

FINAL PRIVATE LETTER RULING

REQUEST LETTER

09-024

DATE

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

Re: Request for a Private Letter Ruling

Dear Mr. Johnson:

COMPANY submits this Request for a Private Letter Ruling pursuant to Utah Adm. Code Rule R861-1A-34 on behalf of its client, respectfully requesting a ruling on whether certain affiliated out-of-state companies are required to register to collect and remit Utah sales and use tax as a result of specified activities conducted by third parties in Utah.

I. Facts

This ruling request relates to the sale and distribution of gift codes to consumers located in Utah. The gift codes may be redeemed to purchase goods and services from retailers who sell over the Internet.

“Gift Code Issuer” sells gift codes directly to consumers over the Internet. Consumers purchasing gift codes over the Internet may choose to receive the gift code by e-mail, by printing a gift certificate on their printer, or by receiving a tangible gift card via mail.

Gift Code Issuer also sells gift codes to unrelated, third party wholesalers (“Wholesalers”). Wholesalers sell the gift codes to brick-and-mortar retail establishments (“Retail Establishments”) for resale or sell the gift codes directly to consumers, who will purchase the gift codes while at Retail Establishment locations. Gift codes sold to consumers at Retail Establishments are transferred to the consumer using a tangible gift card. The Retail Establishments are located in numerous states, not including Utah.

Gift cards used to transfer the gift codes are imprinted with the name of an Internet marketplace (“Internet Marketplace”). The Internet Marketplace is operated by “Website Operator,” an affiliate of Gift Code Issuer. The Internet Marketplace provides

a virtual marketplace where consumers may purchase tangible personal property and services from various “Internet Retailers.”

Two of the Internet Retailers are affiliated with Gift Code Issuer and Website Operator (“Affiliate Internet Retailers”). Affiliate Internet Retailers sell services and tangible personal property to consumers via the Internet. All tangible personal property sold by the Affiliate Internet Retailers is delivered to consumers via common carrier.

The Internet Marketplace also includes numerous Internet Retailers that are not related to Gift Code Issuer, Website Operator or the Affiliate Internet Retailers. Consumers may use the value contained in the gift codes to purchase goods and services from either Affiliate Retailers or unrelated Internet Retailers via the Internet Marketplace. These retailers are located throughout the United States. When the gift code is redeemed, the Website Operator generates a receivable to collect the amount of the redemption from Gift Code Issuer, and generates a payable to pay the amount of the redemption to the Internet Retailer. These redemption terms are the same whether the Internet Retailer is an Affiliate Internet Retailer or an unrelated, third party Internet Retailer.

Gift Code Issuer contracts with an independent, third party (“Processor”) to arrange for the production of tangible gift cards to transfer gift codes sold at Retail Establishment locations. The tangible gift cards are distributed to the Retail Establishments by the Wholesalers. The tangible gift card is provided for the benefit of the party selling the gift code to the consumer as the card provides a physical medium to transfer the gift code. Gift Code Issuer does not own or have title to the tangible gift card at any point in time, nor does the tangible gift card have value independent from the gift code.

Gift codes are sold to consumers using alternative methods. When a consumer seeks to purchase a gift code at a Retail Establishment, Gift Code Issuer sells the gift code to the Wholesaler. The Wholesaler sells the gift code to the Retail Establishment (who sells it to the consumer). Alternatively, the Wholesaler may sell the gift code to the consumer directly, and provide the Retail Establishment a commission. Gift Code Issuer retains title to the gift code until these sale transactions take place.

The gift code does not have any value until the gift code is activated with a specific dollar value. Once a gift code is sold, the Retail Establishment commences the activation of the purchased gift code using electronic equipment that is owned by the Retail Establishment and connected to the Wholesaler’s network. The Retail Establishment transmits to the Wholesaler the information necessary to activate the gift code. The Wholesaler then transmits this information to Processor, and Processor transmits this information to Gift Code Issuer. Gift Code Issuer pays Processor a processing and fixed card fee at the time of activation.

