

FINAL PRIVATE LETTER RULING

REQUEST LETTER

10-004

April 12, 2010

NAME

TITLE

COMPANY

ADDRESS 1

CITY STATE ZIP

Dear Mr. Johnson:

I am requesting a private letter ruling per Rule R861-1A-34 on just the issue of applicability of sales tax to sales made by private individuals (non-commercial vendors) at the annual meeting of the COMPANY NAME.

Background

The COMPANY NAME is a domestic non-profit corporation registered with the Department of Commerce on 12/15/1969, which currently is in active status. The organization was founded to promote and coordinate the installation and use of COMPANY NAME amateur repeaters throughout Utah. The society also provides financial support for aligned repeaters and serves as the recognized frequency coordination entity for the State of Utah.

COMPANY NAME supports the Department of Public Safety, Division of Homeland Security by allowing the use of its repeater systems for the testing of state-wide [*sic*] communications every two months for members of the Radio Amateur Civil Emergency Service (RACES). The RACES program is managed by the Federal Emergency Management (FEMA), which is administered by the Division of Homeland Security which is the Utah Emergency Management Agency.

The society holds an annual meeting to elect officers, conduct society business, and hold a swap meet for amateur radio operators who may wish to sell or trade their individual, personal radio equipment and radio-related items.

Those members wishing to see radios and related equipment are individuals selling their tangible personal property. They are not in the business of selling.

Virtually all of the equipment for sale or trade by the individuals is used equipment. In many cases at the end of the swap meet those used goods have such little value that they are given away on a "free" table or thrown away.

As the TITLE 2 of COMPANY NAME I was approached by the NAME 1 of the Special Events Unit of the COMPANY and told that all those selling goods at the swap meet would be required

to collect and remit sales tax. I was told to prepare and submit a list of vendors who would have to obtain a Temporary Sales Tax License.

During the meeting I was approached by a former CPA and an attorney who both said the sales by the individuals at the swap meet were isolated or occasional sales not subject to sales tax.

After the society annual meeting/swap meet, the former CPA and I meet with NAME 1 of the Special Events Unit of the COMPANY to determine why members making isolated or occasional sales were required to get a temporary sales tax license and remit sales tax.

After some discussion of the issue of sales at an organized event versus the isolated and occasional sale issue, NAME 1 suggested that we prepare a letter to request a private letter ruling.

Isolated or occasional sale references and discussion

The basis for levying sales and use tax is found in Utah Code Annotated Section 59-12-103 which provides an exception found in 59-12-103(1)(f) which states “except as provided in Section 59-12-104”.

Utah Code Annotated Section 59-12-104(1) states “Isolated or occasional sales and use tax exemption” means a sale that qualifies for the sales and use tax exemption for the sale of tangible personal property by a person:

- (a) regardless of the number of sales of that tangible personal property by that person; and
- (b) not regularly engaged in the business of selling that type of property.

The facts of the individual’s sales at the swap meet indicate the sales are of tangible personal property of the individual, not of a commercial vendor or a person in the business of selling.

Further, the sales at the COMPANY NAME annual meeting/swap meet only occur once a year. In some cases individuals may not even attempt to sell every year. This appears to meet the test of “occasional” as stated in the Utah Code.

The practice of the COMPANY is not to collect sales tax on occasional and incidental sales is recognition of the Commission understands of Code Section 59-12-104. Further, the fact that the Utah Code allows exemption from sales tax for occasional and incidental sales indicates that it is the nature of the sale, not its location, which determination its taxability.

Swap meeting references and discussion

The position of the Special Events Unit of the COMPANY is that because the swap meet is sponsored by the COMPANY NAME Society, all sales are subject to sales tax. This is, in effect, saying all sales are deemed commercial sales by being sponsored by some organization. This approach does not seem to be supported by the Utah Code Sections cited above, nor by the Swap Meets and Flea Markets Act outlined below.

Utah Code Title 13 Commerce and Trade Chapter 32 Swap Meets and Flea Markets Act Section 102 define terms related to sales at swap meets. The remaining sections of Chapter 32 focus on commercial vendors and their responsibilities under the Utah Code.

None of the remaining sections of Chapter 32 specify that the sale by individuals of their tangible personal property transforms them into commercial vendors by merely selling at a swap meet.

Definition 13-32-102 (1) “new and unused property” means tangible personal property that:

- (b) has never been used since its production or manufacturing; and
- (c) if the property was packaged when originally produced or manufactured, is in its original and unopened package or container.

This definition does not agree with the facts of the COMPANY NAME swap meet because the individual tangible personal property sold is used property, not “new and unused property”.

Definition 13-32-102(4) “Vendor means a person who offers for sale or exchange six or more like items of new and unused property at a swap meet or flea market in this state.

This definition does not agree with the facts of the COMPANY NAME swap meet because the individuals selling tangible personal property are not commercial vendors or in the business of selling.

