FINAL PRIVATE LETTER RULING

REQUEST LETTER

15-007

DELIVERED CERTIFIED MAIL
AND VIA EMAIL
taxplr@utah.gov

August 20, 2015

Office of the Commission
Utah State Tax Commission
210 N 1950W
Salt Lake City, Utah 84134

Re: Request for Private Letter Ruling
Sales and Use Tax - Mobile Point of Sale Device

Commissioners:

Please allow this letter to serve as a request for a Private Letter Ruling (PLR) pursuant to Utah Admin. Code § R861-1A-34, with respect to the appropriate taxability of THE COMPANY's use of a mobile point of sale device (described below) within its restaurants in Utah.

The firm of TAX FIRM is authorized to request the tax opinion on behalf of the Company. An executed power of attorney and declaration of representative, Form TC-737, is attached hereto as Exhibit A.

The Company's identifying information, as required is set out below:

THE COMPANY
ADDRESS
CITY-1, STATE-1 #####

STATEMENT OF RELEVANT FACTS

THE COMPANY ("the Company") is a large, full service casual dining company with restaurant locations in Utah. The Company has initiated a pilot program incorporating the use of a mobile point of sale device (herein "Mobile Point of Sale Device" or "Device") at its restaurant locations. The Device accommodates tabletop menu, ordering, and payment in some of its Utah locations. The Device is an Android tablet with a touch screen interface that is located at each

table. It provides pictures/detailed descriptions of the menu items and allows customers to place drink, appetizer, and entree orders, and pay their check directly through the Device. The customer has the option to pay their guest check by credit card, debit card, or gift card on the Device. Alternatively, it can be paid through their server/wait staff if preferred.

The Mobile Point of Sale Device also allows restaurants *the option* to enhance the customer experience by allowing access to premium content located on the Device. This content could include news, sports, access to social media, selecting songs to be played on the restaurant's playlist as well as access to interactive games. The Company will charge separate fees for access to games on the Device, access to current news and social media, and for song selections. The game application software resides within each Device. During the pilot phase, the Company will charge only for game fees, and the use of the Device to access news content will be free.[1] The premium content fee will be included as a line item on the customer's food and beverage bill. The vendor ("Vendor") of the Mobile Point of Sale Device has indicated to the Company that at the average restaurant over 80% of the restaurant customers use the Device for ordering and/or payment at the end of the meal, while only 12-20% of the customers access any premium content located on the Device.

The owner of the Devices charges the Company a monthly service fee for the use of the Devices. Per the agreement between the Vendor and the Company, the Company will be responsible for the collection of the revenue generated by accessing the premium content and collection/remittance of any applicable state or local taxes imposed on the transactions. Additionally, the Vendor may also charge monthly commissions to the Company as a percentage of the game fee and song fee income. The Company will be required to pay to the Vendor a portion (or potentially all) of the revenue generated by these premium content fees.

In a possible alternative scenario, the Vendor will not charge the Company a monthly service fee for use of the devices, but will instead receive from the Company all of the premium content fees up to a maximum amount, at which time the fees in excess of such amount will be shared with the Company.

The Mobile Point of Sale Device was developed specifically for the restaurant industry. The primary purpose of the Device is to facilitate (1) order placement, (2) order add-ons, (3) checkout/payment, and (4) customer satisfaction surveys. The benefits of the Device to the restaurant industry include increased food and beverage sales, a quicker table turnover, and increased guest loyalty and satisfaction. To achieve these desired results, the Company will provide one Mobile Point of Sale Device at each individual table within each restaurant. The average restaurant will typically contain 50 tables, and on average 50 Mobile Point of Sale Devices would then be used at each establishment.

It is the Company's intent that access to premium content (including news, videos, sports, educational items, and interactive games) is ancillary to the true purpose of the Device as part of

[1] This fee structure is intended to be employed solely for the pilot program. Following the conclusion of the program, the Company may elect to charge a fee for access to any premium content on the Device.

the Company's established point of sale order and payment system. A picture of the Device and its intended use (e.g., ordering food through a mobile menu) is included below.

PICTURE REMOVED

ISSUES

1) Based on the information provided, does the Utah State Tax Commission ("Commission") consider the Device to constitute an "unassisted amusement device," the operational receipts from which are exempt from sales tax as provided by Utah Code Ann. §59-12-104(40)?

2) Should the Commission not consider the Mobile Point of Sale Device to be an unassisted amusement device, would the following fees charged for access to the premium content be subject to sales tax:

    a. Fee for unlimited access to games that are stored on the Device; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property or fees or admissions for amusement or entertainment?

    b. Fee for unlimited access to current news events and social media; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property, fees or admissions for amusement or entertainment, or telecommunications services?

    c. Fees for songs that are selected to be played in the restaurant; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property, fees or admissions for amusement or entertainment, or telecommunications services?

3) If a single premium content fee is charged for unlimited access to games stored on the Device and unlimited access to current news events and social media, how will Utah view this single charge?

4) Are the <u>monthly service fees</u> paid by the Company to the Vendor, who retains title to the devices, subject to tax as a rental or lease of personal property? If so, can the Company self-accrue use tax on the amount deemed as rental or lease payments to the Vendor?

5) Are the fees described as <u>commissions</u> paid by the Company to the Vendor, who retains title to the devices, subject to tax as a rental or lease of personal property? If so, can the Company self-accrue use tax on the amount deemed as rental or lease payments to the Vendor? Will the result change if the Device is owned by the Company rather than the Vendor?

6) If the Vendor does not charge the Company a monthly service fee for use of the Devices, but instead receives from the Company all of the premium content fees up to a maximum amount, at which time the fees in excess of such amount are shared with the Company, would such fees provided by the Company to the Vendor as commissions be viewed as payment for the rental or lease of the Devices? Will the result change if the Device is owned by the Company rather than owned by the Vendor?

7) If any of the premium content fees paid by restaurant customers are determined to be taxable as a rental or lease of personal property, does the Commission consider the Company's use of each Device to include both a sale to the customer and taxable business use, in which case both revenue streams would be subject to tax?