Under the proposed transactions (“Proposed Transactions”), Wholesalers would begin selling gift codes to Retail Establishments located in Utah or directly to Utah consumers at Retail Establishment locations. Gift Code Issuer and Affiliate Internet

Retailers are not physically present in Utah, as none of these entities have offices, employees, tangible personal property or real property located within the state.

II. Issues

1. Are sales of gift codes to Utah residents subject to Utah's sales and use tax?
2. Under the Proposed Transactions, will Gift Code Issuer be required to register to collect and remit Utah sales and use tax?
3. Under the Proposed Transactions, will the Affiliate Internet Retailers be required to register to collect and remit Utah sales and use tax on their separate sales of tangible personal property to consumers located in Utah?
4. Would the above conclusions change if Gift Code Issuer sold the gift codes directly to Retail Establishments located in Utah?

III. Legal Framework for Analysis

A. U.S. Constitution

Federal constitutional limitations as well as limitations imposed by federal law are the foundation for state taxation. The Commerce Clause limits the states from levying a tax on income that is unduly burdensome on interstate commerce. The U.S. Supreme Court has held that a tax on interstate commerce is permissible under the Commerce Clause if the tax is: (1) applied to an activity with substantial connection (nexus) to the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The Due Process Clause also prevents a state from taxing a business unless the business has some connection with the taxing state. There must be a definite link or minimum connection between the in-state activities of the taxpayer and the state before the state may impose its tax.

In its analysis of sales and use tax nexus, the U.S. Supreme Court has emphasized that physical presence is required in order to create Commerce Clause substantial nexus. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the U.S. Supreme Court held that the Commerce Clause bars a state from imposing a use tax collection duty on an out-of-state seller with no physical presence in the state. Thus, the "bright-line" physical presence standard first established by the Supreme Court in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), was reaffirmed by the Court in *Quill* and continues to govern today.

The Supreme Court has also held that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for

the sales.” *Tyler Pipe Industries, Inc. v. Dept. of Revenue*, 483 U.S. 232 (1987) (internal quotes omitted). Thus, when considering “attributional nexus” fact patterns, the state is bound to consider both the substantial nexus – i.e., physical presence – of an entity’s representative, as well as whether the presence of said representative is specifically directed to “establishing and maintaining a market” in the state of the sales at issue.

B. Utah’s Sales and Use Tax

1. Imposition of Tax

Utah imposes its sales and use tax upon sales of tangible personal property sold, used or consumed within the state. Utah Code § 59-12-103. “Tangible personal property” is generally defined as personal property that may be seen, weighed, measured, felt, touched or is in any manner perceptible to the senses, and includes electricity, water, gas, steam or prewritten computer software. Utah Code § 59-12-102(108). Tangible personal property does not include sales of products made electronically within its definition; however, Utah does impose tax upon charges for products that are sold electronically if such products would have been subject to tax if sold by other means. *Id.* In addition, Utah subjects charges for telecommunications services, admission fees, repairs to tangible personal property and various other services to tax (collectively referred to here as “taxable services”). Utah Code § 59-12-103.

2. Registration and Collection Requirement

Utah imposes sales and use tax registration, collection and remittance responsibilities on sellers meeting certain statutory requirements. Utah Code § 59-12-107. A “seller” is a person who makes a sale, lease or rental of tangible personal property, a product transferred electronically or a taxable service. Utah Code § 59-12-102(100). Sellers are required to register to collect and remit sales and use tax if the seller has or utilizes within the state:

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

See Utah Code § 59-12-107(1)(a)(i).

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

- (a) Maintains a stock of goods within the state;
- (b) Regularly solicits orders in the state, unless the seller's only activity is:
 - (i) advertising or solicitation by:
 - (aa) direct mail;
 - (bb) electronic mail;
 - (cc) the Internet;
 - (dd) telecommunications service; or
 - (ee) or another similar means;
- (c) Regularly engages in the delivery of property in the state by means other than common carrier or U.S. Mail; or
- (d) Regularly engages in an activity directly related to the leasing or servicing of property located within the state.

See Utah Code § 59-12-107(1)(a).

