FINAL PRIVATE LETTER RULING

REQUEST LETTER

11-006

MEMORANDUM

November 21, 2011

TO: NAME 1

FROM: NAME 2

CLIENT: NAME 3

MATTER: COMPANY

RE: Sales Tax / Utah Withholding Rules

Our client is contemplating forming a new entity called COMPANY (hereafter "COMPANY") and relocating its operations to Utah. COMPANY is a company that provides online analytical services to assist human resource departments in the job application and hiring process.

Based on my conversation with NAME 3, owner of COMPANY, it is my understanding that the following facts are correct and essential to a proper analysis of the sales tax issues in this Memorandum. After COMPANY is retained by a client, COMPANY will interface with the client's human resources department to obtain relevant information regarding essential criteria for a job opening and the corresponding desired skill sets and other relevant factors for successful job applicants. COMPANY then creates a link on the client's internet web-page which directs a potential job applicant to COMPANY's online site. Potential applicants then answer a questionnaire prepared by COMPANY which is specific to the client's job opening. COMPANY has some smaller clients who do not have their own website. In these cases, the client either provides a potential job applicant with a link to COMPANY's website--requesting that the application be completed and submitted online through COMPANY's site--or the client provides a potential job applicant with computer access to the internet at the client's offices by which the potential job applicant is directed to COMPANY's website and completes the application and questionnaire.

Following closure of the applicable job application time period, COMPANY then processes the responses from all applicants for a specified job opening. COMPANY processes and analyzes the applicants' responses for a particular job opening using its own proprietary information and algorithms. The result of COMPANY's processing and analysis is to rank all job applicants for a particular job opening based on their compatibility with the client's stated job criteria, desired skill sets, and other relevant factors. Clients will then use this ranking to set up and order the job interview process so as to maximize success and minimize time spent in

finding a compatible job applicant. The data output generated by COMPANY's processing and analysis is then stored directly on COMPANY's website. A client is thereafter provided a user name and password to allow for continuous access of the data via the internet for a specified period of time. As needed, COMPANY will provide on-going support and follow-up services to a client during the interviewing and hiring process for the specified job opening. Because the information generated by COMPANY's process and analysis is available to a client online, COMPANY does not generally provide to a client a hard copy printout of this information. COMPANY may, on occasion and if requested by a client, provide a printed copy of the data output report to the client.

Whether the client has its own website or not, COMPANY never provides the client with any software or software related materials. Similarly, the client is never given access to COMPANY's proprietary computer algorithms or similar materials. The only item to which a client gains access and control is the data output report ranking the potential job applicants. COMPANY's fees vary and are based upon the work performed for each separate job opening.

Recently, COMPANY sought a business license for its anticipated operations in COUNTY. The County's representative with whom COMPANY spoke indicated that COMPANY would be required to obtain a sales tax number and withhold sales tax on its operations.[1] The stated basis for this position was that COMPANY's operations would be considered the offering for sale of canned computer software, and/or that its operations would be offering for sale, online, a tangible product (similar to a book or other tangible product delivered through an ecommerce format).

Based on this interaction with representatives of COUNTY and the facts as presented to us, COMPANY has requested that we research and analyze the following issues: (1) do COMPANY's business operations constitute the sale of canned computer software?; (2) is the essence of COMPANY's business operations the sale of a service or tangible personal property?; and (3) assuming that COMPANY's business operations were subject to Utah Sales Tax, does COMPANY have a withholding obligation for sales made to clients who are not located in Utah, not engaged in business activities in Utah, and which have no nexus to Utah other than accessing and using COMPANY's online analytical services?

