

**AMENDED FINAL PRIVATE LETTER RULING**

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17-003 Amended

**RESPONSE LETTER**

**AMENDED PRIVATE LETTER RULING 17-003<sup>1</sup>**

July 12, 2018

NAME-1  
Chief Financial Officer  
COMPANY  
P.O. Box #####  
CITY, STATE AND ZIP CODE  
EMAIL ADDRESS

Dear NAME-1:

This letter is in response to your request for a private letter ruling for COMPANY (“Company”), which sells membership subscriptions (“subscriptions” or “membership(s)”) to licensed PROFESSIONALS and their staff members (“Customer(s)” or “Member(s)”). Some of the Company’s Members are located in Utah. According to your letter, the “subscriptions provide Members access to three primary categories of services: education, PROFESSIONAL document drafting software tools, and an interactive community to communicate with other Members.”

You asked the following question: “Is [the Company’s] Membership subscription fee subject to Utah sales and use tax[es]?” This private letter ruling concludes that the Company’s Membership subscription fee sold to Utah Customers is subject to Utah sales and use taxes. Section III. of this private letter ruling includes the analysis for this conclusion.

Through your request letter, you provided us with the following facts about the Company’s sales of memberships.

I. Facts

In your letter, you explained the following, in part:

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<sup>1</sup> This amended private letter ruling corrects the date of the prospective enforcement shown in Subsection III.B. No other corrections were made to Private Letter Ruling 17-003 issued on June 29, 2018.

Members gain access to the Membership by logging in through a Membership portal on [the Company's] website with unique Member identification . . . Members do not need to download any software to their local computers or servers to gain access to their Membership. Many of the Membership features reside on a computer server or servers maintained by [the Company] and [the Company] hosts such features in the cloud.[] . . . [The Company] invoices Members a single nonitemized fee for the Membership.

#### A. *The Services*

[The] subscriptions provide Members access to three primary categories of services: education, PROFESSIONAL document drafting software tools, and an interactive community to communicate with other Members.

##### 1. Educational Resources

The education resources consist of in-person and online continuing PROFESSIONAL education [(“CONTINUING EDUCATION”)] . . . and business education like marketing and leadership. For both in-person and online CONTINUING EDUCATION courses, licensed PROFESSIONALS comprise the faculty who author or present the materials. In-person CONTINUING EDUCATION events are typically three to four day conferences with featured speakers, workshops, and panel discussions. Online CONTINUING EDUCATION is an online library of blogs, downloadable articles, hosted articles, and recorded webinars.

##### 2. Document Drafting Tools

PROFESSIONAL document drafting tools are cloud-hosted, delivered through a software-as-a-service (SaaS) platform.[] Members [with a] subscription may draft various . . . documents from [the Company's] templates . . . .

Once a Member selects a template document, each document draft begins with an “interview.” The interview involves the Member selecting the structure, standard terms, and clauses according to the Member's client's needs which will manipulate the document. . . . The selections the Member makes in the interview will populate throughout the document.

Upon completing these selections, the interview will produce a document for the Member to review in a Document Preview screen. Thereafter, the Member may review and further customize the document . . . before exporting the document as a downloadable Microsoft Word file. Thus, while any given document begins as a template, the final document is customized to each Member's client's needs.

While it is only a small part of the document drafting tool, Members may download and install the [Company] ribbon into their word-processor to properly assemble the document they drafted. . . . Once the ribbon is downloaded, the user can install it locally or on a network. When the ribbon is installed, it formats the document drafted by using [the Company] software in the way that the Member has chosen by running macros when the document is opened. Unless the ribbon is installed, the document will not be properly formatted through Microsoft Word.

[The Company's] employees and contractors update and modify the . . . subscription[] document libraries consistent with PROFESSIONAL developments, new strategies, and increased flexibility through the addition of options and to correct bugs or other errors. In addition, new documents may be developed that expand the scope of the content sets. [The Company's] group of subject matter experts and programmers work together to produce the interview questions and document language, and to program the new or revised material. They are assisted by the product managers, who help determine priorities and the content support manager who works with Members to determine whether there are problems with the systems that need to be corrected. Currently, nine full time employees are in this group, but [the Company] has several open positions at this time. [The Company] also employs contractors from time to time who may perform style editing, programming and[/]or testing.

