

**FINAL PRIVATE LETTER RULING**

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**REQUEST LETTER**

12-010

September 27, 2012

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 Admin. R. 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. On October 28, 2009, COMPANY submitted a Request for a Private Letter Ruling (attached hereto as Attachment 1) for the same client involving substantially similar facts to those described below. On March 15, 2010, the Utah State Tax Commission (the "Commission") responded by issuing Private Letter Ruling 09-024 (attached hereto as Attachment 2), which was consistent with the ruling requested by COMPANY. As a result of a change in Utah law regarding sales and use tax registration and collection requirements effective July 1, 2012, COMPANY's respectfully requests confirmation that the new law does not change its client's Utah sales and use tax registration and collection obligation.

**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 that purchase the gift codes sell them 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 owned by unrelated third parties are located in numerous states, 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 sell 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.

### **Issues**

1. Are sales of gift codes to Utah residents subject to Utah's sales and use tax?
2. Is Gift Code Issuer required to register to collect and remit Utah sales and use tax?
3. Are the Affiliate Internet Retailers 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?

### **Legal Framework for Analysis**

#### **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 for the sales at issue.

## **Utah’s Sales and Use Tax**

### **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(1)(a). “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(113). 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 telecommunication 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(b).

With respect to the sale of gift codes, the Commission has issued guidance which provides that the sale of a gift code is not subject to Utah’s sales and use tax because the gift code is an “intangible right to acquire goods.” Utah Private Letter Ruling 09-024, March 15, 2010. The Commissioner further provided that “the transfer of those same rights electronically would also be excluded from the Utah sales tax.” *Id.*

### **Registration and Collection Requirement**

Utah imposes a sales tax on sellers meeting certain statutory requirements. Utah Code § 59-12-107. A “seller” is a person that makes a sale, lease or rental of tangible personal property, a product transferred electronically or a service. Utah Code § 59-12-102(110). Sellers are required to register to collect and remit sales and use tax if the seller has or utilizes:

- (a) an office;

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

Utah Code § 59-12-107(2)(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.

Utah Code § 59-12-107(2)(a)(ii)-(v).

**a. Affiliate Nexus**

Effective July 1, 2012, Utah tax law requires that a seller register to collect and remit sales and use tax if the seller holds a substantial ownership interest in, or is owned in whole or in substantial part by, a related seller; and either:

- (1) the seller sells the same or a substantially similar line of products as the related seller and does so under the same or a substantially similar business name; *or*

(2) the place of business described in Subsection (2)(a)(i) of section 59-12-107 of the related seller or an in state employee of the related seller is used to advertise, promote, or facilitate sales by the seller to a purchaser.

Utah Code § 59-12-107(2)(b). Under the new law, “related seller” is defined as a seller that:

(1) has a place of business described in Subsection (2)(a)(i) of section 59-12-107; *and*

(2) delivers tangible personal property, a service, or a product transferred electronically that is sold by a seller that does not have place of business in the Utah and to a purchaser in Utah.

Utah Code § 59-12-107(2)(b) (collectively provisions are referenced as “Affiliate Nexus Statute”). Further, “ownership” means direct ownership or indirect ownership through a parent, subsidiary, or affiliate. Utah Code § 59-12-107(1)(a). “Substantial ownership interest” means an means an [sic] ownership interest in a business entity if that ownership interest is greater than the degree of ownership of equity interest specified in 15 U.S.C. Sec. 78p,<sup>1</sup> with respect to a person other than a director or an officer.

## **Analysis**

### **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 equivalents rather than tangible personal property or taxable services, the sale of gift codes is not subject to Utah’s sales and use tax.

### **Gift Code Issuer is Not Required to Register to Collect Utah Sales and Use Tax**

#### **Constitutional Limitations**

Gift Code Issuer is not required to register for and collect Utah sales and use tax as a result [of] its sale of gift codes to Wholesalers 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 does not have any offices or employees in Utah, nor does Gift Code Issuer own real or tangible personal property

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<sup>1</sup> The ownership of equity interest specified in 15 U.S.C. Sec. 78p is 10 percent of any class of any equity security.

located within the state. Therefore, Gift Code Issuer will not satisfy *Quill*'s physical presence nexus standard.