TAXPAYER'S POSITION

Premium Content Fees

The Company believes the fees charged to customers for access to premium content on the Mobile Point of Sale Device are exempt from sales tax in Utah. The Company would like confirmation as to this position.

Utah imposes sales and use tax on sales or rentals of tangible personal property (which includes prewritten software), telecommunications services, and amounts paid as admissions or user fees to places of amusement or entertainment, such as theaters, movies, operas, museums, planetariums, shows, and concerts.[2] Taxable admissions or user fees also include charges for access to video or video games, television programs, and cable or satellite broadcasts.[3]

Utah, however, specifically exempts sales or rentals of the right to use or operate unassisted amusement devices for the purpose of amusement, entertainment, or recreation.[4] The term "unassisted amusement device" includes amusement or skill devices, such as arcade games, that are started and stopped by the person that purchases or rents the right to use the device.[5]

The Company acknowledges that fees to access the premium content (i.e., news, videos, sports, educational items, and interactive games) would likely be considered taxable amusement or entertainment fees if not provided through the Mobile Point of Sale Device. However, because customers are solely responsible for starting and stopping the premium content and because customers remain in exclusive control of the Device while accessing the premium content, the Company asserts that the Mobile Point of Sale Device falls directly within the definition of an "unassisted amusement device," and the premium content fees are thus exempt.

[2] Utah Code Ann. §59-12-103(1); Utah Code Ann. §59-12-102(123)(b); Publication 25, SUT General Information, revised June 2014.
[3] Utah Admin. Code §R865-19S-108.
[4] Utah Code Ann. §59-12-104(40).
[5] Utah Code Ann. §59-12-102(133); Publication 25, SUT General Information, revised June 2014.

Should the Commission not consider the Mobile Point of Sale Device to be an unassisted amusement device, the Company would like confirmation as to whether any fees for access to premium content would be subject to sales tax, and if so, how those fees would be properly classified for sales and use tax purposes.

The Company acknowledges that when the customer pays a specific fee for the use of the Device to access premium content, the Commission may consider the payment of such fees to be payment for the rental or lease of personal property.[6] If the Commission were to determine that this is the correct interpretation of the taxability of the fee for sales tax purposes, the Company concedes that it would be required to collect tax on the fees at the current state tax rate.

The Company also understands that Utah imposes sales tax on telecommunications services, which include the electronic conveyance, routing, or transmission of audio, data, video, voice, or any other information or signal to a point, or among or between points. However, the term specifically excludes Internet access service, radio and television audio and video programming services, and products (including music) delivered electronically.[7]

Fees charged to customers for access to the game content, which consists solely of game application software that resides on each Device, do not enable customers to transmit, route, or convey data. Thus, there are no telecommunications services being provided in connection with the game fees. In addition, because telecommunication services do not include Internet access, radio and television audio and video programming services, the Company further believes that any premium content fees to access news and social media or to select songs from the restaurant playlist would not be considered telecommunications services.

Fees Paid to Vendor

The Company acknowledges that the Vendor's monthly service charges would likely be viewed as a rental or lease of the Devices.[8] The Company would like the Commission to confirm this position.

In addition, the Company also pays the Vendor (who retains title to the Devices) a commission based on a percentage of receipts from the game and song fees. The Company would like to confirm whether the commissions would be subject to sales tax as the rental or lease of personal property from the Vendor to the Company, and whether the result would change if the Device is owned by the Company rather than the Vendor.

If either the monthly service charges or commissions paid to the Vendor are subject to tax, the Company would also like to confirm whether it may self-accrue use tax on the amount deemed to be rental payments to the Vendor.

[6] Utah Admin. Code §R865-19S-32.
[7] Utah Code Ann. §59-12-102(127).
[8] Utah Admin. Code §R865-19S-32.

Finally, the Company requests guidance from the Commission regarding an alternative scenario in which the Vendor will not charge the Company a monthly service fee for use of the Devices, but will instead receive from the Company all of the premium content fees up to a maximum amount, at which time the fees in excess of such amount will be shared with the Company. Absent the monthly service fee, the Company seeks confirmation from the Commission as to whether the premium content fees provided by the Company to the Vendor as commissions would be viewed as payment for the rental or lease of the Devices and whether the result will change if the Device is owned by the Company rather than owned by the Vendor.

CONCLUSION

The Company believes the fees charged for access to premium content on the Mobile Point of Sale Device are exempt from sales tax in Utah as access to an "unassisted amusement device." The Company acknowledges that certain fees paid by the Company to the Vendor that owns the Devices may be subject to sales tax. The Company would like the Commission to provide its determinations for the Company's questions, as discussed above.

Due to the significant impact the Commission's determination could have on the restaurant industry in Utah, we would respectfully request a conference with the Commission to discuss these issues before a decision is issued.

If you have any questions, please contact the undersigned at PHONE NUMBER.

Respectfully submitted this 20th day of August 2015,

SIGNATURE REMOVED

NAME-1*
Director
TAX FIRM
ADDRESS -2
CITY-2, STATE-2 ZIP CODE

PHONE NUMBER, FAX NUMBER Facsimile
MOBILE NUMBER, Mobile

*TAX FIRM is not a law firm.

RESPONSE LETTER

PRIVATE LETTER RULING 15-007

June 29, 2016

NAME-1
Director
TAX FIRM
ADDRESS-2
CITY-2, STATE-2 ZIP CODE

RE: Private Letter Ruling Request – Sales and Use Taxability of Sales of Table Top Point of Sale ("POS") Device System in Restaurants

Dear NAME-1 :

This letter is in response to your request for a private letter ruling on behalf of your client, THE COMPANY ("Restaurant Company"). You have inquired about the Utah sales and use tax treatment of two types of transactions. The first is the sale, lease, or rental by a vendor ("Vendor") to the Restaurant Company of a POS device system that uses computer tablets as POS devices located on the restaurant tables. The second is the sales by the Restaurant Company to its customers of access through the computer tablets to premium content (news, sports, access to social media, selecting songs to be played on the restaurant's playlist, as well as access to interactive games).