ANALYSIS

The following general statutory principles are applicable to an analysis of COMPANY's issues. First, section 59-12-103(1) imposes a sales tax on the purchaser of "retail sales of tangible personal property made within the state." *Utah Code Annotated § 59-12-103(1)(a).* For purposes of this statutory rule, tangible personal property is defined as any property that may be "seen, weighed, measured, felt or touched" and specifically includes "prewritten computer software." *Id. at § 59-12-102(97)(a) and (b).*

[1] Obtaining a sales tax identification number from the State of Utah would not be a concession by COMPANY that its business operations are in fact subject to Utah sales tax withholding obligations. Many businesses obtain a sales tax identification number even though most, if not all, of their transactions may be exempt from tax. Thus, the issue is not that COMPANY was asked to obtain a sales tax ID number, but rather, the assertion that its business transactions would be subject to Utah sales tax withholding requirements.

Second, section 59-12-103(l)(n) of the Utah Code Annotated (hereafter the "UCA") imposes a tax on the purchaser for amounts paid for the sale of a product that is transferred electronically and would be subject to tax under this chapter if the product was transferred in a manner other than electronically. *Id. at § 59-12-103(1)(n).*

Third, a seller who is involved in a transaction subject to sales tax withholding must collect and remit the tax if the seller has, among others, an office or warehouse in Utah. *Utah Code Annotated § 59-12-107.*

An exemption from these general statutory rules is purely a matter of legislative grace, must thus be expressly enumerated by statute, and is narrowly construed against the taxpayer. *See, e.g., MacFarlane v. Utah State Tax Comm'n,* 134 P.3d 1116, 1121 (Utah 2006). An analysis of each of the three issues is set forth below.

ISSUE 1: DO COMPANY'S BUSINESS OPERATIONS CONSTITUTE THE SALE OF CANNED COMPUTER SOFTWARE?

Section 59-12-102(81)(a) of the UCA defines "prewritten computer software" as software that is not designed or developed (i) by the author or other creator of the computer software and (ii) to the specifications of a specific purchaser. Utah Administrative Code R865-192-92(2) (hereafter "Rule 92") provides that the "sale, rental or lease of custom computer software constitutes a sale of a personal service and is exempt from the sales or use tax, regardless of the form in which the software is purchased or transferred."

In several Private Letter Rulings ("PLRs"), the Utah State Tax Commission (hereafter the "Commission") analyzed whether sales tax was owed on the sale or lease of pre-written computer software even if the software was stored on the taxpayer's (and not the purchaser's) website or computers. *See,* PLRs 2009-003, 2008-002, 2001-030, and 2001-027. In PLR 2001-030, the Commission specifically stated:

> *Utah currently applies its sales and use tax if the customer receives possession of canned computer software, whether the software is received on disk or downloaded by electronic means. On the other hand, if a customer goes to an Internet site to access software without downloading it on his or her own computer, then the customer has not received possession of the tangible personal property; i.e., the canned computer software. Nor does Utah currently impose the sales and use tax in this latter circumstance under the theory of renting or leasing tangible personal property because the customer does not have possession of the tangible personal property. Accordingly, for electronic transactions, the software must at least temporarily "reside" in the customer's computer for the transaction to be the taxable sale of tangible personal property. Accessing software at a "host" provider site without downloading the software onto one's computer is not a taxable transaction.*

Accordingly, there does not appear to be any case law or administrative support for the assertion made by COUNTY representative to COMPANY that its business operations would likely be deemed the sale of canned computer software and therefore subject to sales tax.

COMPANY itself retains the right and the sole access to the proprietary algorithms and other software it utilizes for processing and analyzing data provided by client's potential job applicants and in preparing and generating data output and reports to the client. COMPANY's clients are never provided access to this software in any way, whether directly or via COMPANY's site. Instead, the client and the potential job applicants are requested to provide COMPANY with specific and unique information, and then COMPANY itself processes this information.

Based on applicable statutory rules, the language from PLR 2001-030, and the facts as known to us, it appears likely that COMPANY's business operations would not be construed as the sale of canned computer software because COMPANY's clients do not download or receive access to COMPANY's proprietary software. [2]

ISSUE 2: ARE COMPANY'S BUSINESS OPERATIONS ESSENTIALLY THE SALE OF A SERVICE OR TANGIBLE PERSONAL PROPERTY?