3. Affiliate Nexus

Utah tax law also requires sellers that do not have a registration and collection requirement under any of the aforementioned sections to register to collect Utah sales and use tax if the seller is considered a “related seller.” Utah Code § 59-12-107(1)(f)(i)(C). A “related seller” is a seller that does not otherwise have a Utah registration and collection requirement, but is related to a seller, as part of an affiliated group or through common ownership, that does have a sales and use tax collection and registration requirement. Utah Code § 59-12-107(1)(f)(C).¹

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

¹ A seller is also a “related seller” if it is a limited liability company owned by a parent corporation of an affiliated group, and the parent corporation of the affiliated group is required to pay or collect and remit sales and use taxes. Utah Code § 59-12-107(1)(f)(i)(C)(II)(Bb).

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

Utah Code §§ 59-12-107(1)(f)(A); 59-7-101(2)(a). In addition, “affiliated group” includes a corporation that is qualified to do business, but is not otherwise doing business, in the state. Utah Code § 59-12-107(1)(e)(i)(A).

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

- (1) A parent-subsidiary controlled group as defined under IRC Sec. 1563, except that 50% shall be substituted for 80%;
- (2) A brother-sister controlled group as defined under IRC Sec. 1563, except that 50% shall be substituted by 80%; or
- (3) Three or more corporations, each of which is a member of an affiliated group of corporations, as defined above, and one of which is:
 - (a) A common parent corporation included in a group of corporations in which 80% of the stock of each corporation is owned by one or more of the other corporations; and
 - (b) Included in a group of corporations where the common parent directly owns at least 80% of the stock of at least one of the corporations in the group.

Utah Code § 59-7-101(7).

Utah law provides an exception to the requirement for related sellers to register and collect Utah sales and use tax described above (“Affiliate Nexus Exception”). Utah Code §59-12-107(1)(f)(ii). Under the Affiliate Nexus Exception, a “related seller” is not required to register to collect and remit Utah sales and use tax if the registered seller does not engage in any of the following activities on behalf of the related seller:

- (1) Advertising;
- (2) Marketing;
- (3) Sales; or

(4) Other services.

Utah Code § 59-12-107(1)(f)(ii)(B); *see also* Utah Publication 37, Business Activity and Nexus in Utah (Rev. May 2004). In addition, the registered seller must not accept returns of tangible personal property on behalf of its related seller unless the seller accepts returns of items sold by others on the same terms as offered to the related seller's customers. Utah Code § 59-12-107(1)(f)(ii)(C). The Commission has opined that "business activity provided in a state outside of Utah cannot create nexus for a non-Utah business" even if a business performing the activity for an affiliated retailer has a Utah presence." Utah Private Letter Ruling No. 09-008 (July 28, 2009).

IV. Analysis

A. Gift Codes Do Not Constitute Tangible Personal Property or Services Subject to Utah Sales and Use Tax

Gift codes provide consumers with the right to acquire tangible personal property or services from Internet Retailers. Thus, the gift codes are intangible rights that represent a form of payment and function as a cash equivalent. Gift codes are not tangible personal property under Utah's definition because gift codes cannot be seen, weighed, measured, felt or touched, and are not perceptible to the senses in any manner. Nor are gift codes included among the services Utah has specified as subject to sales and use tax. Because gift codes are cash equivalent rather than tangible personal property or taxable services, the sale of gift codes is not subject to Utah's sales and use tax.

B. Gift Code Issuer Will Not Be Required to Register to Collect Utah Sales and Use Tax

1. Constitutional Limitations

Gift Code Issuer will not be required to register for and collect Utah sales and use tax as a result of the Proposed Transactions because Gift Code Issuer will not have a physical presence in the state. Gift Code Issuer sells gift codes, which are intangible rights to purchase property from Internet Retailers, and engages in its business from facilities located wholly outside Utah. Gift Code Issuer will not have any offices or employees in Utah, nor will Gift Code Issuer own real or tangible personal property located within the state. Therefore Gift Code Issuer will not satisfy *Quill's* physical presence nexus standard.