As explained in section IV. Analysis below, the payments by the Restaurant Company to the Vendor for the POS device system are subject to Utah sales and use taxes, while the payments by the restaurant customers to the Restaurant Company for access to premium content are exempt from Utah sales and use taxes under § 59-12-104(40)(a).

This private letter ruling is comprised the following sections: I. Facts, II. Issues, III. Applicable Law, IV. Analysis, and V. Conclusions.

I. Facts

You have described the facts as follows:

> [Restaurant Company] ("the Company") is a . . . dining company with restaurant locations in Utah. The Company has initiated a pilot program incorporating the use of a mobile point of sale device (herein "Mobile Point of

Sale Device" or "Device") at its restaurant locations. The Device accommodates tabletop menu, ordering, and payment in some of its Utah locations. The Device is an Android tablet with a touch screen interface that is located at each table. It provides pictures/detailed descriptions of the menu items and allows customers to place drink, appetizer, and entree orders, and pay their check directly through the Device. The customer has the option to pay their guest check by credit card, debit card, or gift card on the Device. Alternatively, it can be paid through their server/wait staff if preferred.

The Mobile Point of Sale Device also allows restaurants the option to enhance the customer experience by allowing access to premium content located on the Device. This content could include news, sports, access to social media, selecting songs to be played on the restaurant's playlist as well as access to interactive games. The Company will charge separate fees for access to games on the Device, access to current news and social media, and for song selections. The game application software resides within each Device. During the pilot phase, the Company will charge only for game fees, and the use of the Device to access news content will be free. The premium content fee will be included as a line item on the customer's food and beverage bill. The vendor ("Vendor") of the Mobile Point of Sale Device has indicated to the Company that at the average restaurant over 80% of the restaurant customers use the Device for ordering and/or payment at the end of the meal, while only 12-20% of the customers access any premium content located on the Device.

The owner of the Devices charges the Company a monthly service fee for the use of the Devices. Per the agreement between the Vendor and the Company, the Company will be responsible for the collection of the revenue generated by accessing the premium content and collection/remittance of any applicable state or local taxes imposed on the transactions. Additionally, the Vendor may also charge monthly commissions to the Company as a percentage of the game fee and song fee income. The Company will be required to pay to the Vendor a portion (or potentially all) of the revenue generated by these premium content fees.

In a possible alternative scenario, the Vendor will not charge the Company a monthly service fee for use of the devices, but will instead receive from the Company all of the premium content fees up to a maximum amount, at which time the fees in excess of such amount will be shared with the Company.

The Mobile Point of Sale Device was developed specifically for the restaurant industry. The primary purpose of the Device is to facilitate (1) order placement, (2) order add-ons, (3) checkout/payment, and (4) customer satisfaction surveys. The benefits of the Device to the restaurant industry include increased food and beverage sales, a quicker table turnover, and increased guest loyalty and satisfaction. To achieve these desired results, the Company will provide one Mobile Point of Sale Device at each individual table within each restaurant. The

> average restaurant will typically contain 50 tables, and on average 50 Mobile Point of Sale Devices would then be used at each establishment.
>
> It is the Company's intent that access to premium content (including news, videos, sports, educational items, and interactive games) is ancillary to the true purpose of the Device as part of the Company's established point of sale order and payment system. . . .

During a telephone call, you explained more about the access to the premium content the Restaurant Company may sell to its customers. The customers' access to premium content is limited by the apps located on the computer tablets; customers do not have access to an internet browser through the computer tablets. After a conference call you provided a follow-up email with the following facts:

> [1.] Music that is played in the restaurant resides on location.
>
> [2.] A guest may select one song at a time/per payment, to be played in the restaurant.
>
> [3.] There is no Wi-Fi network access fee. The browser is actually on a closed system, so there is no internet available for premium content – it is all contained within the device.

With your request letter, you also provided the Utah State Tax Commission with a redacted Service Agreement between the Vendor and the Restaurant Company.

The terms found in your request for a private letter ruling need to be reconciled with terms used in the Service Agreement. Below, the meanings of certain terms found in the Service Agreement are discussed. Then, those terms are matched to the terms used in your request letter.

The Service Agreement includes Appendix One: Fees and Payment Terms, which states that the Restaurant Company shall pay the Vendor the "**Service Fees**" which are calculated per restaurant location per billing period based on a stated number of displays in that restaurant location.[1] The Service Agreement also includes a First Amendment, which states that the Restaurant Company shall pay to the Vendor "**Premium Content Fees**" if the Restaurant Company's "**Premium Content Revenue**" earned from the Restaurant Company's customers, exceeds the Service Fees paid by the Restaurant Company to the Vendor.[2] The Premium Content Fees paid by the Restaurant Company to the Vendor are calculated as a set percentage of the excess of the Premium Content Revenue received by the Restaurant Company over the Service Fees to be paid by the Restaurant Company.[3,4]

---

[1] Service Agreement, Appendix One, § 2.(a).
[2] First Amendment to Service Agreement, § 6.
[3] First Amendment to Service Agreement, § 6.
[4] The Service Agreement, Appendix One, § 2(c)-(d), includes a WIFI Network Access fee that is potentially payable by a restaurant company to the Vendor and a Promotions Fee that is potentially

Notably, the terms used in your request letter are not identical to the terms used in the Service Agreement and First Amendment. For the transactions between the Restaurant Company and its customers, in your letter the Restaurant Company charges the "**premium content fee**" to its customers and, in the Service Agreement and First Amendment, the Restaurant Company earns "Premium Content Revenue" from its customers. For the transactions between the Vendor and the Restaurant Company, in your letter, the Vendor charges the Restaurant Company a "**monthly service fee**" and "**monthly commissions**," and in the Service Agreement and First Amendment, the Vendor charges the Restaurant Company "Service Fees" and "Premium Content Fees." Below is a table that summarizes the information explained above.