Rule 92 also provides another potentially applicable exemption for services which utilize computerized outputs. "The sale of computer-generated output is subject to sales or use tax if the primary object of the sale is the output and not the services rendered in producing the output." R865-19S-92(3). Rule 92 defines "computer-generated output" as, among others, "paper, discs, tapes, molds, or other tangible personal property generated by a computer." R865-19S-92(1). In determining whether a transaction qualifies for this exception, Utah courts have applied an "essence of the transaction" test. The Utah Supreme Court has defined this test as follows:

> *[T]he essence of the transaction theory, 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.*

B.J.-Titan Services v. State Tax Comm'n, 842 P.2d 822, 825 (Utah 1992); *see also, Eaton Kenway Inc. v. Auditing Div. of Utah State Tax Comm'n*, 906 P.2d 882 (Utah 1995) (holding that a computer company hired to convert engineering drawings into computer-readable format was engaged to perform primarily a service and not a new taxable purchase of tangible personal property).

In PLR 07-013, a Utah company provided customers with a backup and recovery service. Connected with this service, the company provided its customers with prewritten computer

[2] Additionally, COMPANY could likely argue successfully that a "sale" of tangible personal property has not occurred as it relates to its computer software, proprietary algorithms, etc. Section 59-12-102(99) defines a sale as "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." Further, a "sale" specifically includes "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." § 59-12-102(99)(b)(v). As the Customer never receives the right to possess, operate or use COMPANY's proprietary software, it appears likely that no sale has occurred.

software that allowed the customers to select the files to be backed up and to set certain parameters. The software was useless without the backup service. To provide this service, the company temporarily stored the customers' files on the company's servers. The Commission found that, under the primary object or essence of the transaction test, the company was primarily providing a backup service, not a product. Likewise, the Commission found that the software was merely incidental to providing the backup service and that the software was consumed by the company. Furthermore, the Commission found that the company's servers were not leased to its customers because the true object of the transaction for the customers was not the acquisition of storage space. The servers were not necessary for the customers to conduct all of their normal operations.

Similarly, in PLR 01-030 the Commission, while analyzing the taxability of website design, stated:

> *A customer who receives a website designed by the company is in possession of tangible personal property. Accordingly, whether the graphic design services are taxable depends on whether the customer is primarily purchasing the company's expertise in knowing what designs work best on a website and how to incorporate the various designs into a website, or whether it is primarily purchasing a website with the company's design services being a secondary concern. Naturally, such a determination would be dependent upon the facts surrounding each transaction. However, we would consider the company's expertise in designing the content of a website to be of paramount importance in the success and function of a website. So, although the customer is receiving tangible personal property in the form of a website, we would, without further information convincing us otherwise, determine that the customer was purchasing nontaxable graphic design services, not taxable tangible personal property.*

The determination of whether a transaction is essentially the sale of a service or of tangible personal property is very fact intensive. However, based on the facts presented to us and the foregoing analysis and language from the PLRs, it would seem likely that COMPANY could successfully argue that the essence of its business operations is the provision of consulting services rather than tangible personal property, and NAME 4, would not be subject to sales tax withholding rules. In this case, the analytical consulting service to a human resource department appears to be the essential element of the transaction. Any provision of tangible personal property, such as a written report, seems clearly secondary and not primary. COMPANY is clearly doing more than simply collecting data from potential job applicants and compiling it into a data output for a client. Rather, COMPANY takes the collected data and applies its own proprietary and unique analytical tools to the data, which take the form of computer formulas and algorithms, and thereafter makes available to the client a summary of that analysis for further business action and analysis in the hiring process. COMPANY's business operations are analogous to those described in PLR 2007-013, where the taxpayer was found to have been primarily engaged in providing a consulting service and not producing tangible personal property. Accordingly, it seems likely that COMPANY's business operations would be classified as the sale of a service rather than the sale of tangible personal property, and NAME 4 would not be subject to Utah sales tax withholding requirements.

