REQUEST LETTER

08-006

May 12, 2008

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

SENT VIA EMAIL: TP EMAIL ADDRESS

Ruling Request: Undisclosed Taxpayer

To Whom It May Concern:

On February 25, 2008, we requested an urgent letter ruling through the Tax Research Unit on a proposed transaction between two undisclosed taxpayers and requested an urgent response. Since that submission, we have followed up numerous times. The only guidance offered by the Tax Research Unit was a suggestion that Ruling 01-026 may be controlling. The same day that guidance was offered, we clarified the factual difference between Ruling 01-026 and the issue under question. After over one dozen communications with the Tax Commission and nearly three months, we are being required to resubmit our letter ruling request for consideration.

We respectfully request that this matter be assigned IMMEDIATELY. A large contract between a Utah taxpayer and an out-of-state seller is pending the outcome of this ruling request.

We are requesting a ruling on behalf of clients of an undisclosed "Taxpayer." The facts and legal issues are relevant because the Taxpayer is one of many "telemarketing firms" based in the State of Utah with "call centers" located in Utah. This issue has major public policy implications within the State of Utah due to the extensive telemarketing and call center industry that has evolved within the State. The State of Utah is headquarters to numerous large telemarketing firms which may be affected by a ruling on this matter. If the State of Utah were to impute nexus to every client of Utah telemarketing and call centers, the clients would likely engage telemarketing and call centers elsewhere. Therefore, we suggest that the Tax Commission review this matter at the highest level. We have been unable to identify any published guidance or precedents on this matter.

Facts:

"Taxpayer" is an independent marketing agent of service contracts for computer hardware and software retailers ("Clients"). Taxpayer is based outside the State of Utah, but maintains its sole "Call Center" within Utah.

Taxpayer has developed proprietary software and methodology that interfaces with the databases of its clients. Using this interface, Taxpayer contacts Clients' customers via email and/or via telephone and solicits service contracts and/or maintenance agreements to be billed by and fulfilled by the respective client. The customers are located throughout all states of the United States. All components of this solicitation are done via telephone or Internet from the call center in Utah. At no time do Taxpayer employees or representatives visit Clients' customers to solicit sales. The presence of Taxpayer's Call Center in Utah in no way contributes to Client's ability to market or perform Service Contracts to Buyers in Utah.

In most cases, Taxpayer submits the sales information to the respective client, who bills the buyer of the Service Contract. The Client then pays Taxpayer a commission for its service. The factual distinction between these facts on those addressed in Letter Ruling 01-026 is that the Telemarketing Company in that letter ruling diverted all phone calls from Utah customers to Telemarketing Company's non-Utah call centers. In the instance of my client, the Utah call center may take phone calls from or originate calls to potential Utah buyers, but will have no actual contact with the potential Utah buyer. The key, I believe, is whether the presence of the Utah call center contributes to the ability to establish and maintain a market in Utah. This concept has been addressed extensively by the US Supreme Court as it relates to gross receipts taxes in general. (I would be happy to brief these cases.) In this instance, the Utah call center would have no advantage over a call center in India.

The Taxpayer is presently negotiating an independent marketing agreement with several "Prospective Client" retailers. The prospective Client retailers have no activities within Utah, for purposes of sales tax collection.

Issue:

Would the presence of Taxpayer's Call Center in Utah create taxable nexus and therein a sales tax collection duty to the prospective Client retailers?

Discussion of law:

Utah Code Sec. 59-12-102(82) (a) defines a "Retailer" to include "any person engaged in a regularly organized business in tangible personal property or any other taxable transaction under Subsection 59-12-103, and who is selling to the user or consumer and not for resale." Subparagraph (b) adds: ""Retailer" includes commission merchants, auctioneers, and any person regularly engaged in the business of selling to users or consumers within the state."

