10-2086
TAX TYPE: SALES AND USE TAX
TAX YEAR: 4-1-2007 – 12-31-2009
DATE SIGNED: 7-15-2015
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 10-2086 Account No. ##### Tax Type: Sales and Use Tax Audit Period: 04/01/07 – 12/31/09 Judge: Chapman

Presiding:
John L. Valentine, Commission Chair
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE-1 FOR TAXPAYER, Representative
REPRESENTATIVE-2 FOR TAXPAYER, Vice-President of Finance, TAXPAYER
REPRESENTATIVE-3 FOR TAXPAYER, from Auditing Division
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, from Auditing Division

STATEMENT OF THE CASE

TAXPAYER ("Petitioner," "taxpayer," or "TAXPAYER") is appealing a sales and use tax assessment that Auditing Division ("Respondent" or "Division") has imposed upon it. This matter came before the Utah State Tax Commission for a Formal Hearing on October 28, 2014. Based upon the evidence and testimony, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is sales and use tax.

2. The period at issue is April 1, 2007 through December 31, 2009 ("audit period").

3. On July 7, 2010, the Division issued a Statutory Notice - Sales and Use Tax ("Initial Statutory Notice")[1] to the taxpayer, in which it imposed additional sales and use tax and interest (calculated through August 6, 2010)[2] for the audit period, as follows:

Tax	Penalties	Interest	Total
$$$$$	$$$$$	$$$$$	$$$$$

4. On July 17, 2010, the taxpayer timely filed an appeal of the Division's assessment to the Tax Commission. The Commission held an Initial Hearing in this matter and issued its Initial Hearing Order on August 16, 2013. The taxpayer timely requested to proceed to a Formal Hearing.

5. A majority of the assessment that the Division imposed in its Initial Statutory Notice concerned tax that the Division assessed on the taxpayer's sales to its out-of-state customers. The Division subsequently determined that most of these transactions were not subject to Utah taxation and removed them from its assessment. The Division reflected this change in an amended Statutory Notice – Sales and Use Tax ("Amended Statutory Notice") that it issued on June 7, 2011.[3] The Division also made other smaller changes, some of which are disputed and which will be discussed later in the decision. In the Amended Statutory Notice, the Division imposed sales and use tax and interest (calculated through July 7, 2011), as follows:

Tax	Penalties	Interest	Total
$$$$$	$$$$$	$$$$$	$$$$$

6. In the Amended Statutory Notice, the Division imposed tax on a number of the taxpayer's purchases on which the taxpayer did not pay Utah sales and use tax. These transactions are identified on

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1 Respondent's Formal Hearing Exhibit #4 ("Exhibit R-4").

2 Interest continues to accrue while any tax liability remains unpaid.

3 Exhibit R-5. At the hearing, REPRESENTATIVE-2 FOR TAXPAYER, TAXPAYER'S Vice-President of Finance, testified that no sales made by TAXPAYER to its own customers are in dispute. As a result, the Commission need not address the taxability of any sales made by TAXPAYER. The only sales that TAXPAYER made to its customers that the Division assessed in the Amended Statutory Notice are found on Amended Schedule 1 of that notice, which account for $$$$$ of the $$$$$ total amount of taxes assessed in that notice.

Amended Schedule 2, Unreported Expense Purchases ("Amended Schedule 2"), and on Amended Schedule 3, Unreported Asset Purchases ("Amended Schedule 3"). The taxpayer is not contesting most of the purchases identified on these schedules. However, the taxpayer is contesting those purchases it made from the following seven vendors: 1) VENDOR-1; 2) VENDOR-2; 3) VENDOR-3; 4) VENDOR-4; 5) VENDOR-5; 6) VENDOR-6 and 7) VENDOR-7.

7. The Division presented a summary of the purchases being contested by the taxpayer.[4] The Division's summary shows that the contested transactions comprise $$$$$ of the $$$$$ of total tax imposed in the Amended Statutory Notice. The following chart shows how many transactions (or purchases) are at issue for each of the seven "contested vendors" and the amount of taxes at issue for each vendor:

Contested Vendor	Number of Contested Transactions	Tax at Issue per Contested Vendor
VENDOR-1	#####	$$$$$
VENDOR-2	#####	$$$$$
VENDOR-5	#####	$$$$$
VENDOR-6	#####	$$$$$
VENDOR-3	#####	$$$$$
VENDOR-4	#####	$$$$$
VENDOR-7	#####	$$$$$
TOTAL	#####	$$$$$

Parties' Arguments

8. The taxpayer contests the transactions indentified in the prior paragraph for a number of reasons. First, the taxpayer explains that about a decade ago, the software-as-a-service ("SaaS") industry emerged to replace not only traditional labor intensive industries, but also traditional software and technology industries. The taxpayer contends that these SaaS providers allow companies like itself to outsource some of their business functions to third parties rather than expending resources to perform all tasks in-house. The taxpayer contends

4 Exhibit R-7 (which is a summary of the transactions being contested).

that these online services comprise much more than just the use of software and should not be considered the taxable sale or use of software. The taxpayer contends that all seven vendors with whom it entered into the contested transactions are SaaS providers. The taxpayer further explains that while the taxpayer may use these vendors' prewritten computer software, the software is never downloaded or transferred onto the taxpayer's equipment. As a result, the taxpayer contends that the contested transactions are not taxable.

9. The taxpayer asserts that Utah is now about the only state still attempting to tax SaaS-type services.[5] It also asserts that there has been an on-going disagreement between the Tax Commission and the Streamlined Sales Tax Governing Board concerning Utah's taxation of the use of computer software where a transfer of that software does not occur and whether such taxation is in compliance with the Streamlined Sales and Use Tax Agreement ("SSUTA"). For these reasons, the taxpayer contends that the Commission should establish a policy not to tax SaaS transactions and that is should find that the Division improperly imposed tax on all of the contested transactions involving the taxpayer's purchases from SaaS vendors. However, should the Commission not adopt the policy advocated by the taxpayer, the taxpayer made a number of other arguments to contest the Division's assessment of tax on all of the transactions at issue.

10. First, the taxpayer acknowledged that the Commission has historically taxed some SaaS transactions, but not others, depending on its analysis of the transaction using the "essence of the transaction" test (also known as the "primary object of the transaction" test). The taxpayer, however, contends that the object of any SaaS transaction is not primarily for the software, as the Commission has sometimes found, but that the object is primarily for other items associated with the transaction, including consultation and educational services, servers, hardware, internet access, data storage, internet security, onsite personnel, telephone support, etc. As a

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5 The taxpayer referred to a number of other states that do not tax SaaS-type transactions. It also referred the Commission to a 2014 decision from the Michigan Court of Claims, where the court used an "incidental to services" test to determine that prewritten computer software was an incidental component of the SaaS-like services at issue. Using this incidental to services test, the court found that the transactions were not subject to taxation under Michigan law. *See Auto-Owners Insurance Co.v. Dept. of Treasury*, Case No. 12-000082-MT

result, the taxpayer contends that even if the Tax Commission employs the essence or primary object of the transaction test to determine whether each of the contested transactions is taxable, this analysis will show that the transactions are not taxable. The taxpayer further contends that the private letter rulings in which the Tax Commission has employed the essence or primary object of the transaction test to SaaS-type transactions are inconsistent and inconclusive and do not provide an objective standard for determining which online services are taxable and which are not.

11. In addition, the taxpayer contends that Utah law does not allow the use of software to be taxed where a transfer of that software does not occur because the user does not obtain "control" over the software. The taxpayer contends a purchaser's "control" is a requirement before a taxable "lease" exists pursuant to Utah Code Ann. §59-12-102(48) (2009).

12. Furthermore, the taxpayer contends that the SaaS services at issue involve customers, like the taxpayer, who put data into a vendor's system, where the data is then processed, organized, stored, and retrieved. The taxpayer contends that these SaaS services are "data processing and information services," which are expressly excluded from taxable "telecommunications services" pursuant to Section 59-12-102(113)(c)(iv) (2009).

13. In addition, the taxpayer contends that the Division should be equitably estopped from claiming that the taxpayer owes tax on the transactions at issue because there was no notification informing taxpayers that SaaS-type transactions are subject to Utah tax. The taxpayer acknowledges that in May 2012, the Tax Commission published USTC Publication 64, Sales Tax Information for Computer Service Providers ("Publication 64") that addressed the taxability of "remotely accessed software" (which includes SaaS and cloud computing services). However, the taxpayer contends that it would not have known that Utah considered SaaS-

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(Michigan Court of Claims, Opinion and Order Mar. 2, 2014).

type transactions subject to taxation until Publication 64 was published.[6] The taxpayer also argues that should the Commission find that transactions involving the use of prewritten computer software over the internet should be sourced to the location of the user's address, equitable estoppel is also appropriate because the Commission issued private letter rulings during the audit period that called for such transactions to be sourced to the location of the seller's servers.

14. The foregoing arguments concerned *all* of the contested transactions. Should the Commission reject these arguments, the taxpayer presented two additional arguments that do not concern all of the contested transactions. First, the taxpayer contends that between January 1, 2009 and July 1, 2011, Utah law does not allow *any* software that is transferred electronically to be taxed. The taxpayer points out that, effective January 1, 2009, the definition of "tangible personal property" includes "prewritten computer software" but excludes "a product that is transferred electronically." Section 59-2-102(108)(b)(v) and (d). As a result, the taxpayer contends that Utah law precludes taxing software transferred electronically from January 1, 2009 until a "statutory correction" was made effective July 1, 2011. Thus, the taxpayer contends that those contested transactions that occurred on or after January 1, 2009 are not subject to taxation.

15. Second, at the Formal hearing, the taxpayer presented a new argument that it had not identified in its pre-hearing briefs. Specifically, the taxpayer pointed out that the Division imposed tax on a number of transactions in its Amended Statutory Notice that had not been assessed in the Initial Statutory Notice. The taxpayer contends that before the Amended Statutory Notice was issued, the statute of limitations for imposing a tax may have expired for some of the transactions that were not assessed until the Amended Statutory Notice was issued. The taxpayer stated that it did not know whether the statute of limitations to assess a tax would be two

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6 As of May 2012, Publication 64 addresses the taxability of "remotely accessed software," as follows in pertinent part:

> Remotely accessed software includes hosted software, application service provider (ASP) software, software-as-a-service (SAAS), and cloud computing applications.
>
> License fees for remotely accessed prewritten software are taxable if the purchased software is

years or three years, and it did not know the Utah statute that would apply. Nor did the taxpayer identify which of the transactions on the Amended Statutory Notice would be affected by this argument. The taxpayer asked to prepare a post-hearing document to develop and support this argument. The request was denied.

16. The taxpayer's last argument concerns burden of proof. The taxpayer argued that the burden of proof in this matter should be on the Division because the transactions at issue involve tax imposition statutes and not tax exemption statutes. For this argument, the taxpayer specifically referred the Commission to Section 59-1-1417(2)(a), which provides for the Commission to "construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer[.]" Because the tax imposition statutes at issue must be construed strictly in favor of the taxpayer, the taxpayer contends that the Division has the burden to prove that the contested assessments are proper by demonstrating clear and convincing authorities and factual evidence. The Division, however, disputes the taxpayer's burden of proof argument and contends that the burden in this case is upon the taxpayer.

17. The Division also contends that throughout the audit period, Utah law provides that the use of software over the internet at a Utah location is subject to Utah taxation. The Division acknowledges that changes were made to the applicable law during the audit period. The Division, however, contends that these changes did not affect the taxability of the contested transactions throughout the audit period. Furthermore, the Division points out that throughout the audit period and subsequent to it, the Commission's practice has been to tax SaaS-type transactions if the essence or primary object of the transaction test indicated that the use of prewritten computer software was the primary object of the transaction. In the Division's Formal Hearing Brief (Division's "pre-hearing brief"), it referred a number of times to the essence or primary object of the transaction test when determining whether the transactions at issue were subject to taxation. In its pre-hearing brief, the Division also purported that all of the transactions at issue were taxable because the primary object of these transactions is taxable software and because any associated services are incidental to the taxable software. In the Division's

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used in Utah. . . .

closing arguments, it also asked the Commission to find that all of the nontaxable services provided by the contested vendors where incidental to the uses of their software.[7]

18. Prior to the Formal Hearing, the Division had not been made aware of the taxpayer's statute of limitations argument about those transactions that it had not assessed until it issued its Amended Statutory Notice. During the hearing, the Division initially argued that the Commission should not entertain the taxpayer's statute of limitations argument because the statute of limitations defense, if not raised, is waived under the Utah Rules of Civil Procedure. During closing arguments, however, the Division presented different reasons to reject the taxpayer's statute of limitations argument. The Division argued that the general three-year period to assess tax on transactions that occurred during the audit period should not apply because this appeal and the audit period has been open since 2010 and that the statute of limitations should not run for the audit period while the appeal is ongoing. The Division also indicated that to hold otherwise could preclude the Tax Commission from collecting the correct amount of tax that is due. The Division declined to submit a post-hearing brief to address why the taxpayer's statute of limitations argument should be denied.

19. The Division, however, did submit an exhibit at the Formal Hearing on which it showed that 25 of the 41 contested transactions had not been assessed until it issued the Amended Statutory Notice.[8] Of these 25 transactions, the Division identified those that occurred more than three years prior to the June 7, 2011 date on

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7 At the hearing, the Division's witness suggested that the Commission could avoid applying the primary object of the transaction test to determine the taxability of the contested transactions. The witness opined that because the contested transactions all involve the use of taxable prewritten computer software, the transactions would be subject to taxation even though they may also involve nontaxable services, first because they are "bundled transactions" and second because the definition of "purchase price" includes a seller's expenses for service costs and a charge for any service necessary to complete the sale. These legal conclusions, however, are not ones that the Commission has reached when previously determining the taxability of SaaS-type services in a number of private letter rulings (which will be discussed in more detail later in the decision). More importantly, the Division did not rely on the witness's legal conclusions in either its pre-hearing brief or in its closing arguments. For these reasons, the Commission will not address the witness's legal conclusions any further.

8 Exhibit R-6. The 25 contested transactions that had not been assessed until the Division issued its Amended Statutory Notice account for $$$$$ of the total contested tax amount of $$$$$.

which the Amended Statutory Notice was issued and those that occurred on or after this date. The Division indicated that only 11 of these 25 transactions (1 of the 5 VENDOR-1 transactions and 10 of the 16 VENDOR-6 transactions) occurred more than three years prior to the June 7, 2011 date on which the amended notice was issued.[9] In case the Commission were to find that the Division assessed these 11 transactions beyond the statute of limitations period allowed by law, the Division showed on its exhibit that these 11 transactions would only account for $$$$$ of the total contested tax amount of $$$$$.[10]

Purchases the Taxpayer Made from the Contested Vendors[11]

20. REPRESENTATIVE-2 FOR TAXPAYER, the taxpayer's Vice-President of Finance, testified on behalf of TAXPAYER. REPRESENTATIVE-2 FOR TAXPAYER did not begin working for TAXPAYER until 2011, which is subsequent to the audit period of April 1, 2007 to December 31, 2009. However, he stated

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9 It appears that the Division may have used a date of July 7, 2011 to identify these 11 transactions because one of them (specifically a VENDOR-1 transaction from June 28, 2011) occurred less than three years prior to the *June 7*, 2011 date on which the Amended Statutory Notice was issued. The Initial Statutory Notice was issued on *July 7*, 2010.

10 As will be explained later in the Discussion section of the decision, the Commission does not find the taxpayer's statute of limitations argument sufficient to show that any of the contested transactions should be removed from the Amended Statutory Notice. Regardless, even if the Commission had found the argument convincing, it appears that 4 of the 11 contested transactions identified by the Division were assessed within the three-year statutory period.