Description	Terms Used in Request Letter	Terms Used in Service Agreement and First Amendment
A charge paid by the customers to the Restaurant Company; revenue of the Restaurant Company received from its customer	premium content fee	Premium Content Revenue
A charge by the Vendor to the Restaurant Company	monthly service fee	Service Fees
A charge by the Vendor to the Restaurant Company	monthly commissions	Premium Content Fees

The Service Agreement also includes information on the POS device system, which you described as the Mobile Point of Sale Device or Device in your letter.

The POS device system includes the Display, which includes "the monitor display [and its] Content,"[5] with the content including "the information, visuals, and images . . . displayed on the Display[,] printed from the Display[,] or printed on the email receipt [] provided to [the Customers]."[6] The POS device system's equipment includes more than just the Displays; it includes "any other components provided by [the Vendor] . . . including . . . the associated server, wifi controller, access points, [etc.][7] "[A]ll of the [e]quipment [involved in the POS device system] is and shall remain personal property of [the Vendor]."[8] The Vendor "(or its third-party providers as applicable) owns and retains title to all Equipment, all Intellectual Property, all portions thereof[,] any copies thereof, and any modifications thereto."[9] The POS device system is not a stand-alone system; the POS device system utilizes "online web-based

payable by the Vendor to a restaurant company. You have not inquired about the tax treatment of these two fees; thus, they are not analyzed in this private letter ruling.

[5] Service Agreement, § 1. Definitions, "Display."

[6] Service Agreement, § 1. Definitions, "Content."

[7] Service Agreement, § 1. Definitions, "Equipment."

[8] Service Agreement, § 4.2.4.2.

[9] Service Agreement, § 8.

applications and platform hosted by [Vendor] for [Restaurant Company]"[10] The Restaurant Company is responsible for providing the Vendor "VPN access . . . for the purpose of providing the Service."[11] The Vendor or its agents "install and configure . . . [the] Equipment at each of the Restaurants,"[12] and the Restaurant Company "shall permit [Vendor] or [Vendor's] Agents . . . reasonable physical access to the Restaurants."[13] The Service Agreement describes the Vendor as providing a "Service" to the Restaurant Company.[14] Overall, based on the above discussion, the POS device system involves both computer hardware and software.

As discussed below, the Service Agreement provides for the Vendor to control the software and for the Restaurant Company to have only use of the software. The Restaurant Company has "a non-exclusive, nontransferable license to access and use the []Service . . . for internal operations purposes only . . ."[15] The Vendor is to "create, manage, and have the right to modify at any time, any aspect of the Display . . ."[16] The Restaurant Company is restricted from "copy[ing] the Service . . . or Content . . . [and from] disassembl[ing], . . . reverse engineering, . . . tampering [with,] transfer[ring etc.] the Service."[17] The Vendor does not grant the Restaurant Company any "license, right, or interest in [the Vendor's] Intellectual Property."[18] The Vendor or the Vendor's agents "install and configure the . . . [POS device system,] perform POS system integration and testing . . ., provide an electronic copy of standard [] training materials . . ."[19] The Vendor or Vendor's agents "will . . . [h]ost the Service of the Restaurants [] and [] provide technical support of the [] Service . . ."[20] The Vendor "provide[s] content updates,"[21] "software updates,"[22] and "secur[es] any Privacy Information, customer names, addresses, and email addresses in its possession."[23]

II. Issues

In your request letter, you stated the following:

1) Based on the information provided, does the Utah State Tax Commission ("Commission") consider the Device to constitute an "unassisted amusement device," the operational receipts from which are exempt from sales tax as provided by Utah Code Ann. §59-12-104(40)?

[10] Service Agreement, § 1. Definitions, "Service."
[11] Service Agreement, § 4.2.3.
[12] Service Agreement, § 4.1.1.
[13] Service Agreement, § 4.2.3.
[14] Service Agreement, § 1. Definitions, "Service."
[15] Service Agreement, § 2.1.
[16] Service Agreement, § 2.3.
[17] Service Agreement, § 3.
[18] Service Agreement, § 3.
[19] Service Agreement, § 4.1.1.
[20] Service Agreement, § 4.1.2.
[21] Service Agreement, § 4.1.3.
[22] Service Agreement, § 4.1.4.
[23] Service Agreement, § 4.1.5.

2) Should the Commission not consider the Mobile Point of Sale Device to be an unassisted amusement device, would the following fees charged for access to the premium content be subject to sales tax:

   a. Fee for unlimited access to games that are stored on the Device; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property or fees or admissions for amusement or entertainment?

   b. Fee for unlimited access to current news events and social media; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property, fees or admissions for amusement or entertainment, or telecommunications services?

   c. Fees for songs that are selected to be played in the restaurant; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property, fees or admissions for amusement or entertainment, or telecommunications services?

3) If a single premium content fee is charged for unlimited access to games stored on the Device and unlimited access to current news events and social media, how will Utah view this single charge?

4) Are the monthly service fees paid by the Company to the Vendor, who retains title to the devices, subject to tax as a rental or lease of personal property? If so, can the Company self-accrue use tax on the amount deemed as rental or lease payments to the Vendor?

5) Are the fees described as commissions paid by the Company to the Vendor, who retains title to the devices, subject to tax as a rental or lease of personal property? If so, can the Company self-accrue use tax on the amount deemed as rental or lease payments to the Vendor? Will the result change if the Device is owned by the Company rather than the Vendor?

6) If the Vendor does not charge the Company a monthly service fee for use of the Devices, but instead receives from the Company all of the premium content fees up to a maximum amount, at which time the fees in excess of such amount are shared with the Company, would such fees provided by the Company to the Vendor as commissions be viewed as payment for the rental or lease of the Devices? Will the result change if the Device is owned by the Company rather than owned by the Vendor?

7) If any of the premium content fees paid by restaurant customers are determined to be taxable as a rental or lease of personal property, does the Commission consider the Company's use of each Device to include both a sale to the customer and taxable business use, in which case both revenue streams would be subject to tax?

The answers to your questions are in Section IV. Analysis, and a summary of the answers are in Section V. Conclusions.