Out-of-state sellers are required to collect and remit the sales and use tax if, within Utah, they:

have or utilize an office, distribution house, sales house, warehouse, service enterprise, or place of business similar to the above [Utah Code Ann. §59-12-107(1)(a)(i)];
maintain a stock of goods [Utah Code Ann. §59-12-107(1)(a)(ii)];
regularly solicit orders, whether or not those orders are accepted in Utah, unless their only activity in-state is (a) advertising or (b) solicitation by direct mail, electronic mail, the Internet, telephone, or a means similar to above listing [Utah Code Ann. §59-12-107(1)(a)(iii)];
regularly engage in the delivery of property, other than by common carrier or U.S. mail [Utah Code Ann. §59-12-107(1)(a)(iv)]; or
regularly engage in an activity directly related to the leasing or servicing of property. [Utah Code Ann. §59-12-107(1)(a)(v) .]

The state can impose sales tax collection duty on out–of–state retailers only to the extent that out–of–state sellers have sufficient contacts or nexus with Utah. The presence or absence of sufficient nexus to enable a state to exercise its taxing jurisdiction was discussed by the U.S. Supreme Court in the following cases.

In *National Bellas Hess, Inc. v. Illinois Department Rev.* (1967) 386 US 753 , the U.S. Supreme Court held that states were prohibited by the Due Process and Commerce Clauses of the federal constitution from imposing use tax collection duty on out–of–state mail order sellers whose only contacts with a state are through "instrumentalities of interstate commerce" (that is, solicitation of orders by mailing in flyers or catalogs, filling up orders out of the state and shipment of ordered goods by mail or common carrier. In *Quill Corp. v. North Dakota* (1992) 504 US 298 , the Court reaffirmed the "physical presence" test of *Bellas Hess* and rejected the theory that the use tax collection responsibility may be based upon application of the so-called "economic presence" or "economic benefits" test. Under this theory, North Dakota had alleged that regular and continuous solicitation of business in the state through the media, even in the absence of physical presence, rendered an out–of–state vendor subject to tax collection responsibility. (*Quill*, however, held that contrary to the holding of *Bellas Hess* , physical presence was not required to satisfy due process requirements. Although North Dakota's statute did not violate the Due Process Clause, it was unconstitutional under the Commerce Clause.)

An out–of–state retailer's maintenance of employee sales agents in a taxing state creates nexus. (*General Trading Co. v. Iowa State Tax Comm*. (1944) 322 US 335).

Later, the Supreme Court held that the presence of independent contractors soliciting sales within a state give the out-of-state seller nexus in the State. (*Scripto, Inc. v. Carson* (1960) 362 US 207). The facts described in this ruling differ from those in the *Scripto* case because the Taxpayer's employees, acting as independent sales representatives to its clients, do not personally meet with Buyers in this state, but merely have their Call

Center in this state. For all intents and purposes, this Call Center could be located in any other state, or in India, for that matter. The Utah-based Call Center would not contribute to the prospective Client's ability to establish and maintain a market in Utah as potential customers in Utah would have no knowledge that the solicitation originates from a Call Center in Utah.

The Tax Commission made this distinction in Letter Ruling 01-026 in ruling that in-state telemarketers will not give out-of-state sellers Utah nexus. However, the facts and wording in Letter Ruling 01-026 by themselves are insufficient because of the facts stated in the published letter ruling.

Preliminary Conclusion:

While the Taxpayer in fact maintains a Call Center in Utah that acts as independent commissioned sales representatives on behalf of out-of-state vendors, the fact that the Call Center has no actual in-state contact with the Prospective Clients' customers differentiates the Taxpayer's facts with those described in *Scripto*. The presence of the Taxpayer in Utah in no way contributes to its Clients' ability to establish and maintain a market in the State of Utah. Accordingly, Utah nexus should not be imputed to the Prospective Clients solely as a result of orders solicited via email and telephone by the Utah based call center. Please confirm or clarify our preliminary conclusion on this matter.