Utah Code Ann. §59-1-1410(1) provides that the period within which the Division may assess a tax is three years from the "day on which a person files a return[,]" while Section 59-1-1410(2)(a) provides that a "return filed before the last day prescribed by statute or rule for filing the return is considered to be filed on the last day for filing the return." The last day for filing the taxpayer's 2nd quarter of 2008 return (for the period April 1, 2008 through June 30, 2008) would have been August 1, 2008, which is less than three years prior to the June 7, 2011 date on which the Division issued its Amended Statutory Notice. Accordingly, it appears that any transaction that occurred during the 2nd quarter of 2008 could have been assessed on the Amended Statutory Notice, even had the taxpayer's statute of limitations argument been convincing. Four of the 11 transactions identified by the Division as occurring more than three years prior to the issuance date of the amended notice occurred during the 2nd quarter of 2008. Accordingly, it appears that these 4 of the 11 contested transactions identified by the Division were properly assessed, regardless of whether the taxpayer's statute of limitations argument had been convincing.

11 In regards to the contested vendors and transactions, the facts are based on the evidence submitted at the Formal Hearing, which for most of the contested vendors and transactions, is different from the evidence proffered at the Initial Hearing. For example, the taxpayer had a witness at the Formal Hearing whose testimony was not proffered at the Initial Hearing, and the Division submitted different documents at the Formal Hearing

that he could address the contested transactions because the taxpayer still uses many of the services at issue. He also testified that for those contested services which the taxpayer no longer uses, he discussed the services with other employees at the company.[12] He admitted, however, that he had not reviewed most of the contracts between the taxpayer and the vendors. He also stated that the prices of SaaS transactions are often one to three times more than the price of software alone because of the additional services provided by a SaaS vendor. The taxpayer, however, provided no price comparison information to support this claim. In addition, as explained below for each contested vendor, REPRESENTATIVE-2 FOR TAXPAYER provided little, if any, specific information to show what services each of the seven contested vendors provided to the taxpayer that were in addition to the access to and use of prewritten computer software.

21. Some testimony about the seven contested vendors and the contested transactions was also provided by two Division employees, namely REPRESENTATIVE-3 FOR TAXPAYER, who was called as a witness by the taxpayer, and RESPONDENT, who was called as a witness by the Division. REPRESENTATIVE-3 FOR TAXPAYER stated that the Division believed the contested transactions to be taxable after reviewing the contested vendors' websites and the Commission's prior private letter rulings and after considering the primary object or essence of the transaction test. RESPONDENT acknowledged that the transactions at issue may have involved various nontaxable services in addition to the taxable use of prewritten computer software. But, he stated that an analysis of the primary object or essence of the transaction test is important to know whether a transaction is taxable or not. He contends that because of inadequate information to analyze the contested transactions and to show "breakouts" of the services from the software, the contested

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than it had proffered at the Initial Hearing.

12 Utah Code Ann. §63G-4-206(1)(c) provides that in proceedings such as those held by the Tax Commission, evidence may not be excluded solely because it is hearsay. However, UCA §63G-4-208(3) provides that "[a] finding of fact that was contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence." Utah Admin. Rule R861-1A-28(2)(b) provides that hearsay evidence may be admitted at Tax Commission proceedings, but that no decision of the Commission will be based solely on hearsay evidence.

transactions should be considered sales of software. As explained below for each contested vendor, the Division's employees also provided little information about the vendors and the products purchased by the taxpayer. The Division appears to be relying, in part, on the Commission's finding that the taxpayer has the burden of proof to show that the primary object of the contested transactions is for something other than taxable prewritten computer software and that the taxpayer has not met its burden.

22. Both parties agree that the taxpayer did not download any of the seven contested vendors' software and that the taxpayer only accessed and used the software over the internet.

VENDOR-1 Transactions

23. There are five VENDOR-1 transactions at issue, none of which had been assessed until the Division issued its Amended Statutory Notice. The amount of tax at issue for these five transactions is $$$$$.[13] All of the transactions were assessed as "expense purchases" on Amended Schedule 2. Four of these transactions were described only as "VENDOR-1(A)," while the fifth transaction was described as "VENDOR-1 (B)."[14]

24. In the taxpayer's "pre-hearing brief,"[15] it referred the Commission to VENDOR-1'S website and identified the VENDOR-1 transactions as purchases of the "VENDOR-1(B)," which it described as an automated public relations service. It also indicated that the "purpose and essence" of the service is "to get real time access to the ongoing database of all worldwide media outlets and all significant media persons in order to track and influence on a real time basis all references to your company." The taxpayer contends that VENDOR-1 is an automated public relations search service that replaces the need for traditional public relations firms.

25. At the hearing, REPRESENTATIVE-2 FOR TAXPAYER testified that the taxpayer no longer uses VENDOR-1'S services. However, he stated that the taxpayer had purchased VENDOR-1'S services so that the taxpayer's marketing group could monitor the taxpayer's contacts and see how the taxpayer was perceived in

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13 Exhibits R-6 and R-7.

14 Exhibit R-5.

15 Although the taxpayer identified its pre-hearing brief as its "Initial Brief," it submitted the brief on

the marketplace. He described VENDOR-1'S services as a "media-clipping" service where the taxpayer would be alerted when a particular word was used in the media. He also stated that the taxpayer's team would talk with VENDOR-1'S team and that the taxpayer consistently and constantly put inputs into VENDOR-1'S software so that it could receive information that was mentioned in the media. REPRESENTATIVE-2 FOR TAXPAYER did not indicate that he had read the contract that had existed between the taxpayer and VENDOR-1.

26. In the Division's pre-hearing brief, it contends that the primary object of the VENDOR-1 transactions was for the taxpayer to use VENDOR-1's prewritten computer software over the internet. The Division indicated that the taxpayer's purchases from VENDOR-1 allowed the taxpayer to log onto VENDOR-1's website and use the web-based applications hosted on VENDOR-1's servers to access, manage, and analyze data, to have access to tools to organize, share, track, and report media relations activities, and to integrate activities and emails. The Division indicated that these activities go beyond accessing a seller's database, running searches on it, and creating reports from it. In addition, the Division asserts that the taxpayer was able to create customized lists of media outlet information that it could download and use even after the subscription period had ended. The Division contends that the taxpayer has not shown that the primary object of its transactions with VENDOR-1 was to receive either nontaxable services or the nontaxable use of a database.

27. The Division's employees provided little, if any, testimony specific to the VENDOR-1 transactions. To support the assertions it made in its brief, the Division submitted some pages from VENDOR-1'S website as evidence.[16] These documents indicate that a purchaser would be able to "power your story" with VENDOR-1'S integrated public relations software by: 1) identifying "influencors" by tapping into a database of

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September 18, 2014 (approximately one month prior to October 28, 2014 date of the Formal Hearing).

16 Exhibit R-8. As will be discussed later, this exhibit also contains evidence concerning four of the other six contested vendors. It appears that most, if not all, of the evidence found in Exhibit R-8 was obtained from the internet in 2013 or 2014 (at least four years after the audit period). However, the taxpayer did not provide any information to refute this evidence and show that the information found on the vendors' websites in 2013 and 2014 was not applicable to the contested transactions. Furthermore, in the taxpayer's pre-hearing brief, it, too, appears to have referred the Commission to the vendors' *current* websites.

more than one million contacts to find the journalists and bloggers who have clout with the people the purchaser is targeting; 2) distributing all of your press release distributions and other content with one simple tool; 3) conducting "content marketing" by getting people to "see your story" on VENDOR-1'S #####-partner sites; 4) monitoring media to see what people are saying about your brand; and 5) measuring and analyzing the impact of a customer's "story."

28. The Division also submitted some information about VENDOR-1 that it obtained from WEBSITES.[17] The WEBSITE-1 indicates that VENDOR-1 has "products" to help manage marketing campaigns and identifies its SPECIALITIES (WORDS REMOVED)." The WEBSITE-2 information indicates that PRODUCT is a web-based SaaS product to build media lists, distribute press releases, manage PR campaigns, monitor news coverage and analyze data. It also indicates that there are three editions of PRODUCT, EDITION-1, EDITION-2 and EDITION-3.

29. The descriptions of four of the five VENDOR-1 transactions, as shown on the Division's Amended Statutory Notice, merely indicate "VENDOR-1(A)" and, thus, offer no clue as to what the taxpayer was purchasing from VENDOR-1. As to the fifth VENDOR-1 transaction, the notice description indicates that VENDOR-1 was purchasing "VENDOR-1(B)." However, REPRESENTATIVE-2 FOR TAXPAYER did not testify that the taxpayer purchased access to and use of a database from VENDOR-1. He stated that the taxpayer used VENDOR-1'S software and received media-clipping and marketing services. Unfortunately, neither party provided contracts or invoices that identified the product and/or services that the taxpayer purchased from VENDOR-1 and which the Commission could have analyzed to determine the primary object or objects of the transactions. None of the transaction descriptions found on the notice match VENDOR-1'S products and/or services as identified on the website evidence submitted by the Division. As a result, the transaction descriptions are not helpful in determining the primary object of any of the VENDOR-1 transactions.

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17 Exhibit R-8.

30. The taxpayer also suggested that the primary object of the VENDOR-1 transactions should be considered a service because VENDOR-1'S products and/or services replaced the need for the taxpayer to use the services of traditional public relations firms. This argument is not convincing. Acquiring the services of a professional firm to perform a task is different than acquiring software that may enable the purchaser itself to perform the task. As a result, evidence specific to the transactions at issue must be analyzed to see if it is sufficient to show whether the primary object of the VENDOR-1 transactions was for software or for something else.

31. It appears from the evidence submitted that the taxpayer may have paid VENDOR-1 a subscription fee, in part at least, to access its prewritten software over the internet and to use this software to perform marketing functions. The evidence suggests that the transactions may have also involved the taxpayer's use of VENDOR-1'S software to distribute press releases and other content, monitor media, and perform analyses and measurements. Furthermore, the transactions may have involved the taxpayer's having access to a database maintained by VENDOR-1. Finally, the transactions may have also involved some interaction between the taxpayer's employers and VENDOR-1'S employers, but the extent of actual services provided by VENDOR-1'S employees was not described with any specificity by either party's witnesses or identified in any document.

32. Based on the foregoing, it is possible that the primary object of the VENDOR-1 transactions was for the taxpayer to obtain access to and use of VENDOR-1'S prewritten computer software over the internet. However, it is not implausible that the primary object may have been to obtain access to and use of a database maintained by VENDOR-1 or to obtain other nontaxable services provided by VENDOR-1. Without contracts, invoices, and more specific information about these five transactions and the interaction between the taxpayer and

VENDOR-1, it is unclear whether the primary object of the taxpayer's transactions with VENDOR-1 was for something other than the use of prewritten computer software.[18]

VENDOR-2 Transaction

33. There is one VENDOR-2 ("VENDOR-2") transaction at issue, which the Division assessed as an "expense purchase" on both its Initial Statutory Notice and its Amended Statutory Notice. The amount of tax at issue for this transaction is $$$$$.[19] On the notices, the transaction was described only as "VENDOR-2."[20]

34. In the taxpayer's pre-hearing brief, it indicates that it purchased "an online web conferencing, eLearning service"[21] from VENDOR-2. The taxpayer also referred the Commission to VENDOR-2'S website and indicates that VENDOR-2 provided "the infrastructure for online training and online video conferencing." The taxpayer further contends that VENDOR-2'S services "[r]eplaced need for travel services" because it enables participants to connect to training and conferences without requiring travel and related expenses. REPRESENTATIVE-2 FOR TAXPAYER testified that VENDOR-2 provided a way for the taxpayer to conduct online voice and visual meetings all over the world.

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18 As mentioned earlier, the Commission has issued a number of private letter rulings addressing the taxability of prewritten computer software and related services. Some of these rulings will be discussed later in the decision. Before the Commission made these rulings, however, the party requesting the ruling generally provided detailed information about the various products and/or services at issue and what each of these products and/or services entailed. With this detailed information, the Commission was able to determine what the primary object of each product and/or service was for. The lack of such information in this case hinders such determinations.

19 Exhibits R-5, R-6, and R-7.

20 Exhibit R-5.

21 In *Private Letter Ruling 10-012* (December 7, 2012) ("*PLR 10-012*"), the Commission noted that a seller's "reference to the term 'services' may not actually characterize the nature of the products or transactions. For our analysis, we consider each item's overall characteristics when determining whether the item is a non-taxable service or a taxable sale of either tangible personal property or another taxable item." It is noted that some of the contested vendors also refer to their products and/or services as "solutions." Again, the overall characteristics of a "solution" would need to be analyzed when determining the primary object of such a transaction. Redacted copies of the Commission's private letter rulings can be viewed on the Commission's website at http://www.tax.utah.gov/commission-office/rulings.

35. In the Division's pre-hearing brief, it asserted that the primary object of the VENDOR-2 transaction was for the taxpayer to use VENDOR-2'S prewritten computer software over the internet. The Division further indicated that this software allows the taxpayer to set up links with its own customers so that the taxpayer and its customers "can see each other" while the taxpayer provides instruction to its customers.

36. The Division's employees provided little, if any, testimony specific to the VENDOR-2 transaction. The Division, however, submitted some pages from VENDOR-2'S website as evidence.[22] This information indicates that VENDOR-2'S PRODUCT-1 provides a purchaser the ability to conduct web meetings, have access to "rapid training and mobile learning," "deliver compelling, immersive events," and measure results for optimized outcomes. It is unknown whether the training is conducted by a VENDOR-2 employee or whether the training has already been prepared so that a customer accessing VENDOR-2'S prewritten computer software can also access the training. In its exhibit, the Division also provided some WEBSITE-1 information about VENDOR-2, which indicates that the vendor provides "online training" for its web and video conferencing and that it has "unmatched . . . Certified Trainers." While this suggests that some of the training may be conducted by actual employees of VENDOR-2, it is unknown how much training, if any, the taxpayer was entitled to receive when it made its purchase from VENDOR-2.

37. The description of the VENDOR-2 transaction, as shown on the Division's notices, is not helpful in determining what the transaction entailed. From the evidence the parties' submitted, it appears that VENDOR-2 provides its customers prewritten computer software that allows the customers to connect and attend conferences over the internet. The taxpayer contends that VENDOR-2 provided nontaxable services, in part, because the transaction replaced the need for travel services. This argument, however, is not convincing. While VENDOR-2'S software may allow the taxpayer's employees to attend conferences over the internet instead of

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22 Exhibit R-8.

traveling to some location for the conference, this does not show that VENDOR-2 provided a travel service. It, instead, shows that the taxpayer used VENDOR-2'S software to attend conferences.

38. The evidence suggests that the taxpayer may have paid VENDOR-2 a subscription fee, at least in part, to access its prewritten software over the internet and to use this software to perform web or video conferencing. Again, it was unfortunate that neither party provided an invoice of this sale or the contract between the taxpayer and VENDOR-2 so that the Commission would have had a better understanding of the taxpayer's primary object for entering into this transaction. While the transaction may have also involved some nontaxable training services, the extent of any training services that VENDOR-2 provided were not described with any specificity. The witnesses provided little, if any, information that would help the Commission determine the primary object of the taxpayer's transaction with VENDOR-2.

39. The Commission notes that VENDOR-2'S web-based services appear similar to services the Commission considered in *USTC PLR 10-011* (Feb. 24, 2012) ("*PLR 10-011*"). This ruling concerned a seller who provided online services enabling its subscribers to have remote computer access to attend and participate in meetings online and to attend online webinars. The Commission found that when that seller sold its web-based services, "it in substance grant[ed] Subscribers the right to use the [seller's] proprietary software under a lease or contract." Because the involvement of that seller's employees appeared to be limited to setting up and maintaining its customers' accounts, the Commission found that the primary object of the transaction was for the use of the seller's software and not for services provided by the seller. In this case, it is possible that VENDOR-2 also provides some training services. However, without a contract, an invoice, or more specific information about the transaction and the interaction between the taxpayer and VENDOR-2, it is unclear whether the primary object of the taxpayer's transaction with VENDOR-2 was for something other than the use of prewritten computer software.