The subject matter experts, the product managers and the manager of the programming team all have PROFESSIONAL degrees. The content support manager and one of the programmers are PARAPROFESSIONALS. PROFESSIONAL research resources are frequently consulted during the editorial process, and [the Company] also reaches out regularly to other experts. Ideally, the team spends the vast majority of their working hours producing minor releases and major enhancements. Testing is done at several stages of the enhancement process, and for final testing [the Company] may request assistance from other [Company] employees outside of the Content Team, as well as bring in contractors to assist.

### 3. Interactive Community

Memberships provide Members with access to [a] network of nearly 5,000 licensed PROFESSIONALS nationwide. Upon accessing their Memberships through the login portal, Members' landing pages notify them to Community Updates and Upcoming Events. Members utilize one another as resources through online groups and forums through their Memberships. Members post in topical threads on a forum to consult other members with relevant expertise.

The online groups provide Members with a virus/malware free communication platform where Members can ask questions, discuss important issues and changes within the law, strategize on best practices, learn about upcoming in-person forum events, share articles, documents, and materials, and

get help from the [Company] Team, if needed. Features of the online community include access to specialized groups (state, topical, general membership, referral, etc[.]), document sharing, upcoming virtual or in-person events, customized viewing (ability to hide threads), and access to information that has been shared previously (archives).

[The Company] understands the important contribution that in-person and virtual state and topical forums provide Members. [The Company] provides marketing, event registration, coaching, and administrative support for all Forums. Through [the Company's] Forum Resource Guide, [the Company] shares best practices, ideas for organizing and managing a successful forum, and important resources compiled from the experiences of other forums.

Each [Company] forum has an online community group. This allows the group to continue their conversations and collegiality outside of their meetings. They use these groups to post questions, discuss ideas, plan and promote upcoming events, and share documents and articles.

## B. *Governing Documents*

The Membership Agreement (the "Agreement") governs Memberships (enclosed with this letter as **Exhibit A**). In addition, the Membership Agreement incorporates the End User License Agreement ("EULA") by reference in paragraph 4 (the EULA is enclosed with this letter as **Exhibit B**). The EULA expressly applies to the document drafting software portion of Memberships.

### 1. Critical Membership Agreement Provisions

Section 2 of the Agreement, Membership Subscriptions, expressly makes clear that a Membership is not limited to PROFESSIONAL document drafting software: "Member desires to subscribe to, and [the Company] agrees to provide to Member, the following membership subscription together with all software, content, tools, materials, community forum, and other features of the membership subscriptions . . . all as described on the [Company] website located at WEB ADDRESS.["]

Section 4 of the Agreement incorporates the EULA by reference.

### 2. Critical EULA Provisions

Section 1 grants Members a license to access Memberships. Section 2 sets forth the Membership benefits detailed in section I.A-C above [sic]. Section 3 prohibits Members from using the document drafting tools in a fashion similar to PROFESSIONAL document producing services like COMPANY-2. Section 4 describes that access to Memberships on [the Company] maintained servers may be gained through the Membership portal, and that the access is limited to the

right to use the Membership. In addition, section 4 expressly provides that Members may gain access to Memberships through a downloadable version, but that it is not necessary to gain access to Memberships. Section 6 expressly reserves ownership and title to the Membership to [the Company]; title never passes to Members.

### 3. Additional Information

In addition, enclosed are two sample invoices that [the Company] submits to Members (enclosed with this letter as **Exhibit C**) with light redactions to preserve the privacy of [the Company's] Members. [The Company] encourages the Commission to visit WEB ADDRESS for further information regarding Memberships. Enclosed as **Exhibit D**, you will also find a slide deck that [the Company] has used in sales presentations.