Gift Code Issuer will not establish attributional nexus with Utah because no representatives will be performing market-related activities in Utah on Gift Code Issuer's behalf. As discussed above, Gift Code Issuer sells gift codes to Wholesalers for resale; Wholesalers then resell the gift codes to Retail Establishments or directly to consumers at Retail Establishments. The activities that will be performed by Wholesalers and Retail Establishments in Utah will be for the benefit of those entities and not for Gift Code

Issuer's benefit. Thus, Gift Code Issuer will not have nexus with Utah by virtue of others' Utah activities.

2. Utah Law

Gift Code Issuer is not a "seller" required to register and collect Utah sales and use tax.

As a preliminary matter, Gift Code Issuer is not a "seller" under Utah law. Gift Code Issuer does not sell, lease or rent tangible personal property, products transferred electronically, or services that are subject to Utah tax. Rather, Gift Code Issuer sells gift codes, which are intangible rights that are not subject to Utah sales and use tax.

Moreover, even if Gift Code Issuer was a "seller," Gift Code Issuer is not required to register to collect sales and use tax in Utah because Gift Code Issuer does not conduct the requisite activities within the state.

Gift Code Issuer engages in business from facilities wholly outside of Utah. Gift Code Issuer does not maintain an office, distribution house, sales house, warehouse, service enterprise or similar place of business within Utah, nor does Gift Code Issuer maintain a stock of goods within the state.

Gift Code Issuer does not regularly engage in the delivery of property in Utah by means other than common carrier or U.S. Mail.

Gift Code Issuer does not lease or service property located within Utah.

Moreover, Gift Code Issuer is not required to register to collect Utah sales and use tax as a "related seller." Although Gift Code Issuer is part of an affiliated group, none of Gift Code Issuer's affiliates are performing advertising, marketing, sales or other services on Gift Code Issuer's behalf. Moreover, none of Gift Code Issuer's affiliates accept returns of tangible personal property on behalf of Gift Code Issuer.

Thus, Gift Code Issuer is not required to register to collect sales and use tax in Utah.

C. Affiliate Internet Retailers Will Not Be Required to Register and Collect Utah Sales and Use Tax

1. Constitutional Limitations

Affiliate Internet Retailers also will not be required to register and collect Utah sales and use tax based on U.S. Constitutional principles. Affiliate Internet Retailers are Internet sellers of tangible personal property and services, and engage in business from facilities located wholly outside Utah. All deliveries of tangible personal property to Utah consumers will continue to be made into the state via common carrier. Affiliate

Internet Retailers will not have any offices or employees in Utah, nor will they own real or tangible personal property located in the state. Therefore, Affiliate Internet Retailers will not have physical presence in Utah based upon the standard set forth in *Quill*.

Affiliate Internet Retailers also lack nexus with Utah based upon the attributional nexus standard established in *Tyler Pipe* because no other entity is performing market-related activities in Utah on behalf of Affiliate Internet Retailers. Under the Proposed Transactions, gift codes will be sold to Utah consumers at Retail Establishments. Consumers will not be required to redeem the gift codes from within Utah but rather may redeem them from any state. Moreover, consumers may redeem the gift codes for goods and services with *any* Internet Retailer in the Internet Marketplace, and the terms of redemption are the same whether the consumer purchases property or services from a related or unrelated Internet Retailer. Finally, as discussed above, all of the activities performed by Wholesalers and the Retail Establishments in Utah will be performed for the benefit of those entities' own sales of gift codes within the state. For each of these reasons, Affiliate Internet Retailers will not establish nexus with Utah.

2. Utah Law

Affiliate Internet Retailers are not required to register to collect sales and use tax under Utah law because they do not conduct the requisite activities within the state.

Affiliate Internet Retailers engage in business from facilities wholly outside of Utah. They do not maintain an office, distribution house, sales house, warehouse, service enterprise or similar place of business within Utah, nor do they maintain a stock of goods within the state.

Affiliate Internet Retailers do not regularly engage in the delivery of property in Utah by means other than common carrier or U.S. Mail.

Affiliate Internet Retailers do not lease or service property located within Utah.

Moreover, Affiliate Internet Retailers are not required to register to collect Utah sales and use tax as "related sellers." Although Affiliate Internet Retailers are part of an affiliated group, none of their affiliates are performing advertising, marketing, sales or other services on Gift Code Issuer's behalf. Finally, none of Affiliate Internet Retailers' affiliates accepts returns of tangible personal property for Affiliate Internet Retailers.