VENDOR-5 Transactions

40. There are four VENDOR-5 transactions at issue, which the Division assessed as "expense purchases" on both its Initial Statutory Notice and its Amended Statutory Notice. The amount of tax at issue for these four transactions is $$$$$.[23] On the Division's notices, three of these transactions were described only as "VENDOR-5," while the fourth transaction was described as "PRODUCT-2."[24]

41. In the taxpayer's pre-hearing brief, it referred the Commission to VENDOR-5'S website and, citing from it, indicated that VENDOR-5 "offers both hassle-free audio and web conferencing solutions" and can provide "full integration with any web collaboration solution" and "event management services." The taxpayer also contends that VENDOR-5'S services "[r]eplaced need for travel services" because it enables participants to connect to training and conferences without requiring travel and related expenses. REPRESENTATIVE-2 FOR TAXPAYER testified that the taxpayer uses VENDOR-5'S products and/or services for the education of the taxpayer's own customers. He did not provide any specific details, however, as to how the taxpayer uses VENDOR-5'S product and/or services to educate it customers.

42. In the Division's pre-hearing brief, it contends that the primary object of the taxpayer's transactions with VENDOR-5 is to obtain use of taxable software and not to obtain nontaxable services. It also indicates that there is no information that would differentiate the VENDOR-5 transactions from the VENDOR-2 transaction previously discussed.

43. The Division's employees provided little, if any, testimony specific to the VENDOR-5 transactions. The Division did, however, submit some pages from VENDOR-5'S website as evidence.[25] Much of the evidence the Division submitted about VENDOR-5 was illegible. However, the legible portions of the evidence indicate that VENDOR-5'S "PRODUCT-1" product includes "eLearning," "Webinars," and "Web Conferencing" and that "Web Conferencing" consists of "Online Meetings," "Mobile Conferencing," "Internal

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23 Exhibits R-5, R-6, and R-7.
24 Exhibit R-5.
25 Exhibit R-8.

Webcasts," and "Audio." It also shows that VENDOR-5 provides 11 different "products" and six different "services." It is unknown if a customer purchases each of the products and services separately or in combinations. However, "PRODUCT-1," which is similar to the description shown on the notices for one of VENDOR-5'S transactions, is one of the listed "products" (it is not one of the listed "services"). In its exhibit, the Division also provided some WEBSITE-1 information about VENDOR-5. While this information is not particularly helpful in determining what the taxpayer purchased from VENDOR-5, it does indicate that VENDOR-5 has 16 different "specialities," one of which is "PRODUCT-1."

44. The descriptions on the Division's notices for three of the VENDOR-5 transactions refer only to "VENDOR-5," which is not helpful in determining what the transactions were for. The description of the fourth transaction is more descriptive and refers to "PRODUCT-2." Neither party provided any information to show whether this is a specific product offered by VENDOR-5. However, it appears that it may refer to some type of software product.

45. The taxpayer also contends that VENDOR-5 provided nontaxable services, in part, because the transactions replaced the need for travel services. For these same reasons discussed earlier in regards to the VENDOR-2 transaction, this argument is not convincing. It merely indicates that the taxpayer used VENDOR-5's software to attend conferences.

46. The evidence suggests that the taxpayer may have paid VENDOR-5 subscription fees, at least in part, to access its prewritten software over the internet and to use this software to perform web or video conferencing. It is not implausible that the transactions may have involved some of the services referred to in the documents provided by the Division. However, it is not known if the transactions actually involved any of these services and, if so, which of the services. Again, neither party provided invoices or contracts so that the Commission would have a better understanding of the taxpayer's primary object for entering into these

transactions. Moreover, the witnesses provided little, if any, information that would help the Commission determine the primary object of the taxpayer's transactions with VENDOR-5.

47. Again, it appears that VENDOR-5'S web-based services are similar to the ones the Commission found to be taxable in *PLR 10-011*. Again, however, it is unknown if the VENDOR-5 transactions involved services referred to in the Division's documents that were not at issue in *PLR 10-011*. As a result, without contracts, invoices, and more specific information about the VENDOR-5 transactions, it is unclear whether the primary object of the taxpayer's transactions with VENDOR-5 was for something other than the use of prewritten computer software.

VENDOR-6 Transactions

48. There are 16 VENDOR-6 transactions at issue, none of which were assessed until the Division issued its Amended Statutory Notice. The amount of tax at issue for these 16 transactions is $$$$$.[26] In the Amended Statutory Notice, 12 of the 16 transactions were assessed as "expenses purchases" on Amended Schedule 2. The remaining 4 transactions were assessed as "asset purchases" on Amended Schedule 3.[27]

49. The 12 transactions assessed as "expense purchases" account for $$$$$ of the total contested tax amount. These 12 transactions occurred in 2007 and 2008 at sales prices ranging between $$$$$ and $$$$$.[28] On the Division's notice, these 12 transactions were described only as "VENDOR-6." On page 11 of Amended Schedule 2, the Division referred to these 12 transactions as "consumable purchases."[29]

50. The 4 transactions assessed as "asset purchases" account for $$$$$ of the total contested tax amount. The 4 transactions all occurred in February 2009 at sales prices ranging between $$$$$ and $$$$$.[30] On the Division's notice, these 4 transactions were described as follows: 1) "bill – VENDOR-6: 2 months of

26 Exhibits R-6 and R-7.
27 Exhibit R-5.
28 Exhibit R-7.
29 Exhibit R-5.
30 Exhibit R-7.

salesforce;" 2) "bill – VENDOR-6: old contract that was redone;" 3) "VENDOR-6 prepayment;" and 4) "bill – VENDOR-6: new contract invoice." On page 3 of Amended Schedule 3, the Division referred to these 4 transactions as "asset purchases" and indicated their "source" to be "[a]sset depreciation schedule, asset accounts in the general ledger, accounts payable invoices."[31]

51. In the taxpayer's pre-hearing brief, it referred the Commission to VENDOR-6'S website and appears to have cited from it, as follows:

> The Sales Cloud puts everything in one place. It's as easy to use as your favorite consumer Web sites and the information you care about most gets pushed to you in real time. Suddenly, sales success is not only possible, it's easy. See everything the Sales Cloud offers below. Chatter. Collaborate instantly. Get real-time updates to you on the people, data, and documents that can help you close your deals.

This information provides little, if any, details about the products and/or services the taxpayer purchased from VENDOR-6 and provides no help in determining the primary object of the transactions.

52. REPRESENTATIVE-2 FOR TAXPAYER testified that the taxpayer still uses VENDOR-6 and that he had looked at the contract between the taxpayer and VENDOR-6. However, he did not indicate whether the contract he reviewed is the current contract or the contract(s) in place during the audit period and he did not indicate whether these contracts would have been the same. However, he stated that the VENDOR-6 contract is a one-year agreement for licenses. It is unknown how many licenses were at issue for each of the contested VENDOR-6 transactions.

53. REPRESENTATIVE-2 FOR TAXPAYER described VENDOR-6'S product as customer relationship management software that the taxpayer's sales staff uses to see where it is in the process of getting customers for its own SaaS services. He stated that the taxpayer uses a lot of VENDOR-6'S consulting and support services to put these "processes" together. He stated that the taxpayer's sales group uses VENDOR-6'S software every day. He also stated that getting VENDOR-6'S product ready to use involved services to

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31 Exhibit R-5.

manipulate the software. However, he did not indicate with any specificity the services that VENDOR-6 provided to manipulate the software or put together the "processes" used by the taxpayer. He also provided little information that could help the Commission analyze the extent of the taxpayer's use of VENDOR-6'S software in comparison to the extent of services provided to the taxpayer by VENDOR-6. As a result, REPRESENTATIVE-2 FOR TAXPAYER'S testimony is insufficient to show that the primary object of the taxpayer's transactions with VENDOR-6 was for services and not for prewritten computer software.

54. In the Division's pre-hearing brief, it contends that the primary object of the taxpayer's transactions with VENDOR-6 was to use its prewritten computer software over the internet or to receive computer generated output, either of which it asserts to be subject to Utah taxation. The Division indicated that the taxpayer "purchased a number of different types of services and/or products from VENDOR-6 for specific amount of time (either three months or five months)." The Division indicated that most of the services and/or products were sold in quantities of 1 or 2, but that two of the services and/or products were sold in quantities of 67. The Division also indicated that the invoices at issue described some of the services and/or products at issue as "PRODUCT-3," "PRODUCT-4," "PRODUCT-5," "PRODUCT-6," and "PRODUCT-7." At the Formal Hearing, the Division did not submit any of these invoices to support its assertions,[32] and the Division's employees provided little, if any, testimony specific to the VENDOR-6 transactions. Nevertheless, it is noted that the taxpayer did not refute the assertions found in the Division's pre-hearing brief regarding the descriptions on the invoices.

55. The descriptions of the VENDOR-6 transactions, as found on the Division's amended notice, are not helpful in determining what the transactions were for. Based on the other limited evidence provided by the parties, it appears that the taxpayer may have paid VENDOR-6 a subscription fee, at least in part, to access its

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32 Earlier it was mentioned that the parties submitted different documents as evidence at the Formal Hearing than they proffered at the Initial Hearing. While the Division proffered some VENDOR-6 invoices at the Initial Hearing, it did not submit any such invoices at the Formal Hearing. In fact, it submitted no documents at the

prewritten software over the internet and to use this software to perform certain sales or marketing functions. REPRESENTATIVE-2 FOR TAXPAYER stated that the VENDOR-6 contract he reviewed was a one-year agreement for "licenses," which may explain why the taxpayer booked the larger VENDOR-6 transactions as "assets." REPRESENTATIVE-2 FOR TAXPAYER testimony also indicates that the transactions involved consultation and support services, but the extent of any such services was not described with sufficient specificity to show that these services, and not the software, were the primary object of the transaction. Again, it is unfortunate that the Commission was not provided invoices or contracts that might have provided more information. Without such evidence and without more specific information about the transactions and the interaction between the taxpayer and VENDOR-6, it is unclear whether the primary object of the taxpayer's transactions with VENDOR-6 was for something other than the use of prewritten computer software.

VENDOR-3 Transactions

56. There are nine VENDOR-3 ("VENDOR-3") transactions at issue, eight of which the Division assessed on both its Initial Statutory Notice and its Amended Statutory Notice. The ninth VENDOR-3 transaction, which occurred on August 1, 2008, was not assessed until the Division issued its Amended Statutory Notice. The amount of tax at issue for these nine transactions is $$$$$.[33] On its Amended Statutory Notice, the Division assessed all nine of the transactions as "expense purchases" and described all of the transactions only as "VENDOR-3."[34]

57. In the taxpayer's pre-hearing brief, it referred the Commission to VENDOR-3'S website. It also appears to have cited from the website when it indicated that "SERVICE adds managed services and advanced solutions to VENDOR-3'S email marketing platform – via dedicated account management, customized solutions and more." The taxpayer further indicated that VENDOR-3 provides email services that extract information from

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Formal Hearing in regards to the VENDOR-6 transactions at issue.

33 Exhibits R-6 and R-7.

34 Exhibit R-5.

the taxpayer's servers and sends emails from VENDOR-3'S servers to the taxpayer's clients and prospective clients. The taxpayer further asserts that VENDOR-3'S email services replace the need for traditional U.S. Mail and telephone contact services.

58. REPRESENTATIVE-2 FOR TAXPAYER testified that VENDOR-3 is an emailing service that sends emails to the taxpayer's clients. He described the service as an "outbound marketing effort" from which the taxpayer obtains lists, can track its marketing campaigns, and measure the success of its contacts. He also stated that VENDOR-3 "consults" and explained that the taxpayer's and VENDOR-3'S employees would "construct" a "message" (or email) together both over the telephone and over the internet, after which VENDOR-3 would send the email out. He further explained that the taxpayer would then be able to go into VENDOR-3'S software and look at the "feedback" to see if it needed to "change the message" in the next email.

59. In the Division's pre-hearing brief, it acknowledged that VENDOR-3 is an emailing service that sends information by email to the taxpayer's clients and prospective clients. However, it contends that the primary object of the VENDOR-3 transactions is for the taxpayer to access and use VENDOR-3'S prewritten computer software to organize and filter the entities to whom the taxpayer wants VENDOR-3 to send the emails. The Division further indicates that VENDOR-3'S customers can use "merge fields" to build "email templates in Salesforce."

60. The Division's employees provided little, if any, testimony specific to the VENDOR-3 transactions. The Division did, however, submit some pages from VENDOR-3'S website as evidence.[35] These documents indicate that "[g]rowing your business is easy with VENDOR-3'S email marketing solution" and that an VENDOR-3 purchaser can "[g]o from signing up to sending your first message in minutes." This suggests that a customer of VENDOR-3, such as the taxpayer, may be able to use VENDOR-3'S software to send emails itself instead of having someone at VENDOR-3 send out the email.

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35 Exhibit R-8.

61. The Division's evidence from VENDOR-3'S website also indicates that a purchaser receives "professionally designed email templates," "easy-to-understand tracking and reporting," "award winning product and support," and "plans for every budget." The website indicates that VENDOR-3 provides several different "tools" such as "Email Templates," "MessageBuilder" (a "drag and drop" creation tool), "MessageCoder" (a tool to import HTML from another template or to "start a message from scratch"), and "Email Delivery" (where VENDOR-3 "moves" messages straight to a purchaser's customers). The website indicates that VENDOR-3'S "award-winning support" team "offers top-notch personal support whenever you need help." It also indicates that VENDOR-3 provides "premier services," where VENDOR-3'S "strategic advisors can help a customer build a long-term email marketing strategy, optimize your results, and reach a larger audience." Because neither party provides invoices or contracts for the Commission to analyze, it is unknown which of VENDOR-3'S "plans" were purchased by the taxpayer and whether the taxpayer purchased VENDOR-3'S "premier services."

62. It is noted, however, that each of the nine transactions at issue had a purchase price somewhere in between $$$$$ and $$$$$.[36] The Division's evidence from VENDOR-3'S 2013 or 2014 website indicates that VENDOR-3'S plans cost between $$$$$ per month (for 250 subscribers) to $$$$$ per month (for 15,000 subscribers). It is unclear from this information as to what is provided at these prices and whether these prices were applicable a number of years earlier during the audit period. This information also indicates that the pricing of "VENDOR-3 for Salesforce" is "based on messages sent, not subscribers." It is unknown, however, whether the taxpayer purchased "SERVICE-1," some of VENDOR-3'S other plans, some of VENDOR-3'S premier services, or some combination of these various products and services because no invoices or contracts were submitted as evidence. It is also unknown if any of the transactions were for multiple subscriptions. In addition,

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36 Exhibit R-7.

it is unknown how many emails the taxpayer may have paid VENDOR-3 to send, the cost of these emails, and how these costs may compared to the costs the taxpayer incurred to use VENDOR-3'S software.

63. The taxpayer also suggested that the primary object of the VENDOR-3 transactions should be considered a service because VENDOR-3'S products and/or services replaced the need for the taxpayer to use traditional U.S. Mail and telephone contact services. Again, such an argument is not convincing. Using the U.S. Postal Service or a telephone company to perform a task is different than using software that may enable the purchaser itself to perform a substitute task. As a result, evidence specific to the transactions at issue must be analyzed to see if it is sufficient to show whether the primary object of the VENDOR-3 transactions was for software or for something else.

64. The descriptions of the nine VENDOR-3 transactions, as shown on the Division's notices, do not show which of VENDOR-3'S products and/or services that the taxpayer purchased. It appears from the evidence, however, that the taxpayer may have paid VENDOR-3 subscription fees, at least in part, to access its prewritten computer software over the internet and to use this software to perform emailing or marketing functions. The evidence suggests that the taxpayer may have also used VENDOR-3'S software to import templates and create emails and perform tracking and reporting functions. On the other hand, it appears that the taxpayer may have purchased emailing services and consulting services. However, neither party provided contracts or invoices that would have identified what was purchased. Without such evidence and without more specific information about the transactions and the interaction between the taxpayer and VENDOR-3, it is unclear whether the primary object of the taxpayer's transactions with VENDOR-3 was for something other than the use of prewritten computer software.

VENDOR-4 Transactions

65. There are five VENDOR-4 transactions at issue. The amount of tax at issue for these five transactions is $$$$$.[37] Two of the five transactions were assessed as "expense purchases" on both the Division's Initial Statutory Notice and its Amended Statutory Notice.[38] Neither of these two transactions involve much tax. The first of these two transactions, which occurred on September 25, 2008, was described on the Division's notices as "blank laser ck." The tax at issue on this transaction is $$$$$ (based on a sales price of $$$$$).[39] Neither party explained what "blank laser ck" referred to. However, as will be explained in the subsequent two paragraphs, the description for this transaction is different from the descriptions for the other four VENDOR-4 transactions. From the description, it is possible that this transaction refers to the sale of some sort of tangible personal property such as checks, which would be the sale of tangible personal property. However, the information is insufficient to know for sure what the transaction is for.