## II. Applicable Law

Utah Code Annotated § 59-12-103(1) imposes tax on certain transactions, stating the following in part:

A tax is imposed on the purchaser . . . on the purchase price or sales price for amounts paid or charged for the following transactions:

- (a) retail sales of tangible personal property made within the state;
- . . . .
- (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:
  - . . . .
  - (ii) used; or
  - (iii) consumed; and
- (m) amounts paid or charged for a sale:
  - (i) (A) of a product transferred electronically; . . .
  - . . . .
  - (ii) regardless of whether the sale provides:
    - (A) a right of permanent use of the product; or
    - (B) a right to use the product that is less than a permanent use, including a right:
      - (I) for a definite or specified length of time; and
      - (II) that terminates upon the occurrence of a condition.

Utah Code Ann. § 59-12-102 defines various terms, stating in part:

As used in this chapter:

....

(18) (a) "Bundled transaction" means the sale of two or more items of tangible personal property, products, or services if the tangible personal property, products, or services are:

- (i) distinct and identifiable; and
- (ii) sold for one nonitemized price.

(b) "Bundled transaction" does not include:

....

(iv) the retail sale of tangible personal property and a service if:

- (A) the tangible personal property:
  - (I) is essential to the use of the service; and
  - (II) is provided exclusively in connection with the service; and
- (B) the service is the true object of the transaction;

....

(d) (i) For purposes of Subsection (18)(a)(ii), property sold for one nonitemized price does not include a price that is separately identified by tangible personal property, product, or service on the following, regardless of whether the following is in paper format or electronic format:

- (A) a binding sales document; or
- (B) another supporting sales-related document that is available to a purchaser.

(ii) For purposes of Subsection (18)(d)(i), a binding sales document or another supporting sales-related document that is available to a purchaser includes:

- (A) a bill of sale;
- (B) a contract;
- (C) an invoice;
- (D) a lease agreement;
- (E) a periodic notice of rates and services;
- (F) a price list;
- (G) a rate card;
- (H) a receipt; or
- (I) a service agreement.

....

(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.

....  
(35) "Digital audio-visual work" means a series of related images which, when shown in succession, imparts an impression of motion, together with accompanying sounds, if any.

(36)(a) "Digital audio work" means a work that results from the fixation of a series of musical, spoken, or other sounds.

(b) "Digital audio work" includes a ringtone.

(37) "Digital book" means a work that is generally recognized in the ordinary and usual sense as a book.

....  
(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.

....  
(95) (a) Except as provided in Subsection (95)(b), "product transferred electronically" means a product transferred electronically that would be subject to a tax under this chapter if that product was transferred in a manner other than electronically.

(b) "Product transferred electronically" does not include:

(i) an ancillary service;

(ii) computer software; or

(iii) a telecommunications service.

....  
(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.

....  
(109) "Retail sale" or "sale at retail" means a sale, lease, or rental for a purpose other than:

(a) resale;

(b) sublease; or

(c) subrent.

....  
(110)(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.

.....

(125).....

- (b) "Tangible personal property" includes:

.....

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

.....

Utah Code Ann. § 59-12-211(3) provides the location of sales that involve the purchasers' receipt of tangible personal property, with Subsection § 59-12-211(3) stating the following:

Subject to Subsection (10), and except as provided in Subsections (7), (8), (9), (11), and (14), if tangible personal property, a product transferred electronically, or a service that is subject to taxation under this chapter is not received by a purchaser at a business location of a seller, *the location of the transaction is the location where the purchaser takes receipt of the tangible personal property or service.*

(Emphasis added.)

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 § 59-12-211(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.<sup>2</sup>

Utah Code Ann. § 59-12-104(25) and (78) exempt from Utah sales and use taxes the following:

(25) a product purchased for resale in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product;

.....

(78) amounts paid or charged to access a database:

- (a) if the primary purpose for accessing the database is to view or retrieve information from the database; and
- (b) not including amounts paid or charged for a:
  - (i) digital audiowork;
  - (ii) digital audio-visual work; or
  - (iii) digital book . . .

### III. Analysis

As stated previously in this private letter ruling, you asked, “Is [the Company’s] Membership subscription fee subject to Utah sales and use tax[es]?” This private letter ruling concludes that the Company’s sales of memberships to Utah Customers are subject to Utah sales and use taxes. The analysis supporting the conclusion is in Subsection III.A. below. Additionally, prospective enforcement is discussed in Subsection III.B.