If the individual sellers are not selling new and unused property, and not even defined as vendors at a swap meet by the Title 13 Section 32 of the Code, the conclusion must be that the individuals selling at the COMPANY NAME swap meet are engaged in occasional and incidental sales of their tangible personal property.

Conclusion

Based on the Uniform Code citations and the facts and circumstances presented, the individuals selling their tangible personal property at COMPANY NAME swap meet do not meet the requirements for charging, collecting, obtaining a Temporary Sales Tax License, and remitting sales taxes.

In advance of issuing a response to this request for a ruling, I respectfully request that the Commission contact me at the cell phone number below to discuss any facts or questions that may potentially result in an adverse ruling.

Sincerely,

NAME 2
TITLE 2, COMPANY NAME
ADDRESS 2
CITY STATE ZIP 1
PHONE NUMBER

RESPONSE LETTER

February 17, 2011

Mr. NAME 2, TITLE 2
COMPANY NAME
ADDRESS 2
CITY STATE ZIP 1

Sent via e-mail
Original to follow in U.S. Mail

RE: Private Letter Ruling Request–Sales Tax Treatment of Sales by Private Individuals Selling Used Equipment at the Annual COMPANY NAME Society Swap Meet

Dear Mr. NAME 2:

You have requested a ruling on behalf of the COMPANY NAME (the “Society”) about the applicability of the Utah sales tax statutes to sales made by private individuals (non-commercial vendors) at the Society’s annual swap meet. You believe these sales are occasional and incidental and, thus, exempt from sales tax under Utah Code § 59-12-104(13). Likewise, you conclude, “[T]he individuals selling their tangible personal property at COMPANY NAME swap meet do not meet the requirements for charging, collecting, obtaining a Temporary Sales Tax License, and remitting sales taxes.”

You explained that the Society is a domestic non-profit corporation, which promotes and coordinates the installation and use of COMPANY NAME amateur repeaters throughout Utah. You said that the Society holds, in connection with its annual meeting, a swap meet at which amateur radio operators may sell or trade their individual, personal radio equipment and radio-related items. You asserted that these operators are not in the business of selling, that their equipment is virtually always used, and that often the equipment has such little value that it are given away or discarded at the end of the meet.

During a subsequent telephone conversation, you explained that the swap meet also has a few sellers who are not operators. Some sellers are individuals running small, commercial businesses that sell new items unrelated to radios, such as scented candles or embroidered hats. Other sellers are organizations such as the Davis County Amateur Radio Club or the Utah Amateur Radio Club, who in the past have sold new accessories for radios. Licensed businesses that regularly selling radio equipment do not attend the swap meets because they have lost money doing so in the past. You have not asked for a ruling about any of these other sellers.

You further explained that the Special Events Unit of the COMPANY approached the Society, told the Society that all sellers at the swap meet must collect and remit sales tax, and instructed the Society to prepare and submit a list of sellers, who must obtain Temporary Sales Tax Licenses. You also said that a former CPA and an attorney told you that the sales by the operators selling their used equipment were isolated or occasional sales not subject to sales tax. After additional discussion between the Society and the Special Events Unit, it was suggested

that the Society prepare a request for a private letter ruling to address the applicability of the isolated or occasional sales tax exemption.

I. Applicable Law

Utah Code § 59-12-103(1)-(1)(b)(ii) states:

- (1) A tax is imposed on the purchaser . . . for . . .
 - (a) retail sales of tangible personal property made within the state . . .

Utah Code § 59-12-104(13) provides the following exemption for certain sales of tangible personal property:

- (a) except as provided in Subsection (13)(b), ***the sale of tangible personal property*** or a product transferred electronically ***by a person***:
 - (i) regardless of the number of transactions involving the sale of that tangible personal property or product transferred electronically by that person; and
 - (ii) ***not regularly engaged in the business of selling that type of tangible personal property*** or product transferred electronically;
- (b) this Subsection (13) does not apply if:
 - (i) the sale is one of a series of sales of a character to indicate that the person is regularly engaged in the business of selling that type of tangible personal property or product transferred electronically;
 - (ii) the person holds that person out as regularly engaged in the business of selling that type of tangible personal property or product transferred electronically;
 - (iii) the person sells an item of tangible personal property or product transferred electronically that the person purchased as a sale that is exempt under Subsection (25); . . .

....

(Emphasis added.)

Utah Admin Code R865-19S-38 provides additional guidance on the above exemption, stating in part:

- (1) “Isolated or occasional sales and use tax exemption” means a sale that qualifies for the sales and use tax exemption for the sale of tangible personal property by a person:
 - (a) regardless of the number of sales of that tangible personal property by that person; and
 - (b) not regularly engaged in the business of selling that type of property.

....

- (3) If a business regularly sells a type of property, sales of that type of property do not qualify for the isolated or occasional sales and use tax exemption, even if the primary purpose of the business is not the sale of that type of property. For example, the sale of repossessed radios or refrigerators by a

finance company do not qualify for the isolated or occasional sales and use tax exemption.