66. The other VENDOR-4 transaction assessed as an "expense purchase" on both the Initial Statutory Notice and the Amended Statutory Notice occurred on August 27, 2009. This transaction was described only as "VENDOR-4(A)." It involves $$$$$ of tax (based on a sales price of $$$$$).[40]

67. The remaining three VENDOR-4 transactions were not assessed until the Division issued its Amended Statutory Notice. Unlike the two transactions discussed above (which were assessed as expense purchases), these three transactions were assessed as "asset purchases" and involve significantly more tax. The amount of tax at issue for these three transactions is $$$$$.[41] The descriptions of these three transactions are, as follows: 1) the October 17, 2008 transaction with a purchase price of $$$$$ is described as "VENDOR-4 license software and implementation fees;" 2) the February 12, 2009 transaction with a purchase price of $$$$$ is

37 Exhibits R-5, R-6, and R-7.
38 Exhibit R-5.
39 Exhibit R-7.

40 Exhibits R-5, R-6, and R-7.

described as "bill – VENDOR-4: accounting software;" and 3) the March 1, 2009 transaction with a purchase price of $$$$$ is described as "bill – VENDOR-4: NAME license."[42]

68. In the taxpayer's pre-hearing brief, it referred the Commission to VENDOR-4'S website and appears to have cited from it, indicating that VENDOR-4 describes itself as:

> . . . a leading provider of cloud financial management and accounting software, delivering all the functionality your company needs, at a fraction of the cost and risk of traditional accounting software. Named by the AICPA as its preferred provider of financial applications, VENDOR-4 helps companies of all sizes improve access to real-time information, optimize business processes and strengthen financial controls. VENDOR-4's cloud computing model provides you with anytime, anywhere access to all your financial data whether use you a Mac or a PC – all you need is a web browser and an Internet connection. Our main focus is to provide our customers with comprehensive, easy to use cloud financial management applications. We do, however, have deep pre-built integrations with other leading solutions like Salesforce CRM so you can create a seamless ecosystem of products that best meet your business needs, when you need them.[43]

In its brief, the taxpayer also indicates that the primary object of the VENDOR-4 transactions is for the taxpayer to receive "outsourced accounting information technology data processing." It also contends that the VENDOR-4 transactions replaced the taxpayer's "need for accounting IT department and much of traditional accounting staff."

69. REPRESENTATIVE-2 FOR TAXPAYER testified that he had looked at the VENDOR-4 contract, which he characterized as a one-year agreement for licenses.[44] He also testified that the taxpayer purchased a service from VENDOR-4 that he described as a "resource planning tool." He stated that the taxpayer is purchasing an "accounting system," not just "accounting software." He explained that with this system, the taxpayer is obtaining a general ledger that it can access over the internet and with which it can keep records and

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41 Exhibits R-5, R-6, and R-7.
42 Exhibit R-5.
43 This information is difficult to reconcile with REPRESENTATIVE-2 FOR TAXPAYER "general" testimony about SaaS providers, as described in Finding of Fact #20. REPRESENTATIVE-2 FOR TAXPAYER stated that the prices of SaaS transactions are often one to three times more than the price of software alone. VENDOR-4, however, indicates that its software is "a fraction of the cost" of traditional accounting software.
44 It is unknown how many licenses the taxpayer may have purchased with each transaction.

bill customers. He explained that the taxpayer can put information into the system and get output back. He also stated that by entering into the VENDOR-4 transactions, the taxpayer has replaced the need to have an accounting department. Lastly, he stated that because the taxpayer inputs data into the VENDOR-4 software, he believes that these transactions also involve "data processing" as described in UCA §59-12-102(113)(c)(iv).

70. In the Division's pre-hearing brief, the Division indicates that the taxpayer accesses VENDOR-4'S prewritten software to input data and gets back computer generated output. As a result, it contends that the primary object of the VENDOR-4 transactions is for the taxpayer to use VENDOR-4'S prewritten software to prepare its accounting records and documents or to receive the computer generated accounting documents (output) produced with the computer software, either of which it contends is taxable.

71. RESPONDENT testified that a "T" could be observed on the VENDOR-4 invoices. He contends that the presence of this "T" indicates that the transactions are taxable. The Division, however, did not submit these invoices as evidence for the Commission to review where on the invoices the "T" was located and to decide how the presence of the "T" should be interpreted. As a result, this testimony is not helpful in determining the primary object of the VENDOR-4 transactions and deciding whether they are taxable.

72. The Division did submit some pages from VENDOR-4'S website as evidence.[45] A significant portion of the evidence the Division submitted from VENDOR-4'S website was illegible. However, the legible portions of the evidence indicate that VENDOR-4'S "award-winning cloud accounting software" brings "cloud computing to finance and accounting" and that "VENDOR-4 is the leading provider of cloud financial management and accounting software." The information indicates that "basic packages start at $$$$$ a month" and that a customer can take advantage of "cost-effective, modular pricing and pay only what you need for your business." It also describes some of the "optional modules" as "global consolidations, revenue recognition, or Salesforce CRM integration." It also indicates that its products "save costs" through "extensive automation."

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45 Exhibit R-8.

73. The Division also provided some WEBSITE-2 information about VENDOR-4.[46] This information indicates that VENDOR-4 "helped pioneer software-as-a-service or cloud computing, and its products were some of the first to use a multi-tenant approach, which defines a unique approach to software architecture that significantly lowers the cost of delivering and using products." It also indicates that the "VENDOR-4 system includes applications for accounting, contract management, revenue recognition, inventory, purchasing, vendor management, financial consolidation, and financial reporting."

74. The taxpayer suggested that the primary object of the VENDOR-4 transactions should be considered a service because VENDOR-4'S products and/or services replaced the "need for accounting IT department and much of traditional accounting staff." Again, such an argument is not convincing. Using accounting or IT staff to perform tasks is different than acquiring or using software that may enable the purchaser to perform the same task with fewer or other staff. As a result, evidence specific to the transactions at issue must be analyzed to see if it is sufficient to show whether the primary object of the VENDOR-4 transactions was for software or for something else.

75. The taxpayer has not identified any specific services that it receives from VENDOR-4 employees because of these transactions. However, the descriptions for the three largest VENDOR-4 transactions, as found on the Division's Amended Statutory Notice, refer to "software" and "licenses." REPRESENTATIVE-2 FOR TAXPAYER also characterized the VENDOR-4 contract he reviewed as an agreement for "licenses." This and the other evidence submitted by the parties indicate that the taxpayer's transactions with VENDOR-4 allow it to access and use VENDOR-4'S prewritten software over the internet. It appears that the taxpayer inputs its own data into VENDOR-4'S software and uses the software to generate reports and other output. However, the evidence is insufficient to find that the primary object of the transaction is for any processed data or information the taxpayer retrieves from the software. As a result, it is doubtful that the transactions are data processing and

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46 Exhibit R-8.

information services, as described in Section 59-12-102(113)(c)(iv),[47] especially where there is no evidence to show that VENDOR-4'S employees provided any services. The evidence suggests that the primary object of the transactions may have been for the taxpayer to acquire access to and use of VENDOR-4'S prewritten accounting software. Again, however, neither party provided contracts or invoices that might have identified the primary object of the transactions. Without such evidence, it is unclear whether the primary object of the taxpayer's transactions with VENDOR-4 was for something other than the use of prewritten computer software.

VENDOR-7 Transaction

76. There is one VENDOR-7 transaction at issue, which the Division assessed as an "expense purchase" on both its Initial Statutory Notice and Amended Statutory Notice. The amount of tax at issue for this transaction is $$$$$ (based on a sales price of $$$$$).[48] On the Division's notices, the transaction was described only as "VENDOR-7."[49]

77. In the taxpayer's pre-hearing brief, it refers the Commission to a website for an entity named "WEBSITE-3," which it does not refer to again. As a result, it is possible that "WEBSITE-3" may be an entity that offers a product called VENDOR-7. Regardless, the taxpayer appears to cite from the WEBSITE-3 website, indicating that "PRODUCT AND/OR SERVICE integrates with your accounting or e-commerce software to deliver real-time sales tax calculations based on up-to-date sales and use tax rules . . . . PRODUCT AND/OR SERVICE makes compliance simple, with transaction history and on-demand reporting." It is unknown whether PRODUCT AND/OR SERVICE and VENDOR-7 are the same product and/or service.

78. In its pre-hearing brief, the taxpayer made some additional assertions, indicating that "it is not a service but and (sic) online information retrieval service and sales tax compliance service." It is unknown whether

47 Section 59-12-102(113)(c)(iv) reference to "data processing and information services" will be discussed in more detail in the Discussion section of the decision.
48 Exhibits R-5, R-6 and R-7.
49 Exhibit R-5.

this assertion refers to PRODUCT AND/OR SERVICE or VENDOR-7.[50] Regardless, this statement is confusing and seems contradictory. However, when all of the taxpayer's statements are read in concert, it appears that the taxpayer is arguing that the primary object for its entering into the VENDOR-7 transaction was to receive services, not software. The taxpayer further contends that VENDOR-7'S "online service" has never been available as canned, prewritten software and that the service "replaces" the "need for third party sales tax compliance services."

79. REPRESENTATIVE-2 FOR TAXPAYER testified that since he has worked for the taxpayer, he knows that the taxpayer has used VENDOR-7. He also stated that he had looked at the VENDOR-7 contract, which he characterized as a one-year agreement for licenses. It is unknown, however, whether he looked at a contract that has been entered into since he began working for the taxpayer in 2011 or whether he looked at the contract applicable to the audit period. It is also unknown how many licenses the taxpayer may have purchased in regards to the VENDOR-7 transaction.

80. REPRESENTATIVE-2 FOR TAXPAYER also stated that VENDOR-7 integrates with VENDOR-4 so that the taxpayer can see if it needs to impose sales tax. He stated that VENDOR-7 makes an "assessment" of whether the taxpayer needs to impose tax on its own sales. He also stated that VENDOR-7 "fixes" the taxpayer's sales tax returns. He did not indicate whether VENDOR-7'S employees prepare the taxpayer's returns or whether the taxpayer's employees use the VENDOR-7 software to prepare its returns. He also stated that the taxpayer has a "subscription" with VENDOR-7 to have their system "interact" with the taxpayer's system. However, he did not provide any specificity as to how the two systems interact. Upon questioning, REPRESENTATIVE-2 FOR TAXPAYER also testified that the taxpayer's employees set up the "integration" in VENDOR-7'S software so that a determination can be made as to whether a sale is taxable. He

50 To avoid confusion, this contested vendor and transaction will be referred to hereafter using the term "VENDOR-7" (and not the terms "PRODUCT AND/OR SERVICE" or "WEBSITE-3").

estimated that the taxpayer's employees spend four to eight hours a month inputting data into the VENDOR-7 software in order for VENDOR-7'S systems to interact with the taxpayer's systems.

81. In the Division's pre-hearing brief, it contends that the taxpayer has not shown that the primary object of the VENDOR-7 transaction was for nontaxable services. It asserts that each time the taxpayer "makes a taxable sale, it goes to**,** NAME OF SERVICE enters a zip code, and gets the appropriate sales tax rate to apply to the sale." In addition, the Division asserts that "NAME OF SERVICE also prepares TAXPAYER'S sales and use tax returns." The Division contends that if the taxpayer inputs its information into VENDOR-7'S computer software or uses the software to prepare its tax documents, then the taxpayer is using prewritten computer software. The Division asserts that the taxpayer also receives computer generated output in the form of tax documents. The Division submitted no documents in regards to the VENDOR-7 transaction. In addition, no information specific to the VENDOR-7 transaction was provided through the testimony of the Division's employees.

82. The taxpayer suggested that the primary object of the VENDOR-7 transaction should be considered a service because VENDOR-7'S online service has never been available as prewritten computer software. This statement was from the taxpayer's brief and was not supported by any testimony or documents. In addition, it is unclear whether the taxpayer was trying to indicate that no software can be purchased to replicate the products and/or services the taxpayer purchased from VENDOR-7. Regardless, this argument is not convincing because the Commission needs to analyze evidence specific about the product and/or services that was purchased to see if the primary object of the transaction can be determined.

83. The taxpayer also suggested that VENDOR-7'S products and/or services replaced the "need for third party sales tax compliance services." Again, such an argument is not convincing. Using third party services to perform tasks is different than acquiring or using software that may enable the purchaser to perform the same

or similar tasks. Evidence specific to the transaction at issue must be analyzed to see if the primary object of the VENDOR-7 transaction can be determined.

84. On the Division's notices, the transaction at issue was described only as "VENDOR-7," which is not helpful in determining the primary object of the transaction. However, REPRESENTATIVE-2 FOR TAXPAYER has characterized the VENDOR-7 contract he reviewed as an agreement for "licenses." In addition, REPRESENTATIVE-2 FOR TAXPAYER indicates that the taxpayer spends a significant amount of time each month inputting data into VENDOR-7. These facts show that the taxpayer has entered into the VENDOR-7 transaction, at least in part, to access and use VENDOR-7'S prewritten computer software. REPRESENTATIVE-2 FOR TAXPAYER indicated that the taxpayer able to get tax returns prepared with NAME OF SERVICE. However, he did not indicate that any VENDOR-7 employee takes the taxpayer's inputted data and prepared the returns. Without evidence to suggest otherwise, it seems more likely that the taxpayer uses the VENDOR-7 software to generate its own returns. Lastly, it appears that VENDOR-7 has a database of sales tax information which the taxpayer can use to determine the taxability of its own sales and the sales tax rates it should charge its own customers. As a result, it appears that the VENDOR-7 transactions may also involve the use of a database compiled by VENDOR-7. Unfortunately, there were no specific details of the taxpayer's use of the database to resolve sales tax questions in comparison to its use of the software to enter data and prepare reports. Again, neither party provided contracts or invoices that might have been helpful in identifying the primary object of the transaction. Without such evidence, it is unclear whether the primary object of the taxpayer's transaction with VENDOR-7 was for something other than the use of prewritten computer software.

<u>Sourcing the Contested Transactions</u>

85. Utah law provides that some transactions are subject to sales and use tax and that others are either nontaxable or exempt. However, even if a transaction is subject to sales and use tax under Utah law, Utah

cannot tax the transaction unless the sale is also considered to be located in or "sourced to" Utah. At the hearing, the parties' witnesses were asked questions about sourcing the contested transactions.

86. REPRESENTATIVE-3 FOR TAXPAYER testified that even if the contested transactions are found to be the taxable use of tangible personal property, the Commission must find that they are sourced to Utah before sustaining the Division's assessment of the transactions. She explained that two different criteria have been used in the past to source transactions that are similar to the contested transactions. She explained that Utah initially sourced these types of transactions to the location of the vendors' servers (i.e., which in this case would involve a determination of the location(s) where the contested vendors keep the servers on which they stored the software that the taxpayer used over the internet). She further explained that Utah subsequently sourced these types of transactions to the location of the user (i.e., which in this case would involve a determination of the taxpayer's address).[51] She explained that the sourcing criteria for these types of transactions may have changed sometime between 2010 and 2011 (after the audit period).

87. In regards to the first sourcing criteria described by REPRESENTATIVE-3 FOR TAXPAYER, REPRESENTATIVE-2 FOR TAXPAYER testified that he did not know where any of the contested vendors' servers were located. REPRESENTATIVE-3 FOR TAXPAYER also testified that she did not know whether any of the contested vendors had servers in Utah. RESPONDENT was not asked if he knew where any of the contested vendors' servers were located. As a result, the Commission does not know whether the contested vendors' servers are located in Utah or outside of Utah at the time the contested transactions occurred.[52]

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51 Later in the decision, the Commission will discuss whether it is even necessary to determine which of these two sourcing criteria was applicable during the audit period.