#### **A. The Company’s Sales of Memberships to Utah Customers are Subject to Utah Sales and Use Taxes.**

This subsection includes the following items:

- A list of the membership benefits divided into five distinct items (Subsection III.A.1.).
- Analysis about why the sale of a membership is not excluded from the definition of bundled transaction (Subsection III.A.2.).
- Analyses of the taxability of each of the five benefits if sold separately (Subsections III.A.3. through III.A.9.).

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<sup>2</sup> For more direction on the application of § 59-12-211 to the situation you have presented, 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 summary of the taxability of each of the five benefits if sold separately (Subsection III.A.10.).
- A discussion of taxability of the five benefits when sold together for one nonitemized price (Subsection III.A.11.).

*1. The Benefits of the Memberships can be Divided into Five Distinct Items.*

The Company's membership provides Members with the following benefits:

- PROFESSIONAL Document Drafting Software
- Interactive Community
- In-Person Educational Resources
- Online Educational Resources—downloadable for offline viewing
- Online Educational Resources—not downloadable for offline viewing; viewable only while online

To analyze the taxability of the purchase price of a membership, the taxability of the underlying items must be considered. As seen with the Commission's analyses of unrelated memberships in Private Letter Ruling ("PLR") 16-005 and of renewal fees in PLR 15-008, one must "look[] beyond that label [attached to a product] to examine the underlying nature of the transaction."<sup>3</sup> This private letter ruling uses this approach to determine the taxability of the Company's memberships. When a Utah Customer purchases a membership, the Utah Customer is actually purchasing the five benefits listed above.

Subsections III.A.3. through III.A.10., below, include analyses of the taxability of the five items listed above if each item were sold separately. Next, Subsection III.A.11. includes an analysis of the taxability of the five items if they were sold together for one nonitemized price. Thus, this private letter ruling analyzes the Company's sale of a membership as a bundled transaction.

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<sup>3</sup> Private letter rulings can be accessed through the tax.utah.gov website.

2. *The Sale of a Membership is Not Excluded from the Statutory Definition of Bundled Transaction.*

In footnote 4 of your request letter, you asserted that a sale of a membership should not be treated as a bundled transaction. You stated the following:

[B]ecause [the Company] does not sell any component part of Memberships individually, it would be inappropriate to conclude that any individual Membership feature is “distinct and identifiable.”

This private letter ruling reaches a different conclusion. The Utah Code does not require a seller to sell separately the component parts of a transaction before that transaction can be a bundled transaction. *See* PLR 16-005 and PLR 15-008, which analyze the taxability of membership benefits for companies unrelated to the Company of this private letter ruling.<sup>4</sup>

In footnote 4 of your request letter, you asserted a second reason that you think the Company’s sale of a membership should not be treated as a bundled transaction. You stated the following:

[W]e believe the express exclusion to bundled transactions in Utah Code § 59-12-102(18)(b)(iv) would exclude Memberships from taxation as a bundled transaction for the same reasons as stated in IV.A and IV.B.

In Section IV.A. and Section IV.B. of your request letter, you considered all individual membership features as a whole and concluded that the primary object of the transaction or the true object of the transaction is the nontaxable sale of the Company’s services and not a taxable sale of tangible personal property. As explained below, this private letter ruling reaches a different conclusion.

Section 59-12-102(18)(b)(iv) is a statutory exclusion from the definition of “bundled transaction.” Section 59-12-102(18)(b)(iv) states the following:

"Bundled transaction" does not include:

....

(iv) the retail sale of tangible personal property and a service if:

(A) the tangible personal property:

(I) is essential to the use of the service; and

(II) is provided exclusively in connection with the service; and

(B) the service is the true object of the transaction . . .

To apply § 59-12-102(18)(b)(iv), one must determine the tangible personal property and the services involved. The tangible personal property includes the Company’s PROFESSIONAL document drafting software. *See* Subsection III.A.3., which explains that if the use of the PROFESSIONAL document drafting software were sold separately, that membership benefit would be the sale of tangible personal property. The services include access to the interactive

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<sup>4</sup> *See above* note 2.

community, the in-person educational resources, and the online educational resources viewable only while online. *See* Subsections III.A.4., III.A.5., and III.A.9., which explain that if these items were sold separately, these items would be sales of nontaxable services. The downloadable online educational resources are products transferred electronically. *See* Subsection III.A.7., which explains that if this item were sold separately, this item would be the sale of a product transferred electronically.