Thus, Affiliate Internet Retailers are not required to register to collect sales and use tax under Utah law.

D. The Aforementioned Conclusions Will Not Change if Gift Code Issuer Sells Directly to Retail Establishments Located in Utah.

In the event that Gift Code Issuer sells gift codes directly to Utah Retail Establishments for resale to consumers within the state (rather than to Wholesalers), the

aforementioned conclusions will not change. The direct sale of gift codes to Retail Establishments will not cause Gift Code Issuer or Affiliate Internet Retailers to have a physical presence in the state, as they will continue to engage in business from facilities located outside of Utah, and will not have any offices, employees or property in Utah. Moreover, the activities performed by Retail Establishments in Utah will inure to the benefit of the Retail Establishments. Retail Establishments will not be performing market-related activities on Gift Code Issuer's or Affiliate Internet Retailer's behalf. Similarly, Gift Code Issuer's direct sales to Retail Establishments will not create a Utah statutory registration and collection responsibility.

V. Conclusions

1. Gift Code Issuer will not be subject to Utah's sales and use tax registration and collection responsibilities as a result of the Proposed Transactions. This conclusion will not change if Gift Code Issuer sells gift codes directly to Retail Establishments.

2. Affiliate Internet Retailers will not be subject to Utah's sales and use tax registration and collection responsibilities as a result of the Proposed Transactions. This conclusion will not change if Gift Code Issuer sells gift codes directly to Retail Establishments.

In advance of the issuance of a response to this request for a ruling, we respectfully request that the Tax Commission contact us to discuss any facts or questions that may arise. Please feel free to contact NAME 1 at PHONE 1, NAME 2 at PHONE 2, or NAME 3 at PHONE 3 if you have any questions.

Very truly yours,

NAME 1
NAME 2

RESPONSE LETTER

March 15, 2010

NAME 1
NAME 2
COMPANY
ADDRESS

Re: Private Letter Ruling 09-024--Sales Taxation Implications of Sales of Gift Codes

Dear NAME 1 and NAME 2:

You have submitted a request for a Private Letter Ruling on behalf of your client, requesting a ruling on whether certain affiliated out-of-state companies are required to register to collect and remit Utah sales and use tax on the sale and distribution of gift codes to consumers located in Utah. We understand the facts to be as follows:

I. Facts

"Gift Code Issuer" sells gift codes directly to consumers over the Internet. The gift codes may be redeemed to purchase goods and services from retailers who sell over the Internet. Consumers purchasing gift codes may choose to receive the gift code by e-mail, by printing a gift certificate on their printer, or by receiving a tangible gift card via mail.

Gift Code Issuer also sells gift codes to unrelated, third party wholesalers ("Wholesalers"). Wholesalers sell the gift codes to brick-and-mortar retail establishments ("Retail Establishments") for resale. Wholesalers also sell the gift codes directly to consumers, who will purchase the gift codes while at Retail Establishment locations. The Retail Establishment receives a commission from Wholesalers on such sales. Gift codes sold to consumers at Retail Establishments are transferred to the consumer using a tangible gift card. The Retail Establishments are located in numerous states, not including Utah.

Gift cards used to transfer the gift codes are imprinted with the name of an Internet marketplace ("Internet Marketplace"). The Internet Marketplace is operated by "Website Operator," an affiliate of Gift Code Issuer. The Internet Marketplace provides a virtual marketplace where consumers may purchase tangible personal property and services from various "Internet Retailers."

Two of the Internet Retailers are affiliated with Gift Code Issuer and Website Operator ("Affiliate Internet Retailers"). Affiliate Internet Retailers sell services and tangible personal property to consumers via the Internet. The Affiliate Internet Retailers engage in business from facilities located wholly outside Utah. They will not have any offices or employees in Utah, nor will they own real or tangible personal property located in the

state. All tangible personal property sold by the Affiliate Internet Retailers is delivered to consumers via common carrier.