52 On the Amended Statutory Notice (Exhibit R-5), the Division made statements at the end of Amended Schedule 2 and Amended Schedule 3 that suggest that it added some transactions to the originally issued schedules because of a change in the sourcing criteria. Specifically, on Amended Schedule 2 (p. 11 of 11), the Division stated "[t]his schedule has been amended to include previously exempted SaaS software from companies/servers located outside Utah." On Amended Schedule 3 (p. 3 of 3), the Division stated "[t]his schedule has been amended to include previously excluded SaaS software from out of state vendors/servers." Neither party addressed these statements at the hearing. Nevertheless, these statements suggest that the Division

88. In regards to the second sourcing criteria described by REPRESENTATIVE-3 FOR TAXPAYER, the parties agree that the taxpayer's address was in CITY, Utah for the entire audit period.

APPLICABLE LAW

1. Utah Code Ann. §59-12-103(1) (2009)[53] provides that the following transactions are subject to Utah sales and use tax, as follows in pertinent part:

> (a) retail sales of tangible personal property made within the state;
> (b) amounts paid for:
> (i) telecommunications service, other than mobile telecommunications service, that originates and terminates within the boundaries of this state; . . .[54]
> . . . .
> (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;
> . . . .

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added transactions to the amended schedules because it now sourced them to the taxpayer's address and not "out of state." However, because of the way in which the statements are constructed, it is unclear whether the Division had originally sourced the transactions out of state because the *vendors* were located out of state or because the *vendors' servers* were located out of state. Without more information, these statements are insufficient for the Commission to find that any of the contested vendors' servers were located outside of Utah.

53 All cites are to the 2009 version of Utah law, unless otherwise indicated.

54 Prior to January 1, 2009 and effective for the first portion of the audit period (2007 and 2008), Section 59-12-103(1)(b) provides, as follows:

> (b) amounts paid:
> (i) to a:
> (A) telephone service provider regardless of whether the telephone service provider is municipally or privately owned; or
> (B) telegraph corporation:
> (I) as defined in Section 54-2-1; and
> (II) regardless of whether the telegraph corporation is municipally or privately owned; and
> (ii) for:
> (A) telephone service, other than mobile telecommunications service, that originates and terminates within the boundaries of this state;
> (B) mobile telecommunications service that originates and terminates within the boundaries of one state only to the extent permitted by the Mobile Telecommunications Sourcing Act, 4 U.S.C. Sec. 116 et seq.; or
> (C) telegraph service[.]

(m)[55] 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
. . . .
(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.

2. For the 2009 tax year only,[56] UCA §59-12-102(113)(c)(iv) provides that a "telecommunications service" does not include data processing and information services, as follows:

(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;

3. Section 59-12-102(48) defines '"lease" or "rental"' as follows in pertinent part:

(48)(a) "Lease" or "rental" means a transfer of possession or control of tangible personal property or a product transferred electronically for:[57]
(i) (A) a fixed term; or
(B) an indeterminate term; and
(ii) consideration. . . .

4. Section 59-12-102(77) defines "prewritten computer software," as follows:

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55 Subsection (m) was not in effect for the first portion of the audit period (2007 and 2008). It only became effective on January 1, 2009. Effective July 1, 2011 (after the audit period), the Legislature amended subjection (m) and enacted a new definition of "product transferred electronically" to Section 59-12-102.
56 This definition was not in effect for the first portion of the audit period (2007 and 2008). It did not come into effect until January 1, 2009, when UCA §59-12-103(1)(b) was also amended.
57 Prior to January 1, 2009, Section 59-12-102(48)(a) did not include the phrase "or a product transferred

(77)(a) Except as provided in Subsection (77)(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.

(b) "Prewritten computer software" includes:

(i) a prewritten upgrade to computer software if the prewritten upgrade to the computer software is not designed and developed:

(A) by the author or other creator of the computer software; and

(B) to the specifications of a specific purchaser;

(ii) notwithstanding Subsection (77)(a), computer software designed and developed by the author or other creator of the computer software to the specifications of a specific purchaser if the computer software is sold to a person other than the purchaser; or

(iii) notwithstanding Subsection (77)(a) and except as provided in Subsection (77)(c), prewritten computer software or a prewritten portion of prewritten computer software:

(A) that is modified or enhanced to any degree; and

(B) if the modification or enhancement described in Subsection (77)(b)(iii)(A) is designed and developed to the specifications of a specific purchaser.

(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.

5. Section 59-12-102(94) defines "sale," as follows in pertinent part:

(94) (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.

6. Section 59-12-102(108) defines "tangible personal property," as follows in pertinent part:

(108) . . . .

(b) "Tangible personal property" includes: . . . .

(v) prewritten computer software.[58]

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electronically."

58 Effective July 1, 2011 (after the audit period at issue), Section 59-12-102(108)(b)(v) was amended to read "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. . . .[59]

7. Utah Admin. Rule R865-19S-92 (“Rule 92”)[60] provides guidance concerning the taxability of computer software and other related transactions, as follows:

> (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.

8. Utah Code Ann. §59-12-211, which became effective January 1, 2009 (and applies only to the last year of the audit period), provides for the location or sourcing of transactions, as follows in pertinent part:[61]

> (1) As used in this section:
> (a) (i) "Receipt" and "receive" mean:
> (A) taking possession of tangible personal property;
> (B) making first use of a service; or
> (C) for a product transferred electronically, the earlier of:
> (I) taking possession of the product transferred electronically; or

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59 Section 59-12-102(108)(d) was not in effect for the first portion of the audit period (2007 and 2008). It became effective on January 1, 2009, when Section 59-12-103(1)(m) also became effective.

60 The provisions of Rule 92 were renumbered when the rule was amended effective January 1, 2009 to remove what had previously been subsection (B), which provided that “[t]he sale, rental or lease of prewritten computer software constitutes a sale of tangible personal property and is subject to the sales or use tax regardless of the form in which the software is purchased or transferred.” This portion of Rule 92 was deleted when the Legislature added subsection Section 59-12-103(1)(m) in 2009.

A subsection (4) was added to Rule 92 effective June 23, 2011. This portion of the rule, which addresses the location of a transaction involving the use of computer software, was not in effect during the audit period at issue.

61 In 2011 (subsequent to the audit period at issue), Section 59-12-211(12) (2011) was added to clarify that the location of a transaction involving the use of computer software where a copy of the software is not transferred to the purchaser is generally the address of the purchaser, as follows:

> (12) (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).
> . . . .

(II) making first use of the product transferred electronically.

. . . .

(2) Except as provided in Subsections (8) and (13), if tangible personal property, a product transferred electronically, or a service that is subject to taxation under this chapter is received by a purchaser at a business location of a seller, the location of the transaction is the business location of the seller.

(3) Subject to Subsection (10), and except as provided in Subsections (7), (8), (9), (11), and (13), if tangible personal property, a product transferred electronically, or a service that is subject to taxation under this chapter is not received by a purchaser at a business location of a seller, the location of the transaction is the location where the purchaser takes receipt of the tangible personal property or service.

(4) Subject to Subsection (10), and except as provided in Subsections (7), (8), (9), (11), and (13), if Subsection (2) or (3) does not apply, the location of the transaction is the location indicated by an address for or other information on the purchaser if:

(a) the address or other information is available from the seller's business records; and

(b) use of the address or other information from the seller's records does not constitute bad faith.

(5) (a) Subject to Subsection (10), and except as provided in Subsections (7), (8), (9), (11), and (13), if Subsection (2), (3), or (4) does not apply, the location of the transaction is the location indicated by an address for the purchaser if:

(i) the address is obtained during the consummation of the transaction; and

(ii) use of the address described in Subsection (5)(a)(i) does not constitute bad faith. . . .

. . . .

(14) This section does not apply to:

. . . .

(c) a retail sale of tangible personal property or a product transferred electronically if:

(i) the seller receives the order for the tangible personal property or product transferred electronically in this state;

(ii) receipt of the tangible personal property or product transferred electronically by the purchaser or the purchaser's donee occurs in this state;

(iii) the location where receipt of the tangible personal property or product transferred electronically by the purchaser occurs is determined in accordance with Subsections (3) through (5); and

. . . .

9. Prior to 2009, and thus applicable to that portion of the audit in 2007 and 2008, Utah Admin. Rule R865-12L-6(E) (since repealed) also provided for the location or sourcing of transactions, as follows:

E. Purchases subject to use tax are defined as those purchases made by ultimate consumers for their own storage, use, or consumption in Utah when the merchandise is shipped from outside Utah direct to the purchaser in Utah and on which the vendor did not charge Utah use tax. Local use tax applies to purchases subject to use tax, as defined above, that are stored, used, or consumed in a county that has adopted the uniform local tax law.

10. UCA §59-1-1417 (2014) provides that the burden of proof is generally upon the petitioner in proceedings before the Commission, with limited exceptions as follows:

> (1) In a proceeding before the commission, the burden of proof is on the petitioner except for determining the following, in which the burden of proof is on the commission:
> (a) whether the petitioner committed fraud with intent to evade a tax, fee, or charge;
> (b) whether the petitioner is obligated as the transferee of property of the person that originally owes a liability or a preceding transferee, but not to show that the person that originally owes a liability is obligated for the liability; and
> (c) whether the petitioner is liable for an increase in a deficiency if the increase is asserted initially after a notice of deficiency is mailed in accordance with Section 59-1-1405 and a petition under Part 5, Petitions for Redetermination of Deficiencies, is filed, unless the increase in the deficiency is the result of a change or correction of federal taxable income:
> (i) required to be reported; and
> (ii) of which the commission has no notice at the time the commission mails the notice of deficiency.
> (2)[62] Regardless of whether a taxpayer has paid or remitted a tax, fee, or charge, the commission or a court considering a case involving the tax, fee, or charge shall:
> (a) construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer; and
> (b) construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer.

11. Utah Code Ann. §59-1-1410[63] provides the statutory period within which the Division may assess sales and use tax, as follows in pertinent part:

> (1) (a) . . . , the commission shall assess a tax, fee, or charge within three years after the day on which a person files a return.
> (b) . . . , if the commission does not assess a tax, fee, or charge within the three-year period provided in Subsection (1)(a), the commission may not commence a proceeding to collect the tax, fee, or charge.
> (2) (a) . . . , for purposes of this part, a return filed before the last day prescribed by statute or rule for filing the return is considered to be filed on the last day for filing the return.
> . . . .

DISCUSSION

First, the Commission will address burden of proof and the rule of strict construction of tax statutes. Second, the Commission will address the taxpayer's statute of limitations argument. Third, the Commission will

62 Subsection (2) was added to Section 59-1-1417 by the Legislature in Senate Bill 27 (2012) to address the "construction" of a statute involving a tax, fee, or charge by the Tax Commission or a court.

63 The portions of Section 59-1-1410 that are cited were in effect when the Division issued both its Initial

determine whether the contested transactions are ones that are subject to sales and use taxation under Utah law. Included in this section will be a discussion of the taxpayer's plea for the Commission to change its prior practice concerning the taxation of SaaS transactions and software used over the internet (where a taxpayer does not download the software).

Fourth, should the Commission find that any of the contested transactions are ones that are subject to sales and use taxation under Utah law, the Commission will determine whether these transactions are located in or sourced to Utah. Even if the transactions are ones that are subject to sales and use taxation under Utah law, Utah cannot tax the transactions unless they are sourced to Utah. Fifth, if the Commission finds that the Division's assessment of any of the contested transactions should be sustained (i.e., if the Commission finds that any of the contested transaction are both taxable under Utah law and sourced to Utah), the Commission will address the taxpayer's equitable estoppel arguments.

I. Burden of Proof and the Rule of Strict Construction of Tax Imposition Statutes in Favor of the Taxpayer and Tax Exemption Statutes Against the Taxpayer.

Section 59-1-1417 addresses which party has the burden of proof in proceedings before the Commission. With certain exceptions, Section 59-1-1417(1) provides that the burden is upon the Petitioner, who in this case is TAXPAYER. TAXPAYER, however, asserts that the burden is upon the Division pursuant to Section 59-1-1417(2), which provides that the Commission must "construe a statute imposing the tax, fee, or charge strictly in favor of the taxpayer" and "construe a statute providing an exemption from or credit against the tax, fee, or charge strictly against the taxpayer." Because the transactions being contested by the taxpayer involve tax imposition statutes and not exemption statutes, the taxpayer contends that the Division has the burden to prove that its assessments of tax on these transactions are proper.

The taxpayer's position regarding burden of proof is incorrect. First, if the Legislature had intended for the Petitioner only to have the burden of proof for assessments involving exemption statutes, it could have stated

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Statutory Notice and its Amended Statutory Notice.

so. But, it did not. The Legislature clearly provides for the burden to be upon the Petitioner, subject to three exceptions, none of which address tax imposition and tax exemption statutes. If the Commission were to accept the taxpayer's proposed interpretation, it would be inconsistent with the *plain* language of Subsection 59-1-1417(1) and could render all or part of this subsection superfluous or inoperative, which the Commission may not do.[64]

Second, Subsection 59-1-1417(2), unlike Subsection 59-1-1417(1), does not contain or make reference to the term "burden of proof." Instead, it directs the Commission on how to "construe" tax statutes. Even before Subsection 59-1-1417(2) was enacted into law in 2012, however, the Commission has construed tax statutes in accordance with the guidance provided in Subsection 59-1-1417(2) because of similar guidance found in prior Utah Supreme Court decisions.[65] It is noted, however, that the Utah Supreme Court has also explained that while the rule of strict construction applies to tax statutes, the rule is secondary to the intent of a statute. In *MacFarlane v. Utah State Tax Com'n*, 134 P.3d 1116, 2006 UT 18 (Utah 2006), the Court stated that the rule of

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64 In *Warne v. Warne*, 275 P.3d 238, 2012 UT 13 (Utah 2012), the Utah Supreme Court ruled that "[u]nder our rules of statutory construction, we must give effect to every provision of a statute and avoid an interpretation that will render portions of a statute inoperative" (*citing Hall v. Utah State Dep't of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958). The Court further stated that in order "[t]o achieve this goal, we construe the provision at issue 'with every other part or section so as to produce a harmonious whole'" (*citing Sill v. Hart*, 2007 UT 45, ¶ 7, 162 P.3d 1099) (internal quotation marks omitted).

In *Hall v. Utah State Dept. of Corrections*, 24 P.3d 958, 2001 UT 34 (Utah 2001), the Court also stated that "our primary goal when construing statutes is to evince 'the true intent and purpose of the Legislature [as expressed through] the plain language of the Act.'" (*citing Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984)). The Court further stated that "[i]n doing so, we seek 'to render all parts thereof relevant and meaningful' . . . and we accordingly avoid interpretations that will render portions of a statute superfluous or inoperative (*citing Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980), *Platts v. Parents Helping Parents*, 947 P.2d 658, 662 (Utah 1997); *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995)).

65 *See, e.g., USTC Appeal No. 07-1121* (Findings of Fact, Conclusions of Law, and Final Decision Jan. 29, 2009), in which the Commission stated that "[a]lthough we generally construe taxing statutes in favor of the taxpayer and against the taxing authority, we construe statutes providing tax exemptions strictly against the taxpayer" (*citing Hales Sand & Gravel, Inc. v. Audit Division of the State Tax Comm'n of Utah*, 842 P.2d 887 (Utah 1992) (*citing Parson Asphalt Prods., Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1980)).

See also USTC Appeal No. 87-2023 (Findings of Fact, Conclusions of Law, and Final Decision Apr. 13, 1989), in which the Commission indicated that it must strictly construe exemption statutes against a taxpayer. Redacted copies of these and other selected decisions can be viewed on the Commission's website at

strict construction of tax statutes "is only a secondary consideration that does not always come into play" and "should not be utilized to defeat the intent of the legislative body" (*citing State Dep't of Assessments and Taxation v. Belcher*, 315 Md. 111, 553 A.2d 691, 695 (1989)). The Court in *MacFarlane* further explained that "[t]he best evidence of that intent is the plain language of the statute" and that "[i]f the intent of the legislature is manifestly different from the effect that a strict construction of the statute would produce, the manifest intent trumps."[66]

For these reasons, the Commission must review the facts of this case and construe the tax imposition statutes at issue based on their plain language. Only if the plain language of the statutes is deemed to be ambiguous or unclear or if the intent of the Legislature is unclear should the Commission apply the rule of strict construction of tax imposition statutes in favor of the taxpayer. Regardless, the strict construction rule of tax statutes, as set forth in Subsection 59-1-1417(2), does not shift the burden of proof from the taxpayer to the Division. For these reasons, the burden of proof argument made by the taxpayer at the Formal Hearing is not convincing. Accordingly, the Commission should find that the taxpayer, not the Division, has the burden of proof in this matter.