Sincerely,

NAME

APPENDIX

Ruling 01-026
Response: 11/14/01

REQUEST LETTER

Dear Sir/Madam,

This is a request for an official opinion from your Department on whether one of our clients has nexus in your state for sales and use tax purposes and should collect sales tax on the sales of tangible personal property to customers in your state based on the facts set out below.

Following are the details of the nature of the business and the relationship with our client:

- COMPANY is a telemarketing company who has been operating call centers within the State of Utah for over 12 years.
- The inbound calls are driven from client-produced Direct Mail, Print, Radio or Television advertising.
- Representatives from COMPANY answer inbound calls for multiple clients in a shared inbound environment.
- The product offered or product literature would be shipped via the U.S. Postal Service or other overnight service. The product is always shipped from outside of Utah. The client or another other third party vendors would perform this. COMPANY only takes the order by phone and provides that information back to the client.
- The calls coming into our Utah facilities would be inbound calls from persons who live outside of the State of Utah. Any telephone calls from any Utah resident would be diverted outside the State of Utah.
- COMPANY is not owned by any of the companies we contract with for Telemarketing services.
- The client has no payroll or property within your state.

Based upon the factual situation provided, we are requesting an advisory opinion as to whether the client has nexus in your state for sales and use tax purposes and should be collecting such tax from its customers. Please provide references to the applicable statutory authority, case law, or previous advisory opinions.

If you have any questions, or if additional information is needed, please contact NAME by phone at PHONE, email at HREF="mailto:jeff.reed@convergys.com" MACROBUTTON HtmlResAnchor E-MAIL, or at ADDRESS.

Thank you for your timely assistance in this matter.

Sincerely,
NAME
PHONE

RESPONSE LETTER

DATE

NAME
COMPANY
ADDRESS

RE: Advisory Opinion – Is a client of COMPANY. ("COMPANY") subject to sales tax nexus with Utah?

Dear NAME,

COMPANY is a telemarketing company that operates call centers in Utah. You have inquired whether your client has sales tax nexus with Utah where it contracts with COMPANY to answer inbound calls concerning the sale of their product, take orders, and relay the orders back to it. COMPANY neither produces its client's advertising nor participates in the shipping of the items sold. In addition, the client has no payroll or property in Utah, and all orders taken by COMPANY are shipped from outside of Utah. Lastly, any of the client's Utah sales originate at call centers outside of Utah and are shipped into Utah from another state.

You indicate that your client contracts with COMPANY, a Utah company, to answer inbound calls placed by customers outside of Utah, take their orders, then transmit the orders to the client to process outside of Utah. In *CASE*, #### U.S. 207 (1960), the Supreme Court found that, under slightly different circumstances, a company that hired 10 sales representatives or brokers on a commission basis had sales and use nexus in the state where the brokers were located. However, in that case, the brokers were supplied catalogs, samples, and advertising materials and were actively engaged in soliciting customers from the state where the brokers were located. In your situation, the client does not supply COMPANY with catalogs, samples, or advertising materials to dispense to customers. COMPANY relays such requests back to the client to fill. Nor does COMPANY take orders or solicit clients that are located in the state where nexus is at issue, which in this case is Utah. Because of these differences, we do not consider COMPANY to be actively engaged in Utah as a representative of the client for the purpose of attracting, soliciting, and obtaining Utah customers. Accordingly, it does not appear, under these limited circumstances and under the facts presented, that your client's relationship with COMPANY is sufficient to impose Utah's sales and use tax laws on it. However, should your client perform any other services (i.e., marketing, product returns, etc.) or maintain a stock of goods in Utah, it would have responsibility for collecting and paying the sales tax.

Should you have any other questions, please contact us.

For the Commission,
Marc B. Johnson
Commissioner

MBJ/KC
01-026

RESPONSE LETTER

NAME
ADDRESS

RE: Private Letter Ruling 08-006

Dear NAME,

This letter is in response to your request for tax guidance. This letter ruling is not intended as a statement of broad Tax Commission policy. It is an interpretation and application of the tax law as it relates to the facts presented in your request letter and the assumptions stated in the Analysis portion of this ruling letter. If the facts or assumptions are not correctly described in this letter ruling, please let me know so we can assure a more accurate response to your circumstances.