Next, to apply § 59-12-102(18)(b)(iv), one must apply the facts of the Company's sale of a membership to the language found in the exclusion.

Under § 59-12-102(18)(b)(iv), for a transaction to be excluded from the definition of bundled transaction, the transaction must first be "the retail sale of tangible personal property and a service." The Company's sale of a membership involves the retail sale of tangible personal property and services. However, it also includes the sale of a product transferred electronically. Thus, the Company's sale of a membership does not clearly fit within the exclusion of § 59-12-102(18)(b)(iv); nevertheless, this private letter ruling will further analyze the transaction using § 59-12-102(18)(b)(iv).

Under § 59-12-102(18)(b)(iv)(A)(I), for a transaction to be excluded from the definition of bundled transaction, "the tangible personal property . . . [must be] essential to the use of the service." Applying § 59-12-102(18)(b)(iv)(A)(I), the sale of the tangible personal property (the sale of the use of the PROFESSIONAL document drafting software) is not essential to the use of the services (the access to the interactive community, the in-person educational resources, and the online educational resources viewable only while online). Thus, the Company's sale of a membership does not meet the exclusion found in § 59-12-102(18)(b)(iv).

Under § 59-12-102(18)(b)(iv)(A)(II), for a transaction to be excluded from the definition of bundled transaction, "the tangible personal property . . . [must be] provided exclusively in connection with the service." You explained that "[the Company] does not sell any component part of Memberships individually." Applying § 59-12-102(18)(b)(iv)(A)(II), the sale of the tangible personal property (the sale of the use of the PROFESSIONAL document drafting software) is provided exclusively in connection with the services (the access to the interactive community, the in-person educational resources, and the online educational resources viewable only while online). Thus, this requirement is not preventing the Company's sale of a membership from meeting the exclusion found in § 59-12-102(18)(b)(iv). However, other subsections of § 59-12-102(18)(b)(iv), discussed above and below this paragraph, are preventing the Company's sale of a membership from meeting this exclusion.

Under § 59-12-102(18)(b)(iv)(B), for a transaction to be excluded from the definition of bundled transaction, "the service [must be] the true object of the transaction." Applying § 59-12-102(18)(b)(iv)(B), the services (the access to the interactive community, the in-person educational resources, and the online educational resources viewable only while online) are not the only true object of the transaction. Instead, the Company's sale of a membership involves multiple distinct and identifiable items, the sale of each of which can have a separate true object of the transaction. The concept of true object of the transaction is the same as the concepts of primary object of the transaction or essence of the transaction. For this private letter ruling, the

essence of the transaction analysis was applied in Subsection III.A.4. to the sale of access to the interactive community. That analysis concluded that the services, not the software involved, were the essence of the transaction for that membership benefit. However, for the membership benefit involving the use of the Company's PROFESSIONAL document drafting software, the essence of the transaction is the sale of the use of the prewritten software and not the sale of the Company's services relating to that software. See Subsection III.A.3. for the analysis of the PROFESSIONAL document drafting software.

In summary, § 59-12-102(18)(b)(iv) does not exclude the Company's sale of a membership from being a bundled transaction for the following reasons. First, the language of § 59-12-102(18)(b)(iv) is not clearly met because the transaction involves a product transferred electronically. Second, the language of § 59-12-102(18)(b)(iv)(A)(I) is unmet because the sale of the tangible personal property (the sale of the use of the PROFESSIONAL document drafting software) is not essential to the use of the services (the access to the interactive community, the in-person educational resources, and the online educational resources viewable only while online). Third, the language of § 59-12-102(18)(b)(iv)(B) is unmet because the services (the access to the interactive community, the in-person educational resources, and the online educational resources viewable only while online) are not the single true object of the transaction. Instead, there are multiple primary objects of the transaction involved, one of which is the use of tangible personal property (the PROFESSIONAL document drafting software).