....

- (5) Sales that qualify for the isolated or occasional sales and use tax exemption include sales that occur as part of:
 - (a) the reorganization, sale, or liquidation of a business so long as those sales do not include items purchased exempt from sales tax as a sale for resale;
 - (b) a garage sale if:
 - (i) the person selling the items at the garage sale is not regularly engaged in selling that type of property; and
 - (ii) the items sold at the garage sale were not purchased exempt from sales tax as a sale for resale; and
 - (c) the sale of business assets that are:
 - (i) not purchased sales tax exempt by the business as a sale for resale; and
 - (ii) a type of property not regularly sold by the business.
- (6) An example of a sale that qualifies for the sales and use tax exemption under Subsection (5)(a) is a sale, even if it is one of a series of sales, to liquidate the fixtures and equipment of a manufacturing company.
- (7) Examples of sales that qualify for the sales and use tax exemption under Subsection (5)(c) include the sale by a:
 - (a) grocery store of its cash registers, shelves, and fixtures;
 - (b) law firm of its furniture; and
 - (c) manufacturer of its used manufacturing equipment.

....

For licensing, Utah Code § 59-12-106 states in part:

- (1) As used in this section:
 - (a) "applicant" means a person that:
 - (i) is required by this section to obtain a license; and
 - (ii) submits an application:
 - (A) to the commission; and
 - (B) for a license under this section;
 - (e) "license" means a license under this section . . . [Section 59-12-106 provides the sales and use tax requirements.]
- (2) (a) It is unlawful for any person required to collect a tax under this chapter to engage in business within the state without first having obtained a license to do so.

Utah Code § 59-12-107 imposes a collection requirement, stating in part:

- (1) (a) . . . [E]ach 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 . . .
 - (iv) regularly engages in the delivery of property in the state . . . or
 - (v) regularly engages in an activity directly related to the leasing or servicing of property located within the state.
- (b) A seller that does not meet one or more of the criteria provided for in Subsection (1)(a):
- (i) except as provided in Subsection (1)(b)(ii), may voluntarily:
 - (A) collect a tax on a transaction described in Subsection 59-12-103(1); and
 - (B) remit the tax to the commission as provided in this part; or
 - (ii) [Not applicable for this ruling]

II. Analysis

Sales of used equipment by individuals who are not regularly engaged in the business of selling such equipment are generally exempt under § 59-12-104(13).¹ Utah Admin Code R865-19S-38 provides further guidance on § 59-12-104(13). However, based on the facts presented, it is not entirely clear whether the sales of used radio equipment by amateur radio operators who are not regularly engaged in the business of selling such equipment are exempt under Utah Code § 59-12-104(13).

Typically in the past, we have allowed the exemption for individuals who sell personal items from their homes. We have also considered that such individuals who sell their personal property at an organized event such as a swap meet to be exempt from sales tax. However, we have not made a formal ruling addressing this specific situation. Until we do so, the private individuals you have identified are not required to collect and remit sales tax under § 59-12-107(1)(a) on the sale of their privately owned equipment which had been held for personal use.²

¹ We presume under the facts you have presented that these individuals did not originally purchase the equipment as tax-exempt for resale. However, if they did, then the sales of such equipment would not be tax-exempt. See § 59-12-104(13)(b)(3).

² Utah Code § 59-12-107(1)(a) imposes a collection and remittance requirement on certain sellers based on their activities in this state. Such activities include having a place of business or maintaining a stock of goods in the state, regularly soliciting orders or regularly delivering the property in the state, and regularly engaging in activities related to leasing and servicing property in the state.

Furthermore, consistent with our general policy, because these radio operators do not have a tax collection requirement they are not required to obtain sales tax licenses under § 59-12-106.³

However, because the issue of individuals selling personal goods and services at organized events has not been addressed, the Commission intends to initiate rule-making procedures to address the sales tax liability of private individuals who sell their own tangible personal property at organized events. In the event that we should reconsider our position, these individuals may be required to collect and remit sales tax in the future.

III. Conclusion

In summary, currently the individuals who sell their personal property at an organized event such as a swap meet are exempt from sales tax. However, if in the future the Commission makes a formal ruling or adopts a Tax Commission administrative rule addressing this specific situation, then the private individuals you have identified might be required at that time to collect and remit sales tax and likewise obtain sales tax licenses.

This ruling is based on current law and could be changed by subsequent legislative action or judicial interpretation. Also, our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. Finally, we note that because of the unique circumstances addressed in your request, this ruling is directed only for the amateur radio operators participating in this event and not for individuals running small businesses or for non-individuals such as clubs. If you feel we have misunderstood the facts as you have presented them, you have additional facts that may be relevant, or you have any other questions, you are welcome to contact the Commission.

For the Commission,

Marc B. Johnson
Commissioner

MBJ/aln
10-004

³ Under § 59-12-106(2)(a), a person who is required to collect sales tax must first obtain a sales tax license before engaging in business in Utah.