Gift Code Issuer has not established 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 are 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 does not have nexus with Utah by virtue of others' Utah activities.

## **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 under Utah's affiliate nexus provisions because it does not have an affiliated entity present in the state that meets the requisite ownership requirements and meets the definition of "related seller." None of Gift Code Issuer's affiliated entities have a location in Utah and deliver taxable products or services on its behalf. Additionally, none of Gift Code Issuer's affiliated entities have both a substantially similar line of products and business name. Finally, no Utah business location of an entity affiliated with Gift Code Issuer is used to advertise, promote, or facilitate sales by Gift Code Issuer.

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

## **Affiliate Internet Retailers are not Required to Register and Collect Utah Sales and Use Tax**

## **Constitutional Limitations**

Affiliate Internet Retailers also are not required to register and collect Utah sales and use tax based upon 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 do not have any offices or employees in Utah, nor do they own real or tangible personal property located in the state. Therefore, Affiliate Internet Retailers do 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. Gift codes are sold to Utah consumers at Retail Establishments. Consumers are not 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 are not performed for the benefit of those entities' own sales of gift codes within the state. For each of these reasons, Affiliate Internet Retailers do not have nexus with Utah.

## **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 under Utah's Affiliate Nexus Statute Retailers. Utah's Affiliate Nexus Statute requires the in-state entity and the out-of-state entity be "related sellers" (which definition has several components) and additionally meet one of two statutory tests - (1) the out-of-state seller sells the same or a substantially similar line of products as the related seller and does so under the same or a substantially similar business name; *or* (2) the related seller's place of business or its in-state employee is used to advertise, promote or facilitate sales for the out-of-state seller to purchasers.

Affiliate Internet Retailers do not have an affiliated entity that meets the requisite ownership requirements and meets the definition of "related seller." None of Affiliate



Internet Retailers' affiliated entities have a location in Utah and deliver taxable products or services for Affiliate Internet Retailers which do not have a Utah location. Regardless, even if Gift Card Issuer or any Affiliate Internet Retailers did meet the definition of "related seller" neither have both a substantially similar line of products and business name. Nor is a Utah business location of Gift Card Issuer or an Affiliate Internet Retailer used to advertise, promote, or facilitate sales of any other Affiliate Internet Retailer. Thus, Affiliate Internet Retailers are not required to register to collect sales and use tax under Utah law.

**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 Issuers 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.

**Conclusions**

1. Gift Code Issuer is not subject to Utah's sales and use tax registration and collection responsibilities as a result of its sale of gift codes to Wholesalers. This conclusion will not change if Gift Code Issuer sells gift codes directly to Retail Establishments.
2. Affiliate Internet Retailers are not subject to Utah's sales and use tax registration and collection responsibilities. This conclusion will not change as a result of Gift Code Issuer's sale of gift codes to Wholesalers and Retail Establishments.

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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 at PHONE NUMBER if you have any questions.

Very truly yours,

NAME

## RESPONSE LETTER

February 8, 2013

NAME, TITLE  
COMPANY  
ADDRESS

Re: Private Letter Ruling Request—Sales Taxation Implications of Sales of Gift Codes

Dear NAME:

You have submitted a request for a Private Letter Ruling (“PLR”) 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. Previously, we had answered your questions through PLR 09-024 issued on March 15, 2010, available online at <http://tax.utah.gov/commission/ruling/09-024.pdf>. However, you now seek additional guidance because some of the law applied in PLR 09-024 has changed. We understand the facts to be as follows:

### **I. Facts**

You stated that you request this PLR for the same client under substantially similar facts as your prior PLR request. In PLR 09-024 we stated the facts as follows:

"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.

For this PLR you provided the following additional, revised, or clarifying facts. The locations of the Retail Establishments now include Utah. Thus, Wholesalers are currently selling gift codes to Retail Establishments located in Utah or directly to Utah consumers at these Retail Establishments located in Utah. All Retail Establishments are owned by unrelated third parties. The Gift Code Issuer does not lease or service property located in Utah. None of Gift Code Issuer's affiliated entities, which include the Affiliated Internet Retailers and the Website Operator, have a location in Utah and deliver taxable products or services on the Gift Code Issuer's behalf. Additionally, none of Gift Code Issuer's affiliated entities have both a substantially similar line of products and business name. Finally, no Utah business location of an entity affiliated with Gift Code Issuer is used to advertise, promote, or facilitate sales by Gift Code Issuer.