ISSUE 3: ASSUMING COMPANY'S BUSINESS OPERATIONS WERE SUBJECT TO UTAH SALES TAX WIHHOLDING REQUIREMENTS, WOULD SUCH REQUIREMENTS EXTEND TO TRANSACTIONS ENTERED INTO WITH CLIENTS NOT LOCATED IN UTAH AND WITH NO NEXUS TO UTAH?

From the analysis of the prior two issues, it appears that COMPANY's business operations would likely not be subject to Utah's sales tax withholding rules. However, assuming that the outcome of those two issues were unfavorable to COMPANY, a third issue for consideration is whether and to what extent COMPANY would have sales tax withholding obligations for its business transactions involving clients who are not located in Utah and have no nexus to Utah. The applicability of sales tax withholding requirements to interstate online transactions is an area that is under a great deal of scrutiny currently and in flux as states press for new and additional streams of tax revenue. That said, under current Utah law, if an online purchaser of tangible personal property is not located in Utah and has no nexus of any kind with Utah, then such purchase of tangible personal property over the internet from a Utah company, where the receipt of such tangible personal property takes place outside of Utah, is not subject to Utah's sales tax withholding requirements.

Section 59-12-103(1) of the UCA imposes a sales tax on the purchaser of "retail sales of tangible personal property made *within the state*." *Utah Code Annotated § 59-12-103(1)(a) (emphasis added)*. Additionally, Utah Administrative Rule R865-19S-44 ("Rule 44") states that "[s]ales made in interstate commerce are not subject to sales tax imposed."[3] Section 59-12-211 of the UCA provides some guidance regarding electronically transferred property:

> (2) Except as provided in Subsections (8) and (14), 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 (14), 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.

[3] Rule 44 contemplates an actual physical delivery of a tangible personal property via interstate commerce, and it is unclear how this Rule would be interpreted for purely on-line transactions without actual shipping of goods. Similarly, under a prior Administrative Rule, R865-21U-3, the Commission provided that when "tangible personal property is sold in interstate commerce for use or consumption in this state and the seller is engaged in the business of selling such tangible personal property in this state for use or consumption and delivery is made in this state, the sale is subject to use tax. In 2008, the Commission elected to repeal this rule due to statutory changes under U.C.A. § 59-12-103 and 104.

(4) Subject to Subsection (10), and except as provided in Subsections (7), (8), (9), (11), and (14), 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.

Utah Code Annotated § 59-12-211(2) – (4).

Accordingly, and again assuming for the sake of argument that the transaction were taxable, to the extent COMPANY physically mails a copy of its analysis and report to the client which has no nexus to Utah, it appears unlikely that the transaction would be subject to sales tax due to the fact that the exchange was made via interstate commerce.

A more difficult issue occurs when COMPANY does not provide a physical report to the client and instead simply allows the client access to the report on COMPANY's website. Three relatively recent PLRs provide some insight as to how the Commission may consider this issue. In PLR 01-027, a taxpayer sold licenses to its content software and its content database. The Commission found that the content software and content database were prewritten computer software and therefore potentially subject to sales tax. The Commission stated that if that software was delivered by disk or other electronic means to a Utah customer such that the customer possessed the software (i.e. the software resided on the customer's computer), then that transaction was taxable. However, if a customer merely viewed a database without downloading it onto its computers or servers, the Commission reasoned customer was not in possession of the software. Additionally, a customer would be deemed to possess the software and the transaction would be subject to sales or use tax if the software was downloaded onto a server located in Utah and the customer was considered to be renting or leasing that server. Finally, the Commission stated that if the server were located outside of Utah, the customer would not possess the software in Utah and the sale of the software would not be taxable in Utah.