Facts

"Taxpayer" is an independent marketing agent of service contracts and maintenance agreements for computer hardware and software retailers ("Clients"). Taxpayer is based outside the State of Utah, but maintains its sole call center within Utah.

Taxpayer has developed proprietary software and methodology that interfaces with the databases of its Clients. Using this interface, Taxpayer contacts Clients' customers via email and/or telephone and solicits service contracts and/or maintenance agreements to be billed and fulfilled by the respective Clients.

All components of this solicitation are done via telephone or the Internet from the call center in Utah. The call center may take phone calls from, or originate calls to, Utah buyers, as potential customers are located throughout all states of the United States. At no time do Taxpayer employees or representatives meet with Clients' customers in person to solicit sales. In most cases, Taxpayer submits the sales information to the respective Client, who bills the customer for the service contract or maintenance agreement. The Client then pays Taxpayer a commission for its service

Relevant Authority

Utah Code Ann. §59-12-103 imposes sales tax on certain transactions, as set forth in pertinent part below:

> (1) A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions…

(g) amounts paid or charged for services for repairs or renovations of tangible personal property, unless Section 59-12-104 provides for an exemption from sales and use tax for:

(i) the tangible personal property; and

(ii) parts used in the repairs or renovations of the tangible personal property described in Subsection (1)(g)(i), whether or not any parts are actually used in the repairs or renovations of that tangible personal property…

Utah Code Ann. §59-12-103 (2007).

Utah Administrative Rule R865-19S-78 provides additional guidance on the charges for labor and repair under extended warranty agreements, as set forth below:

(1) Sales of extended warranty agreements or service plans are taxable, and tax must be collected at the time of the sale of the agreement. The payment is considered to be for future repair, which would be taxable. If the extended warranty agreement covers parts as well as labor, any parts that are exempt from sales tax pursuant to Section 59-12-104 must be separately stated on the invoice or the entire charge under the extended warranty agreement is taxable. Repairs made under an extended warranty plan are exempt from tax, even if the plan was sold in another state.

(a) Repair parts provided and services rendered under the warranty agreements or service plans are not taxable because the tax is considered prepaid as a result of taxing the sale of the warranty or service plan when it was sold.

(b) If the customer is required to pay for any parts or labor at the time of warranty service, sales tax must be collected on the amount charged to the customer. Sales tax must also be collected on any deductibles charged to customers for their share of the repair work done under the warranty agreement. Parts or materials that are exempt from sales tax pursuant to Section 59-12-104 must be separately stated on the invoice of the entire charge for labor and parts is taxable.

(2) Extended warranties on items of tangible personal property that are converted to real property are not taxable. However, the taxable nature of the parts and other items of tangible personal property

provided in conjunction with labor under an extended warranty service shall be determined in accordance with R865-19S-58.

Utah Admin. Code R865-19S-78 (2007).

The collection, remittance, and payment of sales tax by sellers is governed by Utah Code Ann. §59-12-107, as follows:

(1) (a) Except as provided in Subsection (1)(d) or Section 59-12-107.1 and subject to Subsection (1)(e), each seller shall pay or collect and remit the sales and use taxes imposed by this chapter if within this state the seller…

(iii) regularly solicits orders, regardless of whether or not the orders are accepted in the state, unless the seller's only activity in the state is:

(A) advertising; or

(B) solicitation by:
(I) direct mail;
(II) electronic mail;
(III) the Internet;
(IV) telephone; or
(V) a means similar to Subsection (1)(a)(iii)(A) or (B)…

(v) regularly engages in an activity directly related to the leasing or servicing of property located within the state…

Utah Code Ann. §59-12-107 (2007).

A "seller" is defined in Utah Code Ann.§59-12-102 as follows:

(89) "Seller" means a person that makes a sale, lease, or rental of:

(a) tangible personal property; or
(b) a service.