The Internet Marketplace also includes numerous Internet Retailers that are not related to Gift Code Issuer, Website Operator or the Affiliate Internet Retailers. Consumers may use the value contained in the gift codes to purchase goods and services from either Affiliate Retailers or unrelated Internet Retailers via the Internet Marketplace. These retailers are located throughout the United States. When the gift code is redeemed, the Website Operator generates a receivable to collect the amount of the redemption from Gift Code Issuer, and generates a payable to pay the amount of the redemption to the Internet Retailer. These redemption terms are the same whether the Internet Retailer is an Affiliate Internet Retailer or an unrelated, third party Internet Retailer.

Gift Code Issuer contracts with an independent, third party ("Processor") to arrange for the production of tangible gift cards to transfer gift codes sold at Retail Establishment locations. The tangible gift cards are distributed to the Retail Establishments by the Wholesalers. The tangible gift card is provided for the benefit of the party selling the gift code to the consumer as the card provides a physical medium to transfer the gift code. Gift Code Issuer does not own or have title to the tangible gift card at any point in time, nor does the tangible gift card have value independent from the gift code.

Gift codes are sold to consumers using alternative methods. When a consumer seeks to purchase a gift code at a Retail Establishment, Gift Code Issuer sells the gift code to the Wholesaler. The Wholesaler sells the gift code to the Retail Establishment (who sells it to the consumer). Alternatively, the Wholesaler may sell the gift code to the consumer directly, and provide the Retail Establishment a commission. Gift Code Issuer retains title to the gift code until these sale transactions take place.

The gift code does not have any value until the gift code is activated with a specific dollar value. Once a gift code is sold, the Retail Establishment commences the activation of the purchased gift code using electronic equipment that is owned by the Retail Establishment and connected to the Wholesaler's network. The Retail Establishment transmits to the Wholesaler the information necessary to activate the gift code. The Wholesaler then transmits this information to Processor, and Processor transmits this information to Gift Code Issuer. Gift Code Issuer pays Processor a processing and fixed card fee at the time of activation.

Under the proposed transactions ("Proposed Transactions"), Wholesalers would begin selling gift codes to Retail Establishments located in Utah or directly to Utah consumers at Retail Establishment locations. Gift Code Issuer and Affiliate Internet Retailers are not physically present in Utah, as none of these entities have offices, employees, tangible personal property or real property located within the state.

II. Issues

In this context, you have asked the following questions:

1. Are sales of gift codes to Utah residents subject to Utah's sales and use tax?
2. Under the Proposed Transactions, will Gift Code Issuer be required to register to collect and remit Utah sales and use tax?
3. Under the Proposed Transactions, will the Affiliate Internet Retailers be required to register to collect and remit Utah sales and use tax on their separate sales of tangible personal property to consumers located in Utah?
4. Would the above conclusions change if Gift Code Issuer sold the gift codes directly to Retail Establishments located in Utah?

III. Authorities

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

59-12-103. Sales and use tax base - Rates - Effective dates - Use of sales and use tax revenues.

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

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

(l) amounts paid or charged for tangible personal property if within this state the tangible personal property is:

- (i) stored;
- (ii) used; or
- (iii) consumed; and

(m) amounts paid or charged for a sale:

- (i) (A) of a product that:

(I) is transferred electronically; and

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

- (B) of a repair or renovation of a product that:

(I) is transferred electronically; and

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

(ii) regardless of whether the sale provides:

(A) a right of permanent use of the product; or

(B) a right to use the product that is less than a permanent use, including a right:

(I) for a definite or specified length of time; and

(II) that terminates upon the occurrence of a condition.