Alternatively, in PLR 2008-02, the Commission found that a taxpayer which offered canned computer software and that only allowed the customer to access it through the taxpayer's server, was required to collect sales tax on the transaction. In so doing, one of the issues the Commission appeared to focus upon was the fact the taxpayer's servers which hosted the software were located in Utah. "The Commission finds that the ASP Model of the "Base Service" is a taxable "sale" when Corporation's customers possess, operate, or use the base software in Utah because the software is located on servers in Utah." It is not entirely clear from this PLR whether the purchasers were located in Utah or whether the Commission would make any distinction for such out of state clients.

In PLR 2009-003, the taxpayer was not a Utah resident and its servers that hosted its software were located outside of Utah. In distinguishing PLR 2008-02, the Commission stated"[t]here must be a delivery, i.e., a transfer of physical possession of the tangible personal property (i.e., the canned software) to a customer in Utah before it can be deemed to be used in the state. Here, because there is never a transfer/delivery of Company's application software, it cannot be deemed to be used by a customer in Utah under Utah's use tax provisions. Moreover,

to determine the "use" of the application software takes place where the servers are located, does not conflict with [PLR 0208-02] in any way." *Utah PLR 2009-003 at 15 (Lexis).*

Whether COMPANY would be required to collect sales tax on purchases from clients that have no nexus to Utah may depend on the form of the delivery and possibly on the location of COMPANY's server. If the non-Utah client receives a .pdf or other electronic form of the report that it can down-load onto its computer, it would appear that COMPANY could argue under PLR 2001-027 and 2009-003 that the transaction would not be taxable. If on the other hand, COMPANY stores the report on its own website and servers and simply provides the client with online access to the report, the Commission may argue that PLR 2008-02 applies if COMPANY's servers are located in Utah.

But again, this analysis assumes that COMPANY's business operations are deemed to be the sale of tangible personal property and thus subject to Utah's sales tax withholding rules. As concluded in the analysis of Issues 1 and 2, above, it seems unlikely that COMPANY's business operations would be subject to Utah sales tax withholding and thus this third issue would likely be moot.

SUMMARY AND CONCLUSION

Based on the foregoing analysis of the relevant facts as applied to current administrative rules, private letter rulings from the Commission, case law, and applicable statutes, it appears that COMPANY's activities of providing analytical hiring information to the human resource departments of its clients would not constitute the sale of canned computer software, and that the essence of COMPANY's activities is the provision of a service rather than the sale of tangible personal property. NAME 4, COMPANY would not be responsible to collect and remit any sales tax to the State of Utah on these transactions. And even assuming that such activities were deemed to be the sale of tangible personal property within the State of Utah, COMPANY's obligation to collect sales tax would most likely involve only those transactions made with companies which are either located in the State of Utah or have a significant nexus to the State of Utah by virtue of their business activities in the State.

RESPONSE LETTER

January 12, 2012

Mr. NAME 3
COMPANY
ADDRESS
CITY, STATE ZIP CODE

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

RE: Private Letter Ruling Request–Sales Tax Treatment of Sales of Online Services that Assist Human Resource Departments in the Job Application and Hiring Process

Dear Mr. NAME 3:

You have requested a ruling on the sales tax treatment of COMPANY's business operations, which include online services to assist human resource ("HR") departments in the job application and hiring process.

In your request letter you explained that COMPANY interfaces with a client's HR department, obtaining information about the client's job openings and creating a link on the client's webpage directing potential job applicants to COMPANY's online site. At COMPANY's site, potential job applicants complete a questionnaire. At the end of the time period for accepting job applications, COMPANY analyzes all job applicants' answers and creates a report ranking the applicants on their compatibility with the job opening. The client can access the report online for a limited time, through a user name and password. The client will use this report to order its interview process to maximize success and minimize time spent in finding a compatible job applicant. COMPANY provides on-going support and follow-up services to a client as needed.

Through a subsequent telephone conversation, you explained more detail about COMPANY's services. COMPANY's primary clients are states, private companies, and nonprofit companies that provide health services, such as the services provided to people in assisted living facilities. COMPANY's clients hire caregivers who directly care for people with varying levels of ability or disability.