II. Statutory Period within Which the Division May Impose a Tax.

At the Formal Hearing, the taxpayer pointed out that the Division imposed tax on a number of transactions in its Amended Statutory Notice that had not been assessed in the Initial Statutory Notice. The taxpayer asserts that prior to the Division's issuance of its Amended Statutory Notice, the "statute of limitations" to impose a tax may have expired for some of the transactions that were not assessed until the issuance of the amended notice. At the hearing, the taxpayer stated that it did not know whether the statute of limitations to

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http://www.tax.utah.gov/commission-office/decisions.

66 The Commission has used the guidance provided in *MacFarlane* in a number of its recent decisions. *See, e.g., USTC Appeal No. 12-58* (Findings of Fact, Conclusions of Law, and Final Decision Apr. 4, 2014); *USTC Appeal No. 13-1749* (Initial Hearing Order Oct. 3, 2013); *USTC Appeal No. 12-1866* (Initial Hearing Order May 28, 2013).

assess a tax would be two years or three years and that it did not know which Utah statute would apply. Nor did the taxpayer identify which of the transactions on the Amended Statutory Notice would be affected by this argument. The Commission is concerned with addressing an assertion made by a party where that party offers no legal argument in support of it, where it cannot cite the applicable law and what this law entails, and where it cannot even identify the affected transactions, especially where the taxpayer submitted a pre-hearing brief in which it did not even raise the assertion.[67]

However, the taxpayer did raise the statute of limitations issue at the hearing and the Division, although unprepared to address it, did its best to provide some information to the Commission about the issue. As a result, the Commission will decide if the taxpayer has met its burden of proof to show that any transactions that were not assessed until the issuance of the Amended Statutory Notice should be removed because the Division did not impose tax on them within the timeframe authorized by law.

Section 59-1-1410(1)(a) provides that the "commission shall assess a tax, fee, or charge within three years after the day on which a person files a return." It is clear that in both the Initial Statutory Notice and the Amended Statutory Notice, the Division has only imposed tax on transactions that occurred during the audit period that is properly before the Commission in this appeal. However, the Amended Statutory Notice was not issued within three years of all days on which the taxpayer filed sales and use tax returns for the audit period. As a result, a question exists as to whether the Division was authorized to assess the transactions that occurred

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67 The Commission notes that the Utah Supreme Court has held on numerous occasions that it will not address issues not adequately briefed and has even stated that the Court "is not simply a depository in which the appealing party may dump the burden of argument and research." *State v. Bishop*, 753 P.2d 439 (Utah 1988). The Commission recognizes that the Utah Rules of Appellate Procedure, which apply to the appellate courts, do not apply to the appeals before the Tax Commission. However, in a case that is applicable to appeals before the Tax Commission, the Utah Court of Appeals found that it was improper for the Commission to raise and decide an issue that had not been raised by the parties, stating that "a judgment must be responsive to the issues framed by the pleadings, and a trial court has no authority to render a decision on issues not presented for determination." *Chevron U.S.A., Inc. v. Utah State Tax Com'n*, 847 P.2d 418 (Utah App. 1993). Accordingly, the Commission will not raise and address issues that the parties themselves did not raise at the hearing.

during the first year of the audit period and which it did not assess until it issued its amended notice. The Division stated that the issue appears to be whether the three-year period to assess a tax continues to run for transactions that occurred during an audit period already under appeal. The Division argues that the period should not continue to run for an audit period that is "open" in an appeal.

This Commission is not aware of this issue ever being raised before. Because of the taxpayer's failure to raise this issue sooner, neither party was prepared to support or refute the taxpayer's assertion. As a result, the Commission does not have the benefit of any legal precedent that might help it decide this matter. Section 59-1-1410(1)(b), however, states that "if the commission does not assess a tax, fee, or charge within the three-year period provided in Subsection (1)(a), the commission may not commence a proceeding to collect the tax, fee, or charge." The Commission has not commenced a proceeding to collect a tax that the Division did not assess until it issued its Amended Statutory Notice. This appeal was already open when the Division issued its Amended Statutory Notice and when it imposed tax on the transactions assessed for the first time on that notice. Accordingly, it is arguable that under Section 59-1-1410(1)(b), the Division properly complied with the three-year statutory period to impose a tax for any transaction found on the amended notice that occurred during the open audit period.

Regardless of whether Section 59-1-1410(1)(b) supports the Division's position, however, the taxpayer has the burden of proof in this matter, and it has not provided any convincing evidence or arguments to show that the three-year period to assess a tax continues to run for transactions that occurred in an audit period already under appeal. For these reasons, the Commission should deny the taxpayer's assertion that some of the transactions assessed in the Amended Statutory Notice might need to be removed because they violate the three-year statutes of limitations period within the Division can assess a tax.

III. Are the Contested Transactions Subject to Sales and Use Taxation under Utah Law?

First, the Commission will address whether the use of prewritten computer software over the internet (where the software is not downloaded) is subject to sales and use taxation under Utah law. It will also address the Commission's historic use of the primary object or essence of the transaction test in determining the taxability of such transactions. Second, the Commission will address the taxpayer's plea for the Commission to change its prior practice concerning the taxation of SaaS transactions and prewritten computer software used over the internet (where the software is not downloaded). Third, the Commission will address other items involved in the contested transactions and discuss whether or not these items are subject to taxation. Fourth, the Commission will determine whether the party with the burden of proof, in this case the taxpayer, has shown that the contested transactions are not subject to taxation under Utah law.

A. Use of Prewritten Computer Software Over the Internet. In this case, all of the contested transactions involve the taxpayer's access to and use of prewritten computer software over the internet (where the software is not downloaded). During the audit period, the Commission issued several private letter rulings in which it determined that a transaction whose primary object was for the use of prewritten computer software over the internet (where the software was not downloaded) was subject to sales and use taxation. While private letters rulings are specific to the facts of the entity requesting the ruling and are not intended as statements of broad Tax Commission policy, they are helpful in showing that during the audit period, the Commission considered the use of prewritten computer software over the internet (where the software was not downloaded) to be taxable if it was the primary object of the transaction and if the transaction was sourced to Utah.[68]

68 Subsequent to the audit period, the Legislature also took an action acknowledging that the use of computer software without a transfer of that software to the purchaser is subject to sales and use taxation. In House Bill 277 ("HB 277") (2011), the Legislature added a new subsection to Section 59-12-211, which is a statute that addresses where to source transactions that may be subject to sales and use taxation under Utah law. Specifically, the Legislature added Subsection 59-12-211(12) (2011), which address where to source a transaction for the use of computer software where a copy of the software is not transferred to the purchaser. Although this sourcing provision was enacted subsequent to the audit period, it is noted that HB 277 did not

In *USTC Private Letter Ruling 08-002* (Aug. 4, 2008) ("*PLR 08-002*"), the Commission considered the taxability of a "software-supported service" where customers accessed the "base software and data files" over the internet and did not download the software. The Commission determined that the service was subject to taxation under Utah law after determining that the *use* of prewritten computer software over the internet was subject to taxation (even if the software was not downloaded) and that the primary object of the transaction was for the use of the software.

The Commission determined that the software was "tangible personal property" because Section 59-12-102(108)(b)(v)[69] defined that term to include "prewritten computer software." The Commission then considered whether the *use* of the tangible personal property was subject to taxation under Section 59-12-103(1)(a), which imposes tax on retail sales of tangible personal property. The Commission determined that the *use* of the software without a transfer of the software constituted a "sale" for purposes of Section 59-12-103(1)(a) because Section 59-12-102(94)(b)(v) defines "sale" 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" (emphasis added). Because the transfer of possession of the software would have been taxable had an outright sale of the software been made, the Commission determined that the *use* of the software was also taxable (even though the software was not downloaded).[70] Under these laws, which were in effect for the April 1, 2007 through December 31, 2008 portion

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include any amendments to Section 59-12-102 and 59-12-103 under which the use of prewritten computer software (where the software is not downloaded) is subject to taxation. Accordingly, it appears that the Legislature considered such transactions to be taxable under the Utah law that existed prior to 2011 and that the amendment to Section 59-12-211 was merely to address where such transactions should be sourced.

69 For ease of reference, the 2009 version of Utah law is cited. In *PLR 08-002*, the Commission had cited to the 2007 version of Utah law.

70 The taxpayer argues that such a transaction is not a taxable "lease," as defined under Section 59-12-102(48), because the purchaser does not obtain "control" over the software. In *PLR 08-002*, the Commission agreed that such a transaction is not a taxable lease or rental under Section 59-12-103(1)(k). Regardless, the transaction is still taxable as the sale of tangible personal property under Section 59-12-103(1)(a) because the

of the audit period, the Commission's legal conclusion in *PLR 08-002* appears to be correct. Specifically, the use of prewritten computer software (where the software is not downloaded) is subject to sales and use taxation under the law that existed in 2007 and 2008.[71]

In *PLR 08-002*, the Commission also relied on the primary object of the transaction test to determine whether the use of the software over the internet (where the software was not downloaded) was subject to taxation under Utah law. In determining the taxability of a transaction, the Utah Supreme Court has applied a "primary object of the transaction" test (also called "essence of the transaction" test) to determine whether the object of a transaction is primarily for nontaxable services or for taxable tangible personal property. In *B.J.-Titan Services v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992), the Court explained that this test:

> . . . 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.[72]

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definition of "sale" includes the *use* of *tangible personal property* under a *contract* if the transfer of possession would be taxable if an outright sale were made.

71 In *PLR 08-002*, the Commission also addressed a ruling that the Commission has issued in 2001. In *USTC Private Letter Ruling 01-027* (Oct. 31, 2001), the Commission determined that accessing software over the internet without downloading it does not constitute a lease or rental. In *PLR 08-002*, the Commission stated that "there is not enough information available in the facts of Ruling 01-027 to reliably apply it as precedent to a different taxpayer."

72 The Commission has applied the primary object of the transaction test when determining the taxability of other transactions involving computer software. As described earlier, *PLR 10-011* concerned a seller who provided a number of web-based "services" to its customers that enabled subscribers to have remote computer access to attend and participate in online meetings. Because the involvement of the seller's employees appeared to be limited to setting up and maintaining its customers' accounts, the Commission found that the primary object of the transaction was for the use of the seller's software and not for services provided by the seller.

In *USTC Private Letter Ruling 13-003* (Dec. 4, 2013), the Commission considered the taxability of certain cloud-based applications and related services that support customers' telecommunications equipment. The Commission found that the primary object of the seller's transaction was for the use of prewritten computer software and that the seller's hardware and technical services to manage and maintain its hardware and software were incidental to the transaction. The Commission noted that the seller's assertion that "[t]he monthly fee covers the charges for hardware, software, virtual server instance charges, required storage charges, rack space charges, power and cooling charges, as well as monitoring and management charges, most moves-adds-changes and major version upgrades" did not change its conclusion.

As a result, for a transaction that involves both tangible personal property and services, the Commission examines the transaction as a whole to determine the primary object of the transaction. However, detailed information about the transaction is usually needed to make such a determination.

In *USTC Private Letter Ruling 08-012* (Jan. 21, 2009) ("*PLR 08-012*"), the Commission considered revisions made to the statutes addressed earlier in regards to *PLR 08-002* and determined that the changes, which were effective January 1, 2009, did not change the taxability of the use of prewritten computer software over the internet (where the software was not downloaded). In *PLR 08-012*, the Commission found that such a transaction would be taxable both before and after the January 1, 2009 effective date of the revisions, if the transaction was sourced to Utah.[73] The changes made to the 2009 law will now be discussed.

On other occasions, the Commission has found that the primary object of the transaction was for nontaxable services and that the computer software was incidental to the transaction. For example, in *USTC Private Letter Ruling 07-013* (Dec. 21, 2007), the Commission considered services that a seller provided to backup and protect a customer's computer files. Although the customer downloaded software provided by the seller, the Commission considered the software to be incidental to the nontaxable backup and protection services that were the primary object of the transaction.

In addition, in *USTC Private Letter Ruling 11-001* (September 9, 2011), the Commission considered a seller who provided authentication services for entities seeking to perform secure electronic commerce and communications over the internet. Although a customer received tangible personal property from the seller, specifically a digital certificate file provided online, the Commission found that the tangible personal property (i.e., the digital certificate file) was incidental to the nontaxable authentication services that were the primary object of the transaction.

Furthermore, in *USTC Private Letter Ruling 11-006* (January 12, 2012), the Commission considered the taxability of a seller's online human resource services to assist its customers' human resource departments in the job application and hiring process. In this ruling, the seller provided its clients with a web link that connected a client's potential job applicants to the seller's server via the internet. The job applicant would fill out a questionnaire on the seller's website, and the seller would use its computer system to process and analyze all job applicants' responses, ranking the applicants on their probability for success in the job. The seller's customers were granted access to this information for a limited time, and the customers were able to retrieve the final reports. The Commission considered that the seller's customers had very limited access to the seller's software and that the customers had no control over how the seller analyzed the data provided by the applicants. Given these circumstances, the Commission determined that the seller's transactions were nontaxable because the primary object of the transaction was nontaxable research and analysis services and that the use of software and receipt of computer generated output (i.e., the reports) were incidental to these services.

73 In *PLR 08-012*, there was no question as to whether the use of the software over the internet was the primary object of the transaction. The Commission ruled that the transaction at issue was nontaxable, however, after determining that it was not sourced to Utah. In *USTC Private Letter Ruling 09-003* (Apr. 7, 2009), the

Effective January 1, 2009, two revisions were made to the applicable Utah law, specifically: 1) while the definition of "tangible personal property" still *included* "prewritten computer software," the definition was revised to *exclude* "a property that is transferred electronically." Section 59-12-102(108)(b)(v) and (d); and 2) Section 59-12-103(1) was revised to add a subsection 59-12-103(1)(m), which provided that the sale of a product that is transferred electronically is taxable if that product would have been subject to tax had that product been transferred in a manner other than electronically.

In *PLR 08-012*, the Commission again relied on the Section 59-12-102(94)(b)(v) definition of "sale" (which was not revised) to find that the use of prewritten computer software over the internet (where the software was not downloaded) would be subject to taxation under Utah law both before and after January 1, 2009, if the transaction was sourced to Utah.

The taxpayer contends that the Commission's ruling in *PLR 08-012* is incorrect. The taxpayer argues that no software transferred electronically is subject to taxation between January 1, 2009 (when the Section 59-12-102(108) definition of "tangible personal property" was revised to exclude a "product that is transferred electronically") and July 1, 2011 (when Section 59-12-211, the sourcing statute, was revised to specifically address the location of a transaction for the use of computer software where there is not a transfer of the software to the purchaser).

The taxpayer's argument is not convincing. First, if the use of prewritten computer software over the internet (where the software is not downloaded) is considered a "product that is transferred electronically," the taxpayer correctly notes that this software would not be considered "tangible personal property," as defined in Section 59-12-102(108). However, at the same time this definition of "tangible personal property" was revised, a new subsection was added to the Section 59-12-103 taxing statute. Specifically, Subsection 59-12-103(1)(m),

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Commission issued another ruling concerning a SaaS provider that was essentially identical to the ruling in *PLR 08-012*.

was enacted to provide that a product that is transferred electronically is subject to taxation regardless of whether the sale provides a right of permanent use of the product. Subsection 59-12-103(1)(m), thus, would apply and subject a transaction that involves software transferred electronically to taxation, even though that product would no longer be considered the taxable sale of tangible personal property under Subsection 59-12-103(1)(a). Accordingly, if the software at issue in the contested transactions is considered a "product that is transferred electronically," it is still subject to taxation in 2009 under Subsection 59-12-103(1)(m).