3. *If the Use of the PROFESSIONAL Document Drafting Software Were Sold Separately, the Benefit Would be Taxable Under § 59-12-103(1)(a), (k), and (l).*

One of the membership benefits is the right for a Member to use the Company's PROFESSIONAL document drafting software. The Company's PROFESSIONAL document drafting software is prewritten computer software. If the Company were to sell use of this software separately, those sales would be subject to Utah sales and use taxes when the Members are located in Utah. The conclusions above are further explained in the paragraphs below. The paragraphs below first explain Utah Code § 59-12-103, § 59-12-102(110), and § 59-12-211 and then apply those sections to the Company's sale of memberships.

Under § 59-12-103(1)(a), (k), and (l), Utah imposes sales and use taxes on retail sales, leases, rentals, and uses of tangible personal property when such transactions occur in this state. Under § 59-12-102(125)(b)(v), tangible personal property includes prewritten computer software.<sup>5</sup> Thus, retail sales, leases, rentals, and uses of prewritten computer software are subject to Utah sales and use taxes when those transactions occur in this state. If the Company's PROFESSIONAL document drafting software is prewritten computer software and the Company's sales of that software occur in this state, then the Company's sales of that software are subject to Utah sales and use taxes.

Under § 59-12-102(110), "sale" is broadly defined to include "any transaction under which *right to possession, operation, or use* of any article of tangible personal property is granted

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<sup>5</sup> Prewritten computer software is defined in § 59-12-102(93) and analyzed later in this ruling.

under a lease or contract and the transfer of possession would be taxable if an outright sale were made” (emphasis added). Therefore, a sale of a *right to use* prewritten computer software is subject to Utah sales and use taxes if that sale occurs in this state. Thus, if the Company’s PROFESSIONAL document drafting software is prewritten computer software and the Company sells a Member *the use* of that software and that sale occurs in this state, then the Company’s sale of *the use* of that software is subject to Utah sales and use taxes.

Section 59-12-211(12) provides the sourcing for a situation in which “a purchaser uses computer software and there is not a transfer of a copy of that software to the purchaser.” For this situation, § 59-12-211(12) provides that “the location of the transaction is determined in accordance with Subsections (4) and (5).” Subsections (4) and (5) of § 59-12-211 locate transactions at an address for the purchaser.<sup>6</sup>

Alternatively, § 59-12-211(3) generally provides the sourcing for a situation in which a purchaser receives tangible personal property, which includes when a Customer receives a copy of prewritten computer software. For this situation, § 59-12-211(3) generally sources the transaction to “the location where the purchaser takes receipt of the tangible personal property.”

Thus under § 59-12-211, if the Company’s PROFESSIONAL document drafting software is prewritten computer software and the Company sells a Member use of that computer software, through either online access or a downloaded copy, and the *Member’s address or location is in Utah*, then the Company’s sale of the use of that software is subject to Utah sales and use taxes.

As explained below, the Company’s PROFESSIONAL document drafting computer software is prewritten computer software and the Company sells a Member use of that computer software. Therefore, the Company’s sale of the use of that software to Utah Customers is subject to Utah sales and use taxes.

The Company’s PROFESSIONAL document drafting computer software is prewritten computer software.<sup>7</sup> Prewritten computer software is defined in § 59-12-102(93) as follows:

"[P]rewritten 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.

Applying the above definition to the Company’s PROFESSIONAL document drafting software, the Company’s software is prewritten computer software because the Company’s PROFESSIONAL document drafting software “is not designed and developed by [the Company] . . . to the specifications of a specific [Member].”

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<sup>6</sup> See above note 1.

<sup>7</sup> “Computer” and “computer software” are defined in § 59 12-102(26) and § 59 12-102(27), respectively.

The Company sells a Member use of that computer software. The Company and the Members enter into an End User License Agreement. Through that agreement, the Company provides Members a license to use the PROFESSIONAL document drafting software to draft customized PROFESSIONAL documents for clients of Members. The Members are to use the software to draft the documents in connection with the Members' delivery of PROFESSIONAL services to those clients. Additionally, Section 4 of the End User License Agreement allows a Member to download a copy of the PROFESSIONAL document drafting software, as well.