III. Applicable Law

Utah Code Ann. § 59-12-103(1) imposes Utah sales and use tax and states the following 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 . . .
> . . . .
> (f) except as provided in Section 59-12-104, amounts paid or charged as admission or user fees for theaters, movies, operas, museums, planetariums, shows of any type or nature, exhibitions, concerts, carnivals, amusement parks, amusement rides, circuses, menageries, fairs, races, contests, sporting events, dances, boxing matches, wrestling matches, closed circuit television broadcasts, billiard parlors, pool parlors, bowling lanes, golf, miniature golf, golf driving ranges, batting cages, skating rinks, ski lifts, ski runs, ski trails, snowmobile trails, tennis courts, swimming pools, water slides, river runs, jeep tours, boat tours, scenic cruises, horseback rides, sports activities, or any other amusement, entertainment, recreation, exhibition, cultural, or athletic activity;
> . . . .
> (k) amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is:
> (i) stored;
> (ii) used; or
> (iii) otherwise consumed;
> (l) amounts paid or charged for tangible personal property if within this state the tangible personal property is:
> (i) stored;
> (ii) used; or
> (iii) consumed . . .
> . . . .

Utah Code Ann. § 59-12-102 defines multiple terms, including the following in part:

> (14) "Assisted amusement device" means an amusement device, skill device, or ride device that is started and stopped by an individual:

(a) who is not the purchaser or renter of the right to use or operate the amusement device, skill device, or ride device; and
(b) at the direction of the seller of the right to use the amusement device, skill device, or ride device.

. . . .

(26) "Computer" means an electronic device that accepts information:
(a) (i) in digital form; or
(ii) in a form similar to digital form; and
(b) manipulates that information for a result based on a sequence of instructions.

(27) "Computer software" means a set of coded instructions designed to cause:
(a) a computer to perform a task; or
(b) automatic data processing equipment to perform a task.

. . . .

(93) (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.

. . . .

(99)
(a) "Purchase price" and "sales price" mean the total amount of consideration:
(i) valued in money; and
(ii) for which tangible personal property, a product transferred electronically, or services are:
(A) sold;
(B) leased; or
(C) rented.

. . . .

(100) "Purchaser" means a person to whom:
(a) a sale of tangible personal property is made;
(b) a product is transferred electronically; or
(c) a service is furnished.

. . . .

(107) "Retail sale" or "sale at retail" means a sale, lease, or rental for a purpose other than:
(a) resale;
(b) sublease; or
(c) subrent.

. . . .

(109)(a) "Sale" means 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.
(b) "Sale" includes:

. . . .

(v) 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.

. . . .

(124) . . . .

(b) "Tangible personal property" includes:

. . . .

(v) prewritten computer software, regardless of the manner in which the prewritten computer software is transferred.

. . . .

(134) "Unassisted amusement device" means an amusement device, skill device, or ride device that is started and stopped by the purchaser or renter of the right to use or operate the amusement device, skill device, or ride device.

Utah Code Ann. § 59-12-104(40)(a) provides the following exemption from Utah sales and use taxes, stating in part:

> [S]ales or rentals of the right to use or operate for amusement, entertainment, or recreation an unassisted amusement device as defined in Section 59-12-102 . . . .

Utah Code Ann. § 59-12-211(12) provides the location of sales that involve the purchasers' use of software when there is not a transfer of a copy of the software, with Subsection (12) stating the following:

> (a) Notwithstanding any other provision of this section and except as provided in Subsection (12)(b), *if a purchaser uses computer software and there is not a transfer of a copy of that software to the purchaser*, the location of the transaction is determined in accordance with Subsections (4) and (5).
> (b) If a purchaser uses computer software described in Subsection (12)(a) at more than one location, the location of the transaction shall be determined in accordance with rules made by the commission in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
>
> (Emphasis added.)

When § 59-12-211(12) applies, subsections (4) and (5) of Utah Code Ann. § 59-12-211 locate transactions at an address for the purchaser.[24]

Utah Code Ann. § 59-12-107(2) imposes collection and remittance requirements on sellers engaging in certain activities within this state, as follows in part:

[24] For more explanation about § 59-12-211, you may contact the Taxpayer Services Division, Technical Research Unit, by phone at 801-297-7705, by email at taxmaster@utah.gov, or by mail at 210 N 1950 W, Salt Lake City, UT 84134.

(a) Except as provided in Subsection (2)(e) . . ., each seller shall pay or collect and remit the sales and use taxes imposed by this chapter if within this state the seller:
    (i) has or utilizes:
        (A) an office;
        (B) a distribution house;
        (C) a sales house;
        (D) a warehouse;
        (E) a service enterprise; or
        (F) a place of business similar to Subsections (2)(a)(i)(A) through (E);
    (ii) maintains a stock of goods;
    (iii) regularly solicits orders, regardless of whether or not the orders are accepted in the state, unless the seller's only activity in the state is:
        (A) advertising; or
        (B) solicitation by:
            (I) direct mail;
            (II) electronic mail;
            (III) the Internet;
            (IV) telecommunications service; or
            (V) a means similar to Subsection (2)(a)(iii)(A) or (B);
    (iv) regularly engages in the delivery of property in the state other than by:
        (A) common carrier; or
        (B) United States mail; or
    (v) regularly engages in an activity directly related to the leasing or servicing of property located within the state.

. . . .

(e) A person shall pay a use tax imposed by this chapter on a transaction described in Subsection 59-12-103(1) if:
    (i) the seller did not collect a tax imposed by this chapter on the transaction; and
    (ii) the person:
        (A) stores the tangible personal property or product transferred electronically in the state;
        (B) uses the tangible personal property or product transferred electronically in the state; or
        (C) consumes the tangible personal property or product transferred electronically in the state.

. . . .

IV. Analysis

As stated in the first paragraph of this letter, you have inquired about the Utah sales and use tax treatment of sales by the Vendor to the Restaurant Company of a POS device system that uses computer tablets located on the restaurant tables. You have also inquired about the Utah sales and use tax treatment of sales by the Restaurant Company to its customers of access to

premium content (news, sports, access to social media, selecting songs to be played on the restaurant's playlist as well as access to interactive games) through the computer tablets.