Utah Code Ann. §59-12-107 imposes a collection obligation on certain sellers, as follows:

(1) (a) Except as provided in Subsection (1)(d) or Section 59-12-107.1 or 59-12-123 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:

(i) has or utilizes:

(A) an office;

(B) a distribution house;

(C) a sales house;

(D) a warehouse;

(E) a service enterprise; or

(F) a place of business similar to Subsections (1)(a)(i)(A) through (E);

(ii) maintains a stock of goods;

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

(A) advertising; or

(B) solicitation by:

(I) direct mail;

(II) electronic mail;

(III) the Internet;

(IV) telecommunications service; or

(V) a means similar to Subsection (1)(a)(iii)(A) or (B);

(iv) regularly engages in the delivery of property in the state other than by:

(A) common carrier; or

(B) United States mail; or

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

III. Discussion.

1. Sale of the Gift Code. We believe the sale of the gift code to the consumer is not a sale of tangible personal property subject to the Utah sales tax. The gift code represents an intangible right to acquire goods or services. Those good or services may be taxable or they may be exempt at the time they are purchased. The gift code itself, however, merely represents an intangible store of value recognizing an advance payment for a good or service yet to be selected. *Black's Law Dictionary* (9th Ed. 2009) at 134 defines "intangible asset" as "any nonphysical asset or resource than [sic] can be amortized or converted to cash, . . . or a right to something, such as services paid for in advance." Utah does not treat the sale of gift certificates as taxable sales. See generally, Appeal No. 08-0073 (recognizing that the sale of plastic gift cards are not subject to sales tax, but that the retailer is subject to sales or use tax on the plastic gift card stock.) We have also recently ruled that "community currency" is an intangible, akin to a gift certificate. See PLR 09-006 (February 20, 2009). We believe the gift codes should be treated the same way, whether delivered by e-mail, printed by the customer on his or her own computer, or evidenced by a tangible gift card mailed to the consumer.

As noted above, Utah also imposes a tax on certain property transferred electronically, but only if the property would be taxable if transferred in a different form. Because the sale of tangible gift cards would be considered the sale of an intangible right, the transfer of those same rights electronically would also be excluded from the Utah sales tax.

2. Registration of Gift Code Issuer. Utah Code Ann. §59-12-106(2)(a) provides that any person required to collect a tax under the Sale and Use Tax Act must be registered with the state. Because Gift Card Issuer is not engaged in the sale of tangible personal property or other taxable services in the state, it is not required to collect the tax and or register as a seller under Utah law.

3. Registration of Affiliate Internet Retailers. You have not disclosed the nature of the Affiliate Internet Retailers sales. For purposes of this ruling, we assume that they are selling taxable tangible personal property, taxable products delivered electronically or taxable services to Utah residents. You have represented, however, that the Affiliate Internet Retailers have no physical presence in the state. As we understand the facts, the Affiliate Internet Retailers do not meet any of the requirements of Utah Code Ann. §59-12-107, nor is any such retailer affiliated with another entity that meets those tests. Accordingly, the Affiliate Internet Retailers have no obligation to register in Utah or

collect Utah sales or use tax on their sales. See also *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

Some Retail Establishments, however, will be located in Utah. They clearly have physical presence and would be required to collect sales tax on any taxable sales in the state. They will be selling the gift codes, via plastic gift cards, that can be used to purchase merchandise from Affiliate Internet Retailers. It could be argued that their activities in soliciting sales of gift codes should be attributed to Affiliate Internet Retailers. We note, however, that the gift codes may be used for any number of Internet Retailers, whether or not they are Affiliate Internet Retailers. We also note that there is no relationship between Utah Retail Establishments and Affiliate Internet Retailers within the meaning of Utah Code Ann. §59-12-107(1)(f). Under these facts, we believe that the nexus of the unrelated Utah Retailers should not be attributed to the Affiliate Internet Retailers.

4. Sale of gift codes directly to Utah Retailers. You have also asked if any of these conclusions would change if Gift Code Issuer sold the gift codes directly to Utah Retailers. We do not believe this fact would change any of the conclusions above.

Conclusions:

1. The sale of gift codes is not subject to Utah sales and use tax.
2. Gift Code Issuer will not be required to collect and remit Utah sales and use tax on sales of the codes.
3. Affiliate Internet retailers will not be required to collect and remit Utah sales and use tax on sales into Utah.
4. These conclusion will not change if Gift Code Issuer begins to sell gift codes directly to Retailers located in Utah.

These conclusions are based on the facts outlined above and the Utah law currently in effect. If there are changes in the governing law or the facts, these conclusions could change. If you believe we have misstated any facts or omitted any material facts in our discussion, please let us know.

For the Commission,

R. Bruce Johnson
Chair