Because the Company sells use of the Company's prewritten computer software, § 59-12-211(12) and § 59-12-211(3) apply to source these transactions based on Members' addresses or locations. When the Members' addresses or locations are in Utah, these sales are subject to Utah sales and use taxes.

In footnote 5 of your request letter, you asked for the "Commission's opinion on whether Membership subscription fees may be characteriz[ed] as sales for resale with the appropriate documentation from Members." Utah Code § 59-12-104(25) exempts from Utah sales and use taxes "a product purchased for resale in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product." The Company's Members sell nontaxable PROFESSIONAL services to the Members' clients; the Members do not sell a "manufactured or compounded product." Members likely provide custom-drafted PROFESSIONAL documents for the Members' clients as part of the nontaxable PROFESSIONAL services. However, the essence of these transactions is still the nontaxable PROFESSIONAL services used to draft the PROFESSIONAL documents. The essence is not the custom-drafted PROFESSIONAL documents the Members provide to their clients. Because the Members are not selling any custom-drafted PROFESSIONAL documents as tangible personal property or as products transferred electronically, the Members cannot purchase use of the Company's PROFESSIONAL document drafting software as "a product purchased for resale."

4. *If the Access to the Interactive Community Were Sold Separately, that Access Would Not be Taxable Under § 59-12-103(1).*

Another membership benefit is the ability to participate in an interactive community comprised of other Members of the Company. If the Company were to sell this benefit separately, the Company would be selling a service that is not subject to Utah sales and use taxes, as explained below.

The taxability of the interactive community benefit depends on whether the essence, or primary object, of the transaction is for a service or for the use of the Company's software. If the essence of the transaction is for a service, the Company's sale of the interactive community benefit would not be subject to Utah sales and use taxes because that service is not listed as taxable in § 59-12-103(1). If the essence of the transaction is for the use of the Company's computer software and the purchasing Member's address is in Utah, the Company's sale involving the interactive community would be subject to sales and use taxes under

§ 59-12-103(1)(a), (k), or (l). An explanation of the taxability of sales of use of prewritten computer software is located in the preceding Subsection III.A.3.

The Utah Supreme Court 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).

First, the paragraphs below discuss the software and services utilized to provide the membership benefit of the interactive community. Next, the paragraphs below determine that the software utilized “is merely incidental to an essentially service transaction” (*see Id.*).

Access to the interactive community involves the use of software, which is tangible personal property under § 59-12-102(125)(b)(v). Under the facts you presented, the software notifies Members of Community Updates and Upcoming Events. The software also allows Members to form online groups and participate in online forums. The software additionally allows the Members to get help from the Company Team, as needed.

Access to the interactive community also involves services. You explained that access to this interactive community is valuable to the Members because this access allows Members to receive valuable information from other Members. More specifically, you explained the following:

Members utilize one another as resources through online groups and forums through their Memberships. [Members consult other Members by] post[ing] in topical threads on a forum.

. . . .

Members can ask questions, discuss important issues and changes within the law, strategize on best practices, learn about upcoming in-person forum events, share articles, documents, and materials, and get help from the [Company] Team, if needed. . . . [Members receive information from other Members via] specialized groups (state, topical, general membership, referral, etc[.]), document sharing, upcoming virtual or in-person events, customized viewing (ability to hide threads), and access to information that has been shared previously (archives).

. . . .

Each [Company] forum has an online community group. This allows the group to continue their conversations and collegiality outside of their meetings. They use

these groups to post questions, discuss ideas, plan and promote upcoming events, and share documents and articles.

After reviewing the software and services involved, the essence of the sale of access to the interactive community is the sale of a service. The service is access to the interactive community comprised of other Members of the interactive community. The value of this access is based on the information Members share with other Members. The Company's software that supports this access to the interactive community is merely incidental to that service. The Company is using or consuming that software in providing the Members with the service of access to the interactive community.

*5. If the In-person Educational Resources Were Sold Separately, the Benefit Would Not be Taxable Under § 59-12-103(1).*

Another membership benefit is the in-person educational resources. If the Company were to sell the in-person educational resources separately, the Company would be selling a service that is not subject to Utah sales and use taxes.