First, this Analysis section addresses in subsections A.-D. the Vendor's sales to the Restaurant Company of a POS device system. Second, this Analysis section addresses in subsections E.-F. the Restaurant Company's sales to its customers of access to premium content through the computer tablets.

A. The Vendor's Sales to the Restaurant Company of a POS Device System are Subject to Utah Sales and Use Taxes.

When the Restaurant Company uses the POS device system at restaurant locations in Utah, the Vendor's sales, leases, or rentals of the POS device system are subject to tax under § 59-12-103(1)(a), (k), and (l) as "amounts paid or charged for . . . retail sales of tangible personal property made within the state . . ."; as "amounts paid or charged for leases or rentals of tangible personal property if within this state the tangible personal property is . . . used . . . or . . . otherwise consumed"; and as "amounts paid or charged for tangible personal property if within this state the tangible personal property is . . . used . . . or . . . consumed . . ."[25]

For the transaction presented, the Utah sales and uses taxes are calculated based on the purchase price of the POS device system. Utah Code Ann. § 59-12-102(99) defines purchase price as "the total amount of consideration . . . valued in money . . . for which tangible personal property, a product transferred electronically, or services are: . . . sold; . . . leased; or . . . rented." For the POS device system, the total amount of consideration for which the POS device system is sold, leased, or rented includes both the monthly service fee ("Service Fees" in the Service Agreement) and the monthly commissions ("Premium Content Fees" in the Service Agreement).

In the Service Agreement, the Premium Content Fees are calculated in part using the Premium Content Revenue the Restaurant Company earns from its customers. The Service Agreement, however, does not state the Vendor charges the Premium Content Fees for providing the premium content to the Restaurant Company. Assuming the Vendor charges the Premium Content Fees for providing the premium content to the Restaurant Company, these fees would still be subject to Utah sales and use taxes. For the games, the Vendor is selling the Restaurant Company use of the Vendor's game software, which is prewritten computer software. Prewritten computer software is tangible personal property under § 59-12-102(124)(b)(v), and the sale of this tangible personal property is taxable under § 59-12-103(1)(a), (k), and (l). For the news and social media, the Vendor is selling the Restaurant Company use of the Vendor's app, which is likewise prewritten computer software and tangible personal property, the sale of which is taxable. For the songs, the Vendor is selling the Restaurant Company use of the Vendor's prewritten computer software to play the songs and might also be selling the Restaurant Company the songs that are stored digitally at the restaurant locations. The sales of either the

[25] Section 59-12-103 uses the term "retail sale." This term is defined in § 59-12-102(107) as "a sale, lease, or rental for a purpose other than: (a) resale; (b) sublease; or (c) subrent."

software or the songs, or both, are subject to Utah sales and use taxes under § 59-12-103(1)(a), (k), and (l).

B. Assuming the Restaurant Company Were to Own the Computer Hardware Used for the POS Device System Located at the Restaurants, the Vendor's Sale to the Restaurant Company of the Use of the Vendor's Computer Software for the POS Device System Would Still be Subject to Utah Sales and Use Taxes.

You inquired whether the Utah sales and use tax treatment will change if the Restaurant Company were to own the Device instead of the Vendor owning it. In summary, the tax treatment would not change in such a situation. As discussed in the previous subsection A. of this Analysis section, when the Vendor owns the computer hardware and software of the POS device system, the sale of that POS device system to the Restaurant Company is taxable under § 59-12-103(1)(a), (k), and (l). Alternatively, when the Vendor owns the software for the POS device system, but does not own the computer hardware located at the restaurants, the Vendor's sale of the use of its computer software to the Restaurant Company is still taxable under § 59-12-103(1)(a), (k), and (l), as explained below.

Under your facts, some of the Vendor's software, such as the game application software, is located on the computer hardware at the restaurant and some of the Vendor's software is accessed remotely from the restaurant locations. The remote access is seen in the Service Agreement, § 1. Definitions, "Service." The Vendor's software at both locations meets the definition of "computer software," found in § 59-12-102(27).

No facts suggest the Vendor designed and developed its computer software specifically for the Restaurant Company. Under § 59-12-102(93)(a), "prewritten computer software means computer software that is not designed and developed . . . by the . . . creator of the computer software . . . to the specifications of a specific purchaser" (internal quotes omitted). Thus, the Vendor's sale of use of its software to the Restaurant Company is a sale of the use of prewritten computer software.

Under § 59-12-102(124)(b)(v), the Utah Code specifically states that prewritten computer software is tangible personal property. Transactions involving tangible personal property are subject to Utah sales and use taxes under § 59-12-103(1)(a), (k), and (l).

For purposes of § 59-12-103, § 59-12-102(109)(b)(v) broadly defines "sale" to include "any transaction under which *right to . . . 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" (emphasis added).

Under the alternative scenario presented in this subsection, the Vendor is selling to the Restaurant Company the right to use the Vendor's prewritten software so that the Restaurant Company will have a working POS device system. The Vendor's sale of the use of its prewritten software is the sale of tangible personal property. Such a sale is taxable under § 59-12-103(1)(a), (k), and (l) when the sale is made within Utah.

Section 59-12-211(12) addresses situations in which "a purchaser uses computer software and there is not a transfer of a copy of that software to the purchaser." In such situation, § 59-12-211 instructs "the location of the transaction is determined in accordance with Subsection (4)." Under subsection (4) of § 59-12-211, "the location of the transaction is the [purchaser's] address [as recorded in] the seller's records . . ." Thus, the Vendor's sales of the use of the Vendor's prewritten software should be located based on the Restaurant Company's address(es).[26]

The agreement between the Vendor and the Restaurant Company is titled "Service Agreement" and describes the sale from the Vendor to the Restaurant Company as the sale of a service. However, this private letter ruling concludes the Vendor is not selling a service, based on both the facts presented and an analysis of the essence, or primary object, of the transaction, which is explained below.

The Utah Supreme Court has explained the essence of the transaction 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) (internal citations removed).