Second, it is arguable that the software at issue in the contested transactions is not a "product that is transferred electronically" because the taxpayer accessed the software over the internet and a copy of the software was never "transferred" to the taxpayer. If this is the case, the software would still be considered "tangible personal property" under Section 59-12-102(108) because the exclusion in Subsection 59-12-102(108)(b)(v) would not apply. As a result, the use of the tangible personal property (i.e., the software) would still be subject to taxation under Sections 59-12-103(1)(a) and 59-12-102(94)(b)(v).

For these reasons, the use of prewritten computer software over the internet (where the software is not downloaded by the purchaser) is subject to taxation under Utah law throughout the entire audit period if it is the primary object of the transaction and if the transaction is sourced to Utah. There is no ambiguity in the applicable law that would require the Commission to apply the strict construction rule for tax imposition statutes and find that the use of prewritten computer software over the internet (where the software is not downloaded) is a nontaxable transaction.

B. Taxpayer's Plea for the Commission to Change its Practice. The taxpayer asks the Commission to change its prior practice of imposing tax on transactions for the use of prewritten computer software over the internet (where the software in not downloaded), asserting that the taxation of such transactions is out of compliance with the Streamlined Sales and Use Tax Agreement ("SSUTA"). The taxpayer also asks the Commission to change its prior practice of imposing sales and use tax on some SaaS transactions. The latter

argument appears to be a request for the Commission to always find that the primary object of a SaaS transaction is for nontaxable services (with the use of any prewritten computer software considered incidental), which would negate the need to obtain detailed knowledge about the transaction and analyze it before determining the primary object of the transaction.

The Commission is hesitant to make major changes to its prior practice in the appeals process because the changes often affect an entire industry and not just the single taxpayer who is a party to an appeal. Generally, it is preferable to propose such changes by rule or statute so that input from all affected parties can be considered before a change is made.[74] Regardless, the Commission will address the taxpayer's requests.

Because Utah law provides for the taxation of the use of prewritten computer software over the internet (where the software is not downloaded), the taxpayer contends that the state is out of compliance with the SSUTA. This appeals process, however, is not the proper venue to determine whether Utah's laws are in or out of compliance with the SSUTA. There are procedures in place under the SSUTA to address such issues. Furthermore, it should be noted that the Commission *implements* the tax laws enacted by the Legislature and does not have the authority to change or enact law. As explained earlier, Utah law does provide that the use of prewritten computer software over the internet (where the software is not downloaded) is subject to sales and use taxation. This is further supported by the Legislature's enactment of Section 59-12-211(12) (2011), as discussed

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74 For example, prior to late 1990, the Commission considered a transaction to purchase eyeglasses from an optometrist to be nontaxable because the optometrist's services were deemed to be the primary object of the transaction (with the tangible personal property, i.e., the eyeglasses, deemed incidental to those services). The Commission changed this practice in rule. Utah Admin. Rule R865-19S-66 was adopted to provide that the sale of eyeglasses involved two primary and separate objects of the transaction. The first primary object was to purchase tangible personal property (i.e., the eyeglasses). The second primary object was to purchase the optometrist's services. By rule, the prior practice was changed to provide that the charge for the eyeglasses would be taxable and the charge for the services would be nontaxable, if the charges were separately stated (i.e., if the charges were not "bundled").

Similarly, until 2000 or 2001, the Commission's general practice had been to treat graphic design services as incidental to the taxable sale of the tangible personal property in which the graphic design was incorporated. However, after receiving input from the graphic design industry, the Commission adopted Utah Admin. Rule R865-19S-111, in which the Commission provided that in certain instances, the sale of graphic

in Footnote 68 of this opinion, to address where such transactions should be sourced. The Commission cannot find that Utah law precludes from taxation all transactions for the use of prewritten computer software over the internet (where the software is not downloaded). To do so would give Section 59-12-211(12) (2011) no meaning and render it inoperative, which must be avoided.[75] For these reasons, the taxpayer would need to approach the Legislature if it wants Utah to bar from taxation all transactions involving the use of prewritten computer software over the internet (where the software in not downloaded).

The Commission, however, does have authority to analyze a transaction and determine whether its primary object is for taxable tangible personal property or for nontaxable services. Nevertheless, the Commission is not inclined to find in the appeals process that the primary object for every product and/or service labeled as a SaaS transaction is for nontaxable services (with the use of the prewritten computer software considered incidental to that transaction). In *PLR 10-012*, the Commission noted that a seller's "reference to the term 'services' may not actually characterize the nature of the products or transactions. For our analysis, we consider each item's overall characteristics when determining whether the item is a non-taxable service or a taxable sale of either tangible personal property or another taxable item." Similarly, a vendor's designation of its sales as "SaaS" transactions may not actually characterize the nature of its products and/or services. SaaS vendors do not offer a single combination of products and/or services, as evidenced by the descriptions of the contested transactions at issue in this appeal. Detailed information about an individual SaaS transaction is needed before the Commission can reliably determine which of a seller's products and/or services may be the primary object of a transaction.

The taxpayer also asserts that the Commission should change its practice because most other states do not tax SaaS transactions and because a Michigan court applied a test similar to the primary object of the

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design services, if separately stated from the sale of taxable tangible personal property, would be nontaxable.

75 Again, in *Warne*, the Utah Supreme Court stated that "an interpretation that will render portions of a statute inoperative" should be avoided.

transaction test and determined that one vendor's SaaS transaction was for nontaxable services (with the use of the software considered incidental). The practices and court decisions of other states, however, are not binding upon Utah and the Commission. The Commission's practice to analyze detailed information about a SaaS transaction and determine whether its primary object is for the use of computer software (which is not downloaded) complies with Utah law and appears to be a proper way to determine whether such transactions are subject to taxation under Utah law. The Commission acknowledges that the taxpayer would prefer a more "black and white" methodology with which to determine the taxability of SaaS transactions. However, the appeals process in which the transactions of a single taxpayer are being considered is not the best venue in which to seek changes that would have a significant impact for an entire industry. For these reasons, the Commission denies the taxpayer's plea.

C. Other Specific Products and/or Services Involved with the Contested Transactions. All of the contested transactions involved the use of prewritten computer software over the internet (where the software is not downloaded), which the Commission has determined to be subject to Utah taxation (if it was the primary object of the transaction). However, other products and/or services were also involved with the contested transactions, such as services provided by the vendors' employees, computer generated output, and uses of databases. The taxability of these products and/or services should also be addressed because they, too, should be considered when determining the primary object of a transaction.

Services Provided by the Vendors' Employees. Section 59-12-103 imposes tax not only on the sale of tangible personal property, but also on a number of other specified transactions. Most services are not specifically identified in Section 59-12-103 and, thus, are not subject to taxation (if they are the primary object of a transaction). On the other hand, services specifically identified in Section 59-12-103 are subject to Utah taxation (if they are the primary object of a transaction).

Computer Generated Output. For the entire audit period, Utah Admin. Rule R865-19S-92(3) ("Rule 92") provides that "[t]he 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." Rule 92(1) defines "computer-generated output" to mean "the microfiche, microfilm, paper, discs, tapes, molds, or other tangible personal property generated by a computer." Accordingly, if the primary object of any of the transactions at issue is the sale of computer generated output, the transaction is subject to Utah taxation.

Use of a Seller's Online Database. In *PLR 10-012*, the Commission ruled that the use of a database, if it is the primary object of a transaction, is not subject to taxation because it is not a service that is specifically listed as taxable under the Section 59-12-103 taxing statute.[76] The Commission found that the use of a database should be considered a "data processing and information service," which as of January 1, 2009 was specifically described in Utah law not to be a taxable "telecommunications service."[77] A taxable "telecommunications service" is defined to "not include" a data processing and information service if the service allows data to be acquired, generated, processed, retrieved, or stored and to be delivered by electronic transmission to a purchaser, if the primary purpose for the underlying transaction is the processed data or information. Section 59-12-102(113)(c)(iv).

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76 In *PLR 10-012*, the Commission determined the taxability of several of the seller's products and/or services, which it sold in separate transactions. One of the transactions gave a customer access to a database of more than 110 million businesses for a subscription fee and allowed the customer to run searches and create reports from the database. Although the transaction involved the use of prewritten computer software and the receipt of computer generated output, the Commission found that the use of the database was the primary object of this transaction. On the other hand, the Commission found that the primary object of some of the seller's other transactions was for the use of prewritten computer software.

Furthermore, in *USTC Private Letter Ruling 12-002* (Dec. 7, 2012), the Commission considered a "News Service" that involved access not only to the application software of the news website, but also to a database holding the news content. The Commission found that the primary object of the transactions was to access and use the database of news content, not to use the application software.

77 Until 2009, Section 59-12-103(1)(b) imposed tax on a "telephone service." Effective January 1, 2009, however, this subsection was amended to replace the taxation of a "telephone service" with the taxation of a "telecommunications service." At the same time, a definition of "telecommunications service" was added to Section 59-12-102.

This definition of "telecommunications service," which does not include a data processing and information service, became effective on January 1, 2009, and thus, was only in effect during the last year of the audit period. Nevertheless, the use of a database over the internet should be deemed nontaxable throughout the entire audit period, if it is the primary object of a transaction. First, throughout the audit period, the Section 59-12-103 taxing statute does not specifically impose tax on data processing and information services or the use of a database. Second, the Division did not contend that the taxability of database use changed during the audit period because of the 2009 amendments. Accordingly, throughout the audit period, if the primary object of any of the contested transactions is deemed to be for the access to and use of a database, the transactions should be deemed nontaxable.[78]

The taxpayer contends that the contested transactions should be considered nontaxable data processing and information services because the taxpayer's own employees use the contested vendors' software to enter the taxpayer's own data and to process, organize, store, and retrieve that data. This argument is not convincing. For a transaction where a customer is the one who compiles its own data and enters it into the software and where the customer is also the one who then uses the software to process, organize, and retrieve its data, it is difficult to find that the primary object for the transaction is for services. Under such circumstances, it is arguable that the seller has provided no services.

For the use of a database compiled by a seller, a customer is paying, in part, for the service provided by the seller to compile the database. This service does not exist where the customer enters its own data. If the Commission were to accept the taxpayer's position, it is arguable that the sale of any accounting software (even

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78 It is noted that in 2013, the Legislature enacted Senate Bill 124 1st Sub., in which it amended the sales and use tax exemption statute, Section 59-12-104, to exempt "amounts paid or charged to access a database . . . if the primary purpose for accessing the database is to view or retrieve information from the database[,]" effective July 1, 2013. The bill's Fiscal Note indicates that the "[e]nactment of this bill clarifies current practice[.]" Even if one interpreted the bill to mean that sales involving databases were taxable prior to July 1, 2013 (including the audit period at issue), it would not impact this decision because the Commission has not found that sufficient evidence has been presented to show that the primary object of any of the contested transactions is to access a

where the customer received a copy of the software) could be considered a nontaxable data processing and information service because the owner of that software enters data into it and uses it to process and retrieve data. It is difficult to find that such a result is intended under Utah law.

For these reasons, the Commission declines to find that the taxpayer's entry of data into software over the internet automatically qualifies as a nontaxable data processing and information service. A customer must receive some sort of service from a seller before the seller's product and/or services can be considered nontaxable data processing and information services. Regardless, for the contested transactions at issue in this appeal, any services provided by the contested vendors will be considered when determining the primary object of a contested transaction and whether a contested transaction is subject to taxation.

D. The Primary Object of the Contested Transactions. In the Findings of Fact, the Commission analyzed the evidence submitted in regards to each contested vendor and the products and/or services provided by that vendor. All of the contested transactions involve the taxpayer's use of prewritten computer software, which is subject to taxation (if it is the primary object of the transaction). For most, if not all, of the contested transactions and especially for those where the taxpayer admitted that it was purchasing licenses, it is likely that the primary object of the transactions is for the use of taxable prewritten computer software.

However, some of the transactions also involve the receipt of taxable computer generated output, while others involve nontaxable services provided by a vendor's employees or the nontaxable use of a vendor's database. For most of the transactions, however, little specific information was submitted about the services provided by the vendor's employees. REPRESENTATIVE-2 FOR TAXPAYER, who testified on behalf of the taxpayer, did not work for the taxpayer during the audit period and had little first-hand information about the services provided by the contested vendors' employees. Furthermore, neither of the parties provided contracts or invoices of the transactions that might have been helpful in determining the extent of any services the contested

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database instead of using prewritten computer software.

vendors may have provided. Because of this lack of information, the Commission has found that it is unclear as to whether the primary object of any of the contested transactions was for something other than the use of prewritten computer software.

Earlier, it was determined that the burden of proof is upon the taxpayer to show that all of the contested transactions are not subject to taxation. To do so, the taxpayer would need to show that the primary object of each transaction was for some nontaxable service and/or use of a database and not for the taxable use of prewritten computer software and/or computer generated output. Because the evidence is insufficient to find that the primary object of any of the contested transactions is for something other than the use of prewritten computer software, the taxpayer has not met its burden. Accordingly, the Commission should find that all of the contested transactions are subject to Utah sales and use tax (unless the taxpayer shows that all or some of the transactions are not located in or sourced to Utah or the taxpayer's equitable estoppel arguments are convincing).

IV. Are the Contested Transactions Found to be Subject to Utah Taxation in the Preceding Section Considered Sales that are Sourced to Utah?

It was determined above that all of the contested transactions are subject to Utah sales and use tax. But, it must still be found that the sales are located in or sourced to Utah before the Division's imposition of tax on them will be sustained. Accordingly, the Commission will now determine if the taxpayer has met its burden of proof to show that the contested transactions are sourced to a location other than Utah.

The evidence suggests that there are two different sourcing options with which the location(s) of the contested transactions could be determined, specifically: 1) using the location of the contested vendors' servers; or 2) using the location of the taxpayer's address. However, as will be explained in more detail below, the Commission need not determine which of these two options is applicable to the audit period because the result will be the same regardless of which option is used. In either case, the taxpayer's evidence is insufficient to show that the contested transactions are sourced to a location other than Utah. However, some background information

about the two options and the Commission's historical sourcing of transactions like those at issue may prove helpful.

The first option would source a transaction for the use of prewritten computer software (where the software is not downloaded) to the location of a seller's server. The Commission used this option to source these types of transactions in two private letter rulings it issued during the audit period.[79] The Commission continued to source these types of transactions to the location of a seller's service until the second option was enacted into law in 2011. Section 59-12-211(12) (2011) became effective July 1, 2011 and provided that sales of the use of computer software where a copy of the software is not transferred to the purchaser are sourced to the location of the purchaser's address.[80] After Section 59-12-211(12) (2011) became effective, the Commission subsequently used the second option in its private letter rulings to source the types of transactions at issue in this appeal.[81]

There is a question, however, of whether the enactment of Section 59-12-211(12) was intended to *change* the prior sourcing law that was in effect during the audit period for these types of transactions or whether the new provision was intended only to *clarify* how the prior sourcing law should have been interpreted. Either intent is arguable because there was no sourcing statute or rule in place during the audit period that specifically addressed these types of transactions and because the sourcing statute and rule that were in place may be subject

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79 *See PLR 08-012* and *PLR 09-003*.

80 Section 59-12-211(12) (2011) provides that "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)." Subsections 59-12-211(4) and (5) provide for transactions to be sourced to the purchaser's address.

81 For example, the Commission issued *PLR 10-011* in February 2012, in which it addressed the effect of the recently enacted Section 59-12-211(12) (2011), as follows:

> 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.** (emphasis in original).

to different interpretations.[82] As a result, one can argue that either of the two sourcing options was applicable during the audit period for transactions such as those currently at issue. Regardless of which option is applicable to the audit period, however, the contested transactions are sourced to Utah because the taxpayer's evidence is insufficient to show that they are sourced to a location other than Utah.

The first option would source the contested transactions to the contested vendors' servers. However, neither party knew where any of the contested vendors' servers were located. Because the burden of proof is upon the taxpayer and because the taxpayer has not shown that any of the contested vendors' servers are located outside of Utah, the Commission should find that the contested transactions occurred in Utah under the first sourcing option. The second option would source the contested transactions to the taxpayer's address. Both parties agree that during the audit period, the taxpayer's address was in Utah. As a result, the Commission should also find that the contested transactions occurred in Utah under the second sourcing option.