Utah Code Ann. §59-12-102(89) (2007).

Analysis and Ruling

Your letter requested a ruling on whether the presence of Taxpayer's call center in the state of Utah creates a taxable nexus, and subsequently places a duty to collect and remit sales and use tax upon Taxpayer's prospective Clients.

In Utah, sales tax is generally imposed on the retail sale of tangible personal property and certain service transactions, as provided in Utah Code Ann. §59-12-103. Specifically included as a taxable transaction are "amounts paid or charged for services for repairs or renovations of tangible personal property…" *See* Utah Code Ann. §59-12-103(1)(g). Utah Administrative Rule R865-19S-78 provides that tax must be collected at the time of sale for an extended warranty or service agreement. It appears from your ruling request that Taxpayer is soliciting the sale of such service agreements on computer hardware and/or software. There is no question that the computer hardware is tangible personal property, and the Commission assumes that any software at issue is "prewritten" and therefore tangible personal property as defined in Utah Code Ann. §59-12-102(97). The Commission concludes that the sale of service contracts and/or maintenance agreements is a taxable transaction, and that tax should be collected at the time of sale.

Although the sales and use tax is the liability of the purchaser, Utah Code Ann. §59-12-107(1)(a) imposes on the "seller" a duty to pay or collect and remit the sales and use tax imposed under Utah Code Ann. §59-12-103. A "seller" is defined as "a person that makes a sale, lease, or rental of…a service" in Utah Code Ann. §59-12-102 (89). A "sale" is defined in Utah Code Ann. §59-12-102(83) as a "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." As the Client actually fulfills the orders and provides the service, it is deemed the "seller". However, it is well established that that an out-of-state seller does not have the duty to collect and remit sales tax unless there is a taxable nexus with the taxing state.

Whether sufficient nexus exists for a state to impose applicable taxes is essentially a constitutional question. The issue has been addressed by the U.S. Supreme Court in several cases. As you point out in your letter, the U.S. Supreme Court held in *National Bella Hess v. Department of Revenue*, 386 U.S. 753 (1967), that under the Due Process and Commerce Clauses, the state of Illinois could not impose use tax collection duties on a mail-order business whose only communication with customers in Illinois was by mail or common carrier. Twenty-five years later, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court overruled prior decisions, including *Bella Hess*, insofar as they indicate that the Due Process Clause requires a physical presence in a state for the imposition of duty to collect a use tax. However, the Court in *Quill Corp.* specifically noted that the ruling in *Bella Hess* was not inconsistent with more recent Commerce Clause jurisprudence. The Court further held, "a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Quill Corp*, 504 U.S. at 313.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the U.S. Supreme Court ruled that a state tax will be sustained against a Commerce Clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state." The issue at hand is whether there is a "substantial nexus". Thus, for purposes of this Private Letter Ruling, it is assumed that the other parts of the *Complete Auto* test are satisfied.

There is not a bright-line test to determine whether there is "substantial nexus" under the Commerce clause, and thus must be decided on a case-by-case basis. As you cite in your request letter, nexus has been found when sales agents are located in the taxing state. In *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944), General Trading Company, a Minnesota company sent traveling salesmen to Iowa to solicit orders. Those orders were subject to acceptance in Minnesota, and the goods were shipped into Iowa through common carriers or the postal service. The Court in *General Trading* found that there was nexus and held that it was proper for General Trading Company to collect the use tax and submit it to the State of Iowa. The Court extended the reasoning of *General Trading* in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), to independent contractors. Though the Georgia company did not own, lease, or maintain any office, warehouse, or other place of business, it did contract with Florida residents to serve as salesmen. The salesmen were furnished with catalogs, samples, and advertising material. The *Scripto* court held that independent contractors soliciting sales in Florida for a Georgia company created a taxable nexus.