To decide whether the essence of the transaction is one for use of the Vendor's software or for a service provided by the Vendor, one must consider the nature and extent of the use of the software compared with that of the services provided by the Vendor's personnel. That analysis is as follows. The Vendor's prewritten software is essential to the transaction between the Vendor and the Restaurant Company; the software is necessary for the Restaurant Company's computer hardware to function as a POS device system. Furthermore, the services provided by the Vendor's personnel are designed to support the Restaurant Company's use of the Vendor's software. As seen in the Service Agreement, the Vendor's employees or agents install and configure the software at the restaurant locations, perform POS system integration and testing, and provide training materials, technical support, software updates, and security. All of these facts show that the essence of the transaction is for the software, not for the services of the Vendor's personnel.

[26] If you want more direction about this area, you may review Section (4) of the Utah Administrative Code R865-19S-92, available on the tax.utah.gov website. You may also contact the Taxpayer Services Division, Technical Research Unit, using the contact information at the end of footnote 24.

C. The Restaurant Company's Duty to Pay Utah Use Taxes Depends on Whether the Vendor Collected Utah Sales Taxes on the Transaction. If the Vendor Has a Duty to Collect and Remit Utah Sales Taxes, the Vendor and Restaurant Company Cannot Transfer Through an Agreement the Vendor's Duty to Collect and Remit the Taxes, from the Vendor to the Restaurant Company.

You inquired if the Restaurant Company could self-accrue use taxes on the purchase of the POS device system from the Vendor. Utah Code Ann. § 59-12-107(2)(a) imposes a Utah sales and use tax collection and remittance requirement on sellers engaging in certain activities in Utah. Utah Code Ann. § 59-12-107(2)(e) imposes a Utah use tax payment requirement on purchasers engaging in taxable transactions in Utah for which the seller did not collect Utah sales taxes. If the Vendor collects and remits Utah sales taxes on the lease of the POS device system, or alternatively on the sales of the use of the Vendor's software, then the Restaurant Company would not pay Utah use taxes on that transaction. If the Vendor does not collect and remit Utah sales taxes on the lease of the POS device system, or alternatively on the sale of the use of the Vendor's software, then under § 59-12-107(2)(e), the Restaurant Company must pay Utah use taxes on that transaction. If under § 59-12-107(2)(a) the Vendor is required to collect and remit Utah sales and use taxes because of the extent of the Vendor's activities within Utah, the Vendor and Restaurant Company cannot, through their agreement, transfer the Vendor's requirement to collect and remit Utah sales taxes from the Vendor to the Restaurant Company.

D. Answers to Your Questions Numbered 4-6.

Addressed below are your issues numbered 4-6, which concern the Company's purchase of the POS device system from the Vendor.

You asked the following:

> 4) Are the <u>monthly service fees</u> paid by the Company to the Vendor, who retains title to the devices, subject to tax as a rental or lease of personal property? If so, can the Company self-accrue use tax on the amount deemed as rental or lease payments to the Vendor?

The monthly service fees paid by the Restaurant Company to the Vendor are part of the purchase price of the POS device system and, as such, are subject to Utah sales and use taxes. The Restaurant Company must pay Utah use taxes on the transaction if the Vendor did not collect Utah sales taxes on the transaction. The analysis for subsection C. above applies here.

You asked the following:

> 5) Are the fees described as <u>commissions</u> paid by the Company to the Vendor, who retains title to the devices, subject to tax as a rental or lease of personal property? If so, can the Company self-accrue use tax on the amount deemed as rental or lease payments to the Vendor? Will the result change if the Device is owned by the Company rather than the Vendor?

The commissions (termed "Premium Content Fees" in the Service Agreement and First Amendment) paid by the Restaurant Company to the Vendor are part of the purchase price of the POS device system and, as such, are subject to Utah sales and use taxes. The Restaurant Company must pay Utah use taxes on the transaction if the Vendor did not collect Utah sales taxes on the transaction. The analysis for subsection C. above applies here. The result will not change if the computer hardware of the POS device system is owned by the Restaurant Company instead of the Vendor.

You asked the following:

> 6) If the Vendor does not charge the Company a monthly service fee for use of the Devices, but instead receives from the Company all of the premium content fees up to a maximum amount, at which time the fees in excess of such amount are shared with the Company, would such fees provided by the Company to the Vendor as commissions be viewed as payment for the rental or lease of the Devices? Will the result change if the Device is owned by the Company rather than owned by the Vendor?

Under this scenario, the commissions (termed "Premium Content Fees" in the Service Agreement and First Amendment) paid by the Restaurant Company to the Vendor comprise the full purchase price of the POS device system and, as such, are subject to Utah sales and use taxes. The result will not change if the hardware of the POS device system is owned by the Restaurant Company instead of the Vendor. If the Restaurant Company owns the hardware, the Vendor will still be engaging in the taxable sale of the use of the Vendor's prewritten computer software.

E. The Restaurant Company's Sales to its Customers of Access to Premium Content Through the Computer Tablets are Exempt from Utah Sales and Use Taxes Under § 59-12-104(40), as Sales of Use of Unassisted Amusement Devices.

Section 59-12-103(1)(f) imposes Utah sales taxes on "amounts paid or charged as . . . user fees for . . . any . . . amusement, entertainment, recreation, exhibition, cultural, or athletic activity." Section 59-12-104(40)(a) provides an exemption for "sales or rentals of the right to use or operate for amusement, entertainment, or recreation an unassisted amusement device." Section 59-12-102(134) defines "[u]nassisted amusement device" as "an amusement device [or] skill device . . . that is started and stopped by the purchaser or renter of the right to use or operate the amusement device [or] skill device . . . ." Section 59-12-102(14) defines "[a]ssisted amusement device" as "an amusement device [or] skill device . . . that is started and stopped by an individual . . . who is not the purchaser or renter of the right to use or operate the amusement device [or] skill device . . . ; and . . . [started and stopped] at the direction of the seller of the right to use the amusement device [or] skill device . . . ."