Because the Commission has previously found that all of the contested transactions are subject to sales and use taxation under Utah law and because the Commission now finds that all of the contested transactions are

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82 During the 2007 and 2008 portions of the audit period, no provision of Section 59-12-211 had been enacted. However, Utah Admin. Rule R865-12L-6(E) ("Rule 6(E)") was in place during these years. Although Rule 6(E) specifically addressed merchandise shipped to a purchaser in Utah, it provided that "use tax applies to purchases . . . that are stored, used, or consumed in a county that has adopted the uniform local tax law." Because the software at issue in this appeal was *stored* on servers, one could argue that the contested transactions that occurred in 2007 and 2008 would be sourced to the location of the vendors' servers (i.e., the first option). On the other hand, the taxpayer *used* the software at its business location, not at the location of the servers. As a result, it is also arguable that under Rule 6(E), the *use* of the software occurred at the location of the taxpayer's address (i.e., the second option).

For the 2009 portion of the audit period, the newly enacted Section 59-12-211 was in place as of January 1, 2009 (even though Subsection 59-12-211(12) (2011) was not added until after the audit period). For 2009, Section 59-12-211(3) provided that if an item "that is subject to taxation under this chapter is not received by a purchaser at a business location of a seller, the location of the transaction is the location where the purchaser takes receipt of the tangible personal property or service." One could argue that for the use of software over the internet, the taxpayer took *receipt* of its use of the software at the server where it was stored (i.e., the first option) or that it took *receipt* of its use of the software at its own address (i.e., the second option).

sourced to Utah, the Division's assessments of the contested transactions will be sustained, unless the Commission finds the taxpayer's equitable estoppel arguments to be convincing.

V. Taxpayer's Equitable Estoppel Arguments.

The taxpayer makes two arguments why the Division should be equitably estopped from assessing the contested transactions. The first argument concerns Publication 64, which the Tax Commission initially published in 2012 to provide sales tax information to computer service providers. The taxpayer acknowledges that Publication 64 informs taxpayers that license fees for remotely accessed prewritten software, including SaaS software, is subject to Utah taxation. However, because this publication did not exist during the audit period, the taxpayer contends that it could not have known that the contested transactions were subject to taxation. The taxpayer contends that this should be sufficient for the Commission to estop the Division from assessing the contested transactions.

If not, however, the taxpayer made a second equitable estoppel argument that concerns how the contested transactions are sourced. The taxpayer contends that the Division should be estopped from sourcing the contested transactions to the location of the taxpayer's Utah address because the Commission issued private letter rulings during the audit period in which it determined that such transactions should be sourced to the location of a seller's server. The taxpayer contends that until 2011, when the Legislature enacted the Section 59-12-211(12) sourcing provision for such transactions, it would not have known that the contested transactions are sourced to its Utah address. For these reasons, the taxpayer contends the Division should be estopped from assessing the contested transactions.

The taxpayer did not address the elements of equitable estoppel or provide any court or Commission precedent to show that equitable estoppel is applicable to the circumstances of this case. Nevertheless, the

Commission has addressed equitable estoppel in prior Tax Commission decisions[83] and will consider whether or not the principle is an appropriate remedy for this case.

In *Orton v. Utah State Tax Comm'n*, 864 P.2d 904 (Utah App. 1993) (*citing Eldredge v. Utah State Retirement Bd*., 795 P.2d 671, 675 (Utah App. 1990)), the Utah Court of Appeals found that the elements necessary to invoke equitable estoppel are as follows:

> (1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Furthermore, Utah courts have found that equitable estoppel should only be applied against a state agency in unusual situations. In *Holland v. Career Serv. Review Bd.*, 856 P.2d 678 (Utah App. 1993), the Utah Court of Appeals found that "it is well settled that equitable estoppel is only assertible against the State or its institutions in unusual situations in which it is plainly apparent that failing to apply the rule would result in manifest injustice." In *Holland*, the Court explained that in such cases, "the critical inquiry is whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." Furthermore, in *Anderson v. Public Service Comm'n*, 839 P.2d 822 (Utah 1992), the Utah Supreme Court has stated that "[t]he few cases in which Utah courts have permitted estoppel against the government have involved very specific written representations by authorized government entities." The Commission will now apply this guidance and the elements of equitable estoppel to the taxpayer's two arguments.

A. Taxpayer's First Argument. This argument concerns Publication 64, which indicates that license fees for remotely accessed prewritten computer software, including SaaS-type services, are subject to taxation in

83 *See USTC Appeal No. 11-297* (Revised Initial Hearing Order, Aug. 25, 2011), in which the Commission invoked equitable estoppel; and *USTC Appeal No. 11-2658* (Initial Hearing Order, Apr. 14, 2013), in which the Commission did not invoke equitable estoppel. Both cases involved petitioners who had received erroneous

Utah. Because Publication 64 did not exist during the audit period, the taxpayer contends that it could not have known that the contested transactions were subject to taxation when they occurred.

All three elements cited in the *Orton* case must be satisfied before equitable estoppel can be invoked. None of the elements are satisfied in regards to the taxpayer's first argument. The first element requires that there be a prior statement, admission, act, or failure to act by one party that is inconsistent with a claim later asserted. With its assessment, the Division is claiming that transactions for the remote use of prewritten computer software (where the software is not downloaded) are subject to taxation during the audit period. This claim, however, is not inconsistent with the Tax Commission's prior statements or actions. As previously discussed, the Commission issued private letter rulings during the audit period in which it indicated that the use of prewritten computer software over the internet (where the software is not downloaded) may be subject to taxation (if the use of the software is the primary object of the transaction). These prior rulings are consistent not only with the guidance found in Publication 64, but also with the Division's current claims.

Furthermore, the fact that a publication addressing the taxability of specific transactions was not prepared and issued until 2012 does not constitute an inconsistent statement or action of the Tax Commission. The Tax Commission cannot address every possible transaction that may be subject to taxation in a publication. Such a project would be encyclopedic in scope and would, invariably, omit transactions of which the Commission is not aware. Furthermore, the Tax Commission is often confronted with matters of first impression where a specific transaction has never been addressed in a prior decision, private letter ruling, or publication. This, however, does not mean that a tax cannot be imposed on a taxable transaction because it had never before been addressed. The taxpayer's suggestion that transactions addressed in a publication should be excused from taxation before the preparation and issuance of that publication is without merit. This circumstance does not

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advice from the Tax Commission.

constitute an inconsistent statement. For these reasons, the first element necessary to invoke equitable estoppel is not satisfied in regards to the taxpayer's first argument.

Because the first element is not satisfied, it is inappropriate to invoke equitable estoppel. Nevertheless, the Commission will address the other two elements to show why these elements are also not satisfied. The second element would require the taxpayer to have taken some reasonable action or inaction "on the basis" of the Tax Commission's prior statement, admission, act, or failure to act. As a result, the taxpayer must have "based" its action or inaction on the Tax Commission prior statement or actions. To satisfy this element, the taxpayer would need to show that it did not pay sales and use tax on the contested transactions because it had known and relied on the Tax Commission's prior statement or act.

The taxpayer did not show that it was even aware of any prior Commission statements (from private letter rulings or otherwise) when it made its decision during the audit period to not pay tax on the contested transactions. There was no testimony or other evidence to show why the taxpayer decided not to pay tax on the contested transactions when they occurred. If the taxpayer was relying on the contested vendors to tell it whether the contested transactions were taxable or not, such reliance would have been upon the vendors' statements or actions, not upon Tax Commission statements and actions. Regardless, the taxpayer has not shown that it knew of, much less relied on, any prior Commission statements when it decided during the audit period not to pay tax on the contested transactions. For these reasons, the second element necessary to invoke equitable estoppel also is not satisfied in regards to the taxpayer's first argument.

The third element requires the taxpayer to show that it would suffer injury if the Tax Commission were allowed to contradict or repudiate its prior inconsistent statement, admission, act, or failure to act. Because there was been no inconsistent prior statement or action and because there is no evidence to show that the taxpayer relied upon it, the taxpayer cannot show that it would suffer injury because of such a statement and its reliance upon it. Accordingly, the third element is also not satisfied in regards to the taxpayer's first argument. None of

the elements necessary to invoke equitable estoppel are satisfied in regards to the taxpayer's first argument. Accordingly, the taxpayer's request for the Commission to estop the Division from assessing tax on the contested transactions on the basis of the first argument should be denied.

B. Taxpayer's Second Argument. This argument concerns the sourcing of the contested transactions. In its Amended Statutory Notice, the Division sourced the contested transactions to the location of the taxpayer's Utah address. However, during the audit period (and until 2011), the Commission issued private letter rulings in which it determined that transactions like those at issue in this appeal should be sourced to the location of a seller's server. Because the Division's current position for transactions occurring during the audit period is different from the Tax Commission's prior position, as found in rulings issued during the audit period, the taxpayer contends that the Commission should estop the Division from assessing the contested transactions.

As will be explained below, all three elements necessary to invoke equitable estoppel are not satisfied in regards to the taxpayer's second argument. As to the first element, the Division's current claim is that transactions for the use of prewritten computer software (where the software is not downloaded) that occurred during the 2007 to 2009 audit period are to be sourced to the location of the purchaser's address. Admittedly, this claim is different from the Tax Commission's prior statements as to where such transactions that occurred during the audit period should be sourced. As discussed earlier in the decision, during the audit period, the Commission issued private letter rulings in which it determined that such transactions should be sourced to the location of a seller's server. However, the Division's current claim is based on its interpretation of a revised sourcing statute that the Legislature amended *after* the audit period by adding a new provision, specifically Section 59-12-211(12) (2011). Whether or not the Division's application of this provision to periods prior to 2011 is correct, it must be remembered that this provision did not exist prior to 2011. As a result, the statements the Commission made during the audit period could not have addressed the provision's applicability to periods

prior to 2011 and, thus, cannot be inconsistent with the Division's current claim about it. Accordingly, the first element necessary to invoke equitable estoppel in regards to the taxpayer's second argument is not satisfied.

The second element is also not satisfied. As previously discussed, this element would require the taxpayer to have taken some reasonable action or inaction "on the basis" of the Tax Commission's prior statement, admission, act, or failure to act. To satisfy this element, the taxpayer would need to show not only that the Division's current claim is inconsistent with a prior statement, but also that it did not pay sales and use tax on the contested transactions because it had known and relied on the inconsistent prior statement. The Commission has found that the Division's current claim is not inconsistent with the Commission's prior statements.

In addition, the taxpayer has again not shown that it was even aware of any prior Commission statements concerning sourcing (from private letter rulings or otherwise) when it made its decision during the audit period to not pay tax on the contested transactions. There was no testimony or other evidence to show why the taxpayer decided not to pay tax on the contested transactions when they occurred. Again, if the taxpayer was relying on the contested vendors to tell it whether the contested transactions were taxable or not, such reliance would have been upon the vendors' statements or actions, not upon Tax Commission statements or actions.

Furthermore, the taxpayer admitted that it does not know where the contested vendors' servers are located. As a result, it appears clear that the taxpayer did not rely on the Commission's prior statements from private letter rulings issued during the audit period when it decided not to pay tax on the contested transactions when they occurred. Had the taxpayer relied on these prior statements, it appears that it would have seen a need to find out the location of the contested vendors' servers because these same rulings would have alerted it that such transactions could be taxable to Utah if the vendors' servers were in Utah. Because the taxpayer did not discover where the servers were located, it appears that they did not rely on the Commission's prior statements when it took its action to not pay tax on the contested transactions. For these reasons, the second element necessary to invoke equitable estoppel is not satisfied in regards to the taxpayer's second argument. Accordingly,

all three elements necessary to invoke equitable estoppel are not satisfied in regards to the taxpayer's second argument.

The Commission also notes that in *Holland*, the Utah Court of Appeals stated that "the critical inquiry is whether it appears that the facts may be found with such certainty, and the injustice to be suffered is of sufficient gravity, to invoke the exception." In this case, the facts are not known with certainty. It is unknown whether all or any of the contested vendors' servers are located in Utah. In addition, not only is there no inconsistent prior statement, but there is also no evidence to suggest that the taxpayer relied on the Commission's prior statements and rulings when it decided not to pay tax on the contested transactions when they occurred. For these reasons, the facts are not of sufficient certainty to find that the taxpayer would suffer a manifest injustice if the Division's assessments of the contested transactions are sustained. This is not one of the unusual situations in which equitable estoppel should be invoked. Accordingly, the taxpayer's request for the Commission to estop the Division from assessing tax on the contested transactions on the basis of the second argument should also be denied.

CONCLUSIONS OF LAW

1. Pursuant to Section 59-1-1417(1), the burden of proof in this appeal is upon the taxpayer. The taxpayer's argument that the burden of proof in upon the Division because of the rule of strict construction of tax statutes, as set forth in Section 59-1-1417(2), is incorrect.

2. The taxpayer has not shown that the Division assessed any of the transactions found in the Amended Statutory Notice beyond the three-year statutes of limitations period found in Section 59-1-1410. Accordingly, none of the contested transactions need to be removed from the Division's assessment because of the taxpayer's statute of limitations argument.

3. Under Sections 59-1-103(1) and 59-12-102(94)(b)(v), the use of prewritten computer software over the internet (where the software is not downloaded by the purchaser) is subject to taxation under Utah law

throughout the entire audit period, if the use of the software is the primary object of the transaction and if the transaction is sourced to Utah.

4. The Commission is not authorized to change Utah law. As a result, the taxpayer's plea for the Commission to change its practice of taxing the use of prewritten computer software (where the software is not downloaded) would violate the law if the use of the software is the primary object of the transaction. Furthermore, the appeals process is generally not the proper venue in which to consider changes in practice that would impact an entire industry.

5. Most services are not specifically identified in Section 59-12-103 and, thus, are not subject to taxation (if they are the primary object of a transaction). On the other hand, services specifically identified in Section 59-12-103 are subject to Utah taxation (if they are the primary object of a transaction).

6. Computer generated output is subject to Utah taxation under Section 59-12-103 and Rule R865-19S-92(3).

7. The use of a seller's online database, if the primary object of a transaction, is not subject to taxation because this service is not listed under Section 59-12-103 and because a "data processing and information service" is not included in the definition of a taxable "telecommunications service," as found in Section 59-12-102(113)(c)(iv). The purchase or use of software in which the taxpayer enters its own data and use the software to process, organize, store, and retrieve that data, but where the seller of the software provides no services, is not a nontaxable "data processing and information service."

8. Because of a lack of information about the contested transactions, it is unclear as to whether the primary object of any of the contested transactions was for something other than the taxable use of prewritten computer software and/or computer generated output. Because the taxpayer has not met its burden to show that the primary object of any of the transactions was for some nontaxable service and/or use of a database, all of the contested transactions are subject to Utah taxation, if they are sourced to Utah.

9. During the audit period, there are two theories as to where the contested transactions are sourced under Section 59-12-211 and Rule R865-12L-6(E). They would either be sourced to the location of the taxpayer's Utah address or to the location of the contested vendors' servers. If the former, the contested transactions are clearly sourced to Utah. If the latter, the transactions are also considered to be sourced to Utah because the taxpayer has not met its burden to show that any of the contested vendors' servers are located outside of Utah. Accordingly, all of the contested transactions are taxable Utah sales.

10. The taxpayer has not shown that all elements necessary to invoke equitable estoppel have been satisfied in regards to either of its equitable estoppel arguments. Accordingly, the taxpayer has not shown that the Division should be estopped from assessing tax on the contested transactions.

11. The taxpayer has not shown that any of the contested transactions from the Division's Amended Statutory Notice have been improperly assessed. Accordingly, the Commission should sustain the Division's assessment, as reflected in the Amended Statutory Notice, in its entirety.

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Kerry R. Chapman
Administrative Law Judge

Appeal No. 10-2086

DECISIONAND ORDER

Based on the foregoing, the Commission finds that the taxpayer has not provided sufficient information to show that any of the contested transactions should be removed from the Division's Amended Statutory Notice. Accordingly, the Commission sustains the Division's June 7, 2011 Amended Statutory Notice in its entirety. It is so ordered.

DATED this _________ day of ________________________, 2015.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601et seq. and 63G-4-401 et seq.