The activity creating nexus, does not have to be the activity being taxed. The Court in *National Geographic Society v. California Board of Equalization* , 430 U.S. 551 (1977) determined that for there to be nexus, there must be something more than the "slightest presence" within the taxing state. In *National Geographic*, the Court found that the maintenance of two offices within the State, and the solicitation of advertising copy by employees of those two offices within the state established nexus between the National Geographic Society and the State of California that supported the imposition of a duty to collect the use-tax on the Society's mail-order operation. Citing to both *National Geographic* and *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954), the Utah Supreme Court has also ruled that nexus can be determined by looking at more than just the taxed activity. "The nexus, therefore, can be either between the activity which is sought to be taxed and the state or between the person or entity that the state is seeking to tax and the state. The activity the state is trying to tax is not the only link that may be considered to determine whether the nexus prong of the *Complete Auto* test is satisfied." *Questar Pipeline Co. v. Utah State Tax Comm'n*, 817 P.2d 316, 319 (Utah 1991).

In your ruling request, you distinguish the Taxpayer's call center from the facts of *Scripto* and cite to Private Letter Ruling 01-026. You note that that Taxpayer's employees, while acting as independent sales representatives, do not personally meet with customers, but merely have their call center in Utah. Further, you argue that the call center being located in Utah does not contribute to the Client's ability to establish and maintain a market in Utah. It is your opinion the presence of the call center in Utah does

not contribute the Taxpayer's Clients' ability to establish and maintain a market in the State of Utah, and that nexus should not be imputed to the Client.

As you point out in your request letter, in Private Letter Ruling 01-026, the Commission found that a call center in Utah did not create nexus for an out-of-state seller. The facts provided in Private Letter Ruling 01-026 indicate that unlike *Scripto*, the salespersons were not provided with catalogs, samples, or advertising materials to dispense to customers. Further, and of significance to the current issue, is that the company did not take orders from or solicit clients located in Utah, the state where nexus was at issue.

In the facts presented in your request letter, Taxpayer would be soliciting sales to potential customers in Utah via e-mail and telephone. Utah Code Ann. §59-12-107(1)(a) requires a seller to pay or collect and remit the sales and use tax imposed if the seller regularly solicits orders, unless the seller's "only activity" in the state is solicitation by electronic mail or telephone (or other similar means). This is not a case where the Taxpayer's "only activity" in the state is the solicitation of sales. The maintenance of a call center in the state of Utah necessitates either owning or leasing real property, registering with the Department of Commerce to conduct business in Utah, as well as hiring employees. The Commission finds that maintaining a call center coupled with the solicitation of Utah customers from within the State of Utah creates a taxable nexus for the Taxpayer.[1]

The Taxpayer is acting as an agent for prospective Clients in soliciting sales. In Private Letter Rulings 04-024 and 05-001, the Commission found that an agent or independent contractor with Utah nexus acting on behalf of a seller creates a taxable nexus for the seller. The Commission concludes that in this instance, Taxpayer would create nexus for the Client, imposing a duty to collect and remit sales tax.

Conclusion

The sale of service contracts and/or maintenance agreements generally is a taxable transaction, and that tax should be collected at the time of sale. While sales tax is imposed on the purchaser, the "seller" has the duty to collect and remit the tax to the state of Utah. Generally, an out-of-state seller does not have an obligation to collect and remit sales tax unless there is a nexus with the taxing state. Taxpayer has a taxable nexus with Utah by virtue of maintaining a call center coupled with the solicitation of Utah customers from within the state of Utah. The activities of Taxpayer on Client's behalf are an agency relationship. Therefore, the Commission concludes Client has a duty to collect and remit sales tax on the sales to Utah customers.

The Tax Commission provides this opinion on the basis of the information provided it. No person should rely on this opinion for facts other than those you provided

[1] Presumably, the Client's fulfillment of the service contracts and maintenance agreements would create nexus with the State of Utah.

in your initial letter and those supplemental facts as described in this letter. If you wish to address these or other Utah tax concerns further, please do not hesitate to contact us.

For the Commission,

Marc B. Johnson
Commissioner

MBJ/jm
08-006