## **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. Is Gift Code Issuer required to register to collect and remit Utah sales and use tax?
3. Are the Affiliate Internet Retailers 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

Much of the applicable law used in PLR 09-024 is the same. Below is noted the statutory changes that occurred after PLR 09-024 was issued.

Utah Ann. Code § 59-12-107 was amended, significantly revising the subsections relating to an area of the Utah Code that you refer to as the Affiliate Nexus Statute. Section 59-12-107 provides in part as follows:

- (1) As used in this section:
  - (a) "Ownership" means direct ownership or indirect ownership through a parent, subsidiary, or affiliate.
  - (b) "Related seller" means a seller that:
    - (i) meets one or more of the criteria described in Subsection (2)(a)(i); and
    - (ii) delivers tangible personal property, a service, or a product transferred electronically that is sold:
      - (A) by a seller that does not meet one or more of the criteria described in Subsection (2)(a)(i); and
      - (B) to a purchaser in the state.
  - (c) "Substantial ownership interest" means an ownership interest in a business entity if that ownership interest is greater than the degree of ownership of equity interest specified in 15 U.S.C. Sec. 78p, with respect to a person other than a director or an officer.
  
- (2) (a) . . . . 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 (2)(a)(i)(A) through (E);
  
  - . . . .
  - (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 (12)(a)(iii)(A) or (B);

- ....
- (b) A seller is considered to be engaged in the business of selling tangible personal property, a service, or a product transferred electronically for use in the state, and shall pay or collect and remit the sales and use taxes imposed by this chapter if:
    - (i) the seller holds a substantial ownership interest in, or is owned in whole or in substantial part by, a related seller; and
    - (ii) (A) the seller sells the same or a substantially similar line of products as the related seller and does so under the same or a substantially similar business name; or  
(B) the place of business described in Subsection (2)(a)(i) of the related seller or an in state employee of the related seller is used to advertise, promote, or facilitate sales by the seller to a purchaser.
- ....

The Utah State Tax Commission revised Publication 37, available at <http://tax.utah.gov/forms/pubs/pub-37.pdf>, to reflect the changes in § 59-12-107.

#### **IV. Discussion**

##### ***Issue 1: Are sales of gift codes to Utah residents subject to Utah's sales and use tax?***

The sales of the gift codes to Utah residents are not subject to Utah's sales and use tax. This answer is the same as it was for PLR 09-024. For the details on the analysis, please review PLR 09-024.

##### ***Issue 2: Is Gift Code Issuer required to register to collect and remit Utah sales and use tax?***

The Gift Code Issuer is not required to register to collect and remit Utah sales and use tax. This answer is the same as it was for PLR 09-024. For the details on the analysis, please review PLR 09-024.

##### ***Issue 3: Are the Affiliate Internet Retailers 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?***

Affiliate Internet Retailers are not 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. This answer is the same as it was for PLR 09-024. For the details on the analysis, please review PLR 09-024.

Furthermore, Affiliated Internet Retailers do not have a registration requirement under the revised § 59-12-107. Under § 59-12-107(2)(b)(i), Affiliated Internet Retailers can

only be required to register, collect, and remit Utah sales and use tax based on another entity's presence in the state if that other entity is a *related seller* and has a certain *ownership relationship* with the Affiliated Internet Retailers. None of the entities you discussed meet both of these requirements. The Gift Code Issuer and the Website Operator are not related sellers under § 59-12-107(1)(b)(i) because they have no place of business in Utah. The Retail Establishments, the other Internet Retailers, the Processor, and the Wholesalers might be located in Utah, but they lack an ownership relationship with Affiliated Internet Retailers. Thus, none of the entities you have discussed can create a Utah sales tax registration requirement for Affiliated Internet Retailers.

***Issue 4: Would the above conclusions change if Gift Code Issuer sold the gift codes directly to Retail Establishments located in Utah?***

The above conclusions would not change if Gift Code Issuer sold the gift codes directly to the Retail Establishments located in Utah. This answer is the same as it was for PLR 09-024.

**V. 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

RBJ/aln  
12-010