The premium content fees charged by the Restaurant Company to its customers are "amounts . . . charged as . . . user fees for . . . [an] amusement, entertainment, recreation, . . .

activity" (*see* § 59-12-103(1)(f)). These fees charged by the Restaurant Company are exempt from sales and use taxes under § 59-12-104(40)(a), as being for "sales or rentals of the right to use or operate for amusement, entertainment, or recreation an unassisted amusement device." When the customer uses the computer tablets located on the table tops, the customer is using the POS device system as an amusement device. The computer tablets meet the definition of an unassisted amusement device because the customers start and stop the amusement activities on the computer tablets. The customer starts and stops the news, social media, interactive games, and songs using the computer tablets; and the Restaurant Company's employees are not assisting the starting and stopping. For the songs, the customer is the person selecting the song to be played in the restaurant and the Restaurant Company's employees have no active role in playing that song for the customer. Instead, the song is played using the Restaurant Company's POS device system and connected sound system.

The lack of activity by the Restaurant Company's employees can be contrasted with the activities of the employees of another, unrelated company. In a prior Commission decision for Appeal No. 09-0049, the Commission found that a company's go-karts used on the company's track were *assisted* amusement devices because the company's customers were "waived on and then off the track by employees at the direction of the [company] and the operation [of the go-karts] [was] assisted and supervised by the [company]'s employees."[27]

F. Answers to Your Questions Numbered 1-3 and 7.

Addressed below are your issues numbered 1-3 and 7, which concern the Restaurant Company's sales to its customers of access to premium content through the computer tablets.

You asked the following:

1) Based on the information provided, does the Utah State Tax Commission ("Commission") consider the Device to constitute an "unassisted amusement device," the operational receipts from which are exempt from sales tax as provided by Utah Code Ann. §59-12-104(40)?

Yes, the Restaurant Company's sales to its customers of access to premium content is exempt from Utah sales taxes based on § 59-12-104(40).

You asked the following:

2) Should the Commission not consider the Mobile Point of Sale Device to be an unassisted amusement device, would the following fees charged for access to the premium content be subject to sales tax:

[27] Prior Commission decisions are available through the www.tax.utah.gov website.

a. Fee for unlimited access to games that are stored on the Device; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property or fees or admissions for amusement or entertainment?

b. Fee for unlimited access to current news events and social media; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property, fees or admissions for amusement or entertainment, or telecommunications services?

c. Fees for songs that are selected to be played in the restaurant; if so, are such fees properly categorized as amounts paid for the rental or use of tangible personal property, fees or admissions for amusement or entertainment, or telecommunications services?

Because the Restaurant Company's sales to its customers of access to premium content through the computer tablets are exempt from Utah sales taxes, your questions listed above do not apply.

You asked the following:

3) If a single premium content fee is charged for unlimited access to games stored on the Device and unlimited access to current news events and social media, how will Utah view this single charge?

The Utah Tax Commission would view the single charge for unlimited access as exempt from Utah sales taxes under § 59-12-104(40).

You asked the following:

7) If any of the premium content fees paid by restaurant customers are determined to be taxable as a rental or lease of personal property, does the Commission consider the Company's use of each Device to include both a sale to the customer and taxable business use, in which case both revenue streams would be subject to tax?

Based on our previous answers discussed above, your question listed for item 7) does not apply.

V. Conclusions

The payments by the Restaurant Company to the Vendor for the POS device system or alternatively for the use of the Vendor's software for the POS device system are subject to Utah sales and use taxes. These payments include the monthly service fees and the commissions, which are termed Service Fees and Premium Content Fees, respectively, in the Service Agreement. If the Vendor does not collect Utah sales taxes on the payments, then the Restaurant

Company must pay Utah use taxes on the payments. If the Vendor has a Utah collection and remittance requirement, the Vendor and the Restaurant Company cannot transfer the Vendor's requirement to the Restaurant Company through their agreement.

The payments by the restaurants' customers to the Restaurant Company for access to premium content are exempt from Utah sales and use taxes under § 59-12-104(40), which applies to "sales . . . of the right to use . . . for amusement, entertainment, or recreation an unassisted amusement device." If the Restaurant Company charges a single premium content fee for unlimited access to games, current events, and social media, the Commission would view that charge as exempt under § 59-12-104(40).

The Tax Commission's conclusions are based on the facts as you described them and the Utah law currently in effect. Should the facts be different or if the law were to change, 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, please feel free to contact the Commission.

Additionally, you may also appeal the private letter ruling in the following two ways.

First, you may file a petition for declaratory order, which would serve to challenge the Commission's interpretation of statutory language or authority under a statute. This petition must be in written form, and submitted within thirty (30) days after the date of this private letter ruling. You may submit your petition by any of the means given below. **Failure to submit your petition within the 30-day time frame could forfeit your appeal rights and will be deemed a failure to exhaust your administrative remedies.** Declaratory orders are discussed in Utah Administrative Code R861-1A-34 C.2., available online at http://tax.utah.gov/commission/effective/r861-01a-034.pdf, and in Utah Administrative Code R861-1A-31, available online at http://tax.utah.gov/commission/effective/r861-01a-031.pdf.

Second, you may file a petition for redetermination of agency action if your private letter ruling leads to an audit assessment, a denial of a claim, or some other agency action at a division level. This petition must be written and may use form TC-738, available online at http://tax.utah.gov/forms/current/tc-738.pdf. Your petition must be submitted by any of the means given below, within thirty (30) days, generally, of the date of the notice of agency action that describes the agency action you are challenging.

You may access general information about Tax Commission Appeals online at http://tax.utah.gov/commission-office/appeals. You may file an appeal through any of the means provided below:

- **Best way**—by email: taxappeals@utah.gov
- By mail: Tax Appeals
  USTC
  210 North 1950 West
  Salt Lake City, UT 84134
- By fax: 801-297-3919

For the Commission,[28]

Rebecca L. Rockwell
Commissioner

RLR/aln
15-007

[28] For this private letter ruling, the members of the Commission are Commission Chair Valentine, Commissioner Cragun, and Commissioner Rockwell. Commissioner Pero is excused.