COMPANY's clients usually have HR departments that oversee the traditional hiring process, such as collecting potential job applicants' applications and resumes, interviewing the applicants, completely background checks, etc. COMPANY's services do not replace this traditional hiring process; COMPANY does <u>not</u> collect potential job applicants' applications or

resumes.[1] Instead, COMPANY provides the HR departments a report with a probability-for-success ranking for the job applicants. This report is created from the applicants' answers to COMPANY's specially designed questionnaire.

COMPANY's services are based on psychometrics, which involves the design, administration, and interpretation of quantitative tests for the measurement of psychological variables such as intelligence, aptitude, abilities, attitudes, knowledge, and personality traits. The field of psychometrics is primarily concerned with the construction and validation of measurement instruments such as questionnaires, tests, and personality assessments.

Through its research and development, COMPANY has designed two questionnaires that measure specific characteristics of job applicants to predict whether the applicants would succeed in two types of caregiver job positions. One type of job position includes caregivers who serve people who are cognitive, such as many elderly people. The other type includes caregivers who serve people who are not cognitive, such those who are severely disabled and immobile. COMPANY's services can assist HR departments in hiring these two types of caregivers, but not in hiring for other positions.[2] COMPANY's questionnaires are <u>not</u> modified for clients' specific job openings.[3]

Potential clients learn about COMPANY's services through a variety of ways—COMPANY participates in trade shows and conferences, directly contacts potential clients, follows referrals, etc. A potential client wanting to know more will contact COMPANY; then, COMPANY will schedule and conduct a webinar with the client's personnel. At this meeting, COMPANY explains its story, its services, how the services are limited to two types of caregivers, how the process of gathering data through the questionnaire works, and how the client should interpret the probability-for-success report. Also, COMPANY and the prospective client will discuss the client's HR process and which of the client's job openings could be characterized as caregiver positions. After the webinar, a potential client can retain COMPANY by calling or emailing COMPANY. Currently, a potential client cannot retain COMPANY by sign up through the internet; however, this may change in the future.

After a client has retained COMPANY, COMPANY provides the client with a web link that connects the client's potential job applicants for caregiver positions to COMPANY's server via the internet. When a job applicant uses the link, she connects to COMPANY's server to complete COMPANY's questionnaire. COMPANY receives a job applicant's name and basic contact information but not other application items such as resumes. After the job application period has closed, COMPANY uses its computer system to process and analyze all job applicants' responses, ranking the job applicants on their probability for success for the caregiver job. The client can use these rankings to arrange its job interview and hiring process. COMPANY stores on its website the rankings and other information generated by its processes and analysis, and grants its clients continuous access to that information via the internet for a specified period of time. COMPANY generally does not give clients hardcopies of the information. As needed, COMPANY provides ongoing support and follow-up services during

[1] This fact differs from the facts presented in COMPANY's request letter.
[2] As its research and development continues, COMPANY plans to expand its services to cover additional job positions, such as for supervisors of caregivers.
[3] This fact differs from the facts presented in COMPANY's request letter.

the interviewing and hiring process. The support and services include technical assistance; COMPANY will trouble shoot a client's technical issues such as why a client cannot access COMPANY's server. The support and services also includes how to correctly interpret and use the report. For instance, if a client is not getting the results it expects with the probability-for-success report, COMPANY will work with that client to learn what the client is doing and to teach the client the proper interpretation and role of the probability-for-success report. COMPANY's fees are based on usage; namely, the number of potential applicants completing the questionnaire for each job opening.

COMPANY uses technology to efficiently collect the data, apply algorithms to interpret the data, produce the probability-for-success report, and allow clients access to the results. COMPANY's services could be provided in person if the internet technology were not used. Specifically, Mr. NAME 3 could personally interview the job applicants, analyze their responses, and then tell COMPANY's client, the employer, what he thought. COMPANY believes it is providing consulting services to its clients. COMPANY does not provide clients with any software or related materials. Likewise, clients do not receive COMPANY's proprietary computer algorithms or similar materials.

