish nexus, and is therefore not required to collect and remit Utah sales and use tax. However, a related seller must collect and remit sales and use tax if the entity it is related to (which has nexus) engages in advertising, marketing or sales activities on its behalf.

To maintain the related seller’s non-nexus status, the nexus seller must also accept the return of items from non-related entities.

IV. Application

You have asked us to assume that “[s]ervice would be required to register to collect and remit Utah sales and use tax based on its proposed visits to Utah.”

Although you have not provided specific analysis regarding the affiliated ownership between Service and Retailer, in your request you outlined the applicable statutes for such ownership and proffered that the ownership tests have been met. Therefore, we will assume that the relationship between Service and Retailer indicates that Retailer is a “related seller.”

Before responding to the specific basis for your request, there is an issue arising out of a point you raised in your letter that we will address.

A. Services are Not Performed in Utah; therefore Retailer does Not Have Nexus or a Registration Requirement.

In your letter you stated that the services provided by Service “are **not performed** in Utah . . .” (Emphasis added.) The Commission does not believe that business activity provided in a state outside of Utah can create nexus for a non-Utah business. This holds even if a business performing the activity for an affiliated retailer has a Utah presence. Although we cite no specific authority to support our position, we can find no basis to find nexus in this situation. Accordingly, and in the absence of information to the contrary, because the services are not performed in this state, the provisions found in § 59-12-107(1)(f)(ii) do not apply and Retailer does not have affiliate nexus or a registration requirement. Our finding is premised on your representation, as we interpret below, that the services are not related to assisting Retailer in maintaining a market presence in Utah.

Should we find in the future that legal authority exists or is created to establish nexus for an affiliated retailer under the circumstances described, any ruling we make to that effect will be prospective.

B. Application of the Provisions of § 59-12-107(1) to Your Two Underlying Premises.

¹ Pub. 37 is also available at <http://tax.utah.gov/forms/pubs/pub-37.pdf>.

Having determined that Service’s business activities will not create nexus for Retailer because the services are performed outside of Utah, we will address your two underlying premises relating to whether Retailer does business in Utah and whether it meets the nexus exception for a related seller. We believe this analysis is important because of the complexity of the overall issue and the fact that this is the first time we have addressed subsection (1)(f)(ii) of § 59-12-107 in a published document. Furthermore, it is possible that Service may provide services within Utah to Retailer at some point in the future.

You presented two arguments why Retailer does not have a registration requirement. You stated, first, that Retailer does not meet any of Utah’s statutory doing business requirements found in § 59-12-107(1)(a) and, second, that you believe Retailer satisfies the requirements of § 59-12-107(1)(f)(ii), which you referred to as the “Affiliate Nexus Exception.”

1. Under your first premise, Retailer does not do business in Utah under § 59-12-107(1)(a)

In response to your first argument, based on the facts you presented in your request letter, we agree that Retailer does not meet any of Utah’s statutory registration requirements found in § 59-12-107(1)(a). In general, you have represented that Retailer does not operate, utilize, or maintain a physical facility in Utah. Furthermore, Retailer maintains no personal property or inventory in this state. And finally, Retailer maintains no personnel in the state to solicit orders, nor does it perform any of the other functions specified in the section. However, Retailer is not automatically excluded from nexus at this point because it is a related seller; therefore, our analysis continues below.

2. Under your second premise, Retailer does not have nexus based on your representations and our assumptions.

In response to your second argument, we find that subsection (1)(f)(ii) of § 59-12-107 does not apply to Retailer, but Retailer still does not have affiliate nexus or a registration requirement.

Retailer is part of an affiliated group under § 59-12-107 (1)(f)(i)(A), and is a related seller as defined under § 59-12-107(1)(f)(i)(C)(II)(Aa). So, Retailer meets the “related seller” requirement in subsection (1)(f)(ii)(A) of § 59-12-107. Additionally, Retailer is not excluded from the exception of § 59-12-107(1)(f)(ii) by reason of subsection (1)(f)(ii)(C); Service does not accept the returns of any tangible personal property or items sold by Retailer in the first place, so subsection (1)(f)(ii)(C) does not apply in this case. Therefore, we look to subsection (1)(f)(ii)(B) to determine if Retailer has nexus in Utah.

You have asserted that Service does not perform any advertising, marketing or sales services for Retailer, in or outside of Utah. You maintain, and we concur, that Retailer meets the conditions of subsection (1)(f)(ii)(B)(I) through (B)(III). Therefore, the application of subsection (1)(f)(ii)(B)(IV) may be pivotal.

The application of subsection (1)(f)(ii)(B)(IV) turns on whether Service engages in “other services” “on behalf of” Retailer. We interpret the language “other services” “on behalf of” the out-of-state affiliate broadly enough to include activities that may not be directly related advertising, marketing or sales. We do so because if a seller does not accept returns from a non-related seller as required by (1)(f)(ii)(C), affiliate nexus would be created in certain circumstances. Such service, however, is a little broader in nature than advertising, marketing, and sales. We do, however, recognize that accepting returns from non-related sellers could be considered a marketing tool. Accordingly, “other services” could include several business activities performed on behalf of the out-of-state affiliate. Such services may include warehousing, shipping and distribution, packaging, or networking support. In short, our position would be that if a Utah-based operation does anything to enhance, assist, or implement the direct or support sales operations of an out-of-state affiliate, these services have the potential to create nexus.

We do believe, however, that the “other services” should bear some relationship with a related seller maintaining a market presence in Utah. Therefore, some support operations, including financial or accounting support, as well as other administrative functions might not create affiliate nexus. Furthermore, as we stated previously, in order to create Utah sales tax nexus for a related seller, services would need to be provided from a place of business in Utah.

Based on your description of the types of services that are performed, in and of themselves, we cannot conclude that Service is not engaging in other services on behalf of Retailer. Your description of “business services for its backend infrastructure” is not specific enough for us to exclude them from other services. Furthermore, we do not agree with your assumption that these services must directly related to helping Retailer advertise, market, or target Utah customers. Rather, as mentioned previously, other services may include services that go beyond specifically advertising, marketing, and sales. If Service provides Retailer services that are intended to help Retailer establish or maintain a market presence in Utah, those services could be included under the statutory definition of “other services.” You have represented that those services are not directly intended to help Retailer establish and maintain a market in Utah for new customers. We believe it is also imperative that the services not be directly intended to help Retailer maintain a market for existing customers. Furthermore, we are not comfortable in relying on a statement of intent, which can be highly subjective. Our determination will be based on our assumption that the services are not directly related to establishing or maintaining a market in Utah for new or existing customers. To summarize, Retailer does not have nexus in Utah based on the types of services performed as long as those services are not directly related to establishing or maintaining a market in Utah for new or existing customers.

Nonetheless, we have already established in subsection A of this Application section that Retailer would not have nexus in Utah. However, should Service perform any of its services on behalf of Retailer from a place of business within Utah, our conclusions about § 59-12-107(1)(f)(ii) might change. If there is a change in the facts about the exact nature of the back-end infrastructure services provided by Service, Retailer might be required to register and collect Utah sales tax on its sales to Utah customers.

V. Conclusion

To summarize, the Commission finds that Retailer is not required to register to collect and remit Utah sales and use tax based on the facts presented. The provisions of § 59-12-107(1)(f)(ii) do not apply in this case. 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
09-008

Enc.