The Utah sales tax treatment of COMPANY's business operations will be provided after the Applicable Law section below.

I. Applicable Law

Utah Code § 59-12-103(1) states in part:

> A tax is imposed on the purchaser . . . for amounts paid or charged for the following transactions:
> (a) retail sales of tangible personal property made within the state;
> . . . .

Utah Code § 59-12-102(113), which was recently amended, defines tangible personal property and states in part:

> (a) Except as provided in Subsection (113)(d) . . . , "tangible personal property" means personal property that:
> (i) may be:
> (A) seen;
> (B) weighed;
> (C) measured;
> (D) felt; or
> (E) touched; or
> (ii) is in any manner perceptible to the senses.
> (b) "Tangible personal property" includes:
> . . . .
> (v) 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.

. . . .

Utah Code § 59-12-102(81) defines prewritten computer software as follows in part:

(a) . . . . "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.

. . . .

Utah Administrative Code R865-19S-92 states:

(1) "Computer-generated output" means the microfiche, microfilm, paper, discs, tapes, molds, or other tangible personal property generated by a computer.

. . . .

(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.

. . . .

II. Analysis

COMPANY's testing and analytical services sold for fees are not subject to Utah sales tax under § 59-12-103(1), because they are services not specifically enumerated as taxable in the Utah Code. And, because COMPANY uses its own software in providing these services, that software is not prewritten computer software for purposes of § 59-12-102(81). Instead, the software was authored by COMPANY to create the probability-for-success reports for COMPANY's clients. COMPANY's clients and the clients' job applicants have very limited access to COMPANY's software; the applicants provide the data to be analyzed, and the clients retrieve the final reports. COMPANY's software is not flexible from a client's perspective. The clients have no control over how the data is analyzed; instead, they value COMPANY's analysis methods. COMPANY keeps its uniquely researched and developed methods confidential; they create the value of COMPANY's final reports.[4]

The final probability-for-success reports are computer-generated output as defined under R865-19S-92(1). Under R865-19S-92(3), "[t]he sale of computer generated output is subject to sales and use tax if the primary object of the sale is the output and not the services rendered in producing the output." Based on the facts you presented, the primary object of the sale of the final probability-for-success reports is the services rendered in producing the reports. The clients retain COMPANY because they want COMPANY's analysis, not another company's. They may believe that COMPANY's analysis methods are superior because COMPANY performed narrow

[4] If COMPANY were to sell, rent, or lease its software to customers, then its software would be prewritten computer software because the software would not be designed and developed to the specifications of a particular purchaser. However, this private letter ruling does not involve such a sale of software based on the facts you have presented.

research and development limited to two types of caregivers. Even though COMPANY's research and analysis are incorporated into its custom software, it is the research and analysis services that are still the source of the value of the final reports, not the underlying software code automating the COMPANY's analysis of the data collected. Because the primary object of COMPANY's sales is COMPANY's services, COMPANY's sales are not subject to Utah sales tax, even though they also include the reports.[5]

Because COMPANY's sales of services are not subject to Utah sales tax, COMPANY would not have a Utah sales tax withholding requirement under § 59-12-107 for any such sales, regardless of where COMPANY's clients are located.

III. Conclusion

As explained above, COMPANY's sales are not subject Utah sales tax. 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. 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
11-006

cc (via email only): NAME 5; NAME 6; NAME 7; NAME 8; NAME 9; NAME 10;NAME 11; NAME 12; NAME 13; NAME 14

[5] If the final reports had been the primary object of the transaction, COMPANY's sales might have been taxable under § 59-12-103(1)(a) as the retail sales of tangible personal property made within the state or under § 59-12-103(1)(m) as amounts charged for the sales of products transferred electronically. Under that scenario, the source of such sales would have been determined according to Utah Code §§ 59-12-211 and 59-12-212.