You explained, "In-person CONTINUING EDUCATION events are typically three to four day conferences with featured speakers, workshops, and panel discussions." You also explained, "For . . . in-person . . . CONTINUING EDUCATION courses, licensed PROFESSIONALS comprise the faculty who author or present the materials." These in-person educational services provided to Members are not subject to Utah sales and use taxes because they are not a service listed as taxable in § 59-12-103(1). However, the Company would be subject to sales and use taxes on the tangible personal property, products transferred electronically, or taxable services that the Company consumes in Utah in providing these educational services.

*6. The Online Educational Resources can be Divided into Those that are Downloadable for Offline Viewing and Those that are Not Downloadable for Offline Viewing.*

You explained that for the online CONTINUING EDUCATION courses, as with the in-person CONTINUING EDUCATION courses, "licensed PROFESSIONALS comprise the faculty who author or present the materials." You also explained, "Online CONTINUING EDUCATION is an online library of blogs, downloadable articles, hosted articles, and recorded webinars."<sup>8</sup> Based on your limited explanation, some educational resources are downloadable for offline viewing and other resources might not be downloadable for offline viewing. Thus, this private letter ruling will provide separate analyses for these two groups of online educational resources.

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<sup>8</sup> Live webinars are not included in this list. Depending on the facts, the taxation of the live webinars may be similar to the taxation of the in-person educational resources.

7. *If the Online Educational Resources that are Downloadable for Offline Viewing Were Sold Separately, the Benefit Would be Taxable Under § 59-12-103(1)(m).*

If the Company were to sell separately the online educational resources that are downloadable for offline viewing, the Company would be selling products transferred electronically, which transactions are subject to sales and use taxes, as explained below.

The online educational resources that are downloadable for offline viewing meet the definition of product transferred electronically. Section 59-12-102(95)(a) defines “product transferred electronically” as “a product transferred electronically that would be subject to a tax under this chapter if that product was transferred in a manner other than electronically.” Downloaded articles, audio recordings, and audio-video recordings can meet this definition. If the articles, audio recordings, and audio-video recordings were “transferred in a manner other than electronically,” such as through CDs or DVDs, then the articles, audio recordings, and audio-video recordings would be subject to Utah sales and use taxes if the Customers are located in Utah.

The sales and/or uses in Utah of online educational resources that are downloadable for offline viewing are subject to Utah sales and use taxes under § 59-12-103(1)(m), as “amounts paid or charged for a sale: (i) (A) of a product transferred electronically . . .” Under § 59-12-103(1)(m)(ii), the sale of the online educational resources that are downloadable for offline viewing remain taxable “regardless of whether the sale provides: (A) a right of permanent use of the product; or (B) a right to use the product that is less than a permanent use, including a right: (I) for a definite or specified length of time; and (II) that terminates upon the occurrence of a condition.”

In summary, if the Company’s articles, audio recordings, and audio-video recordings are downloadable, the Company would be selling products transferred electronically and these sales would be subject to Utah sales and use taxes if the sales and/or uses are in Utah. Therefore, if the Company sold separately the online educational resources that are downloadable for offline viewing, these sales would be subject to Utah sales and use taxes if the sales and/or uses are in Utah.

The above analysis and conclusion are consistent with the analysis found in PLR 16-005.<sup>9</sup> PLR 16-005 involved the sale of memberships that provided multiple membership benefits. The membership benefits in PLR 16-005 included a “VIDEOS BENEFIT—downloading movies and TV shows,” an “E-BOOK BENEFIT—downloading books,” and a “MUSIC BENEFIT—downloading music.” PLR 16-005 concluded that these benefits are subject to Utah sales and use taxes.

8. *If the Online Educational Resources that are Downloadable for Offline Viewing Were Sold Separately, that Membership Benefit Would Not Meet the*

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<sup>9</sup> See above note 2.

*Exemption found in § 59-12-104(78), for Amounts Paid or Charged to Access a Database.*

In footnote 7 of your request letter, you asked about the applicability of the exemption found § 59-12-104(78), for amounts paid or charged to access a database, to the sale of the memberships. In footnote 7, you wrote the following:

[W]e note that while *Utah’s statutory exemption under Utah Code § 59-12-10[4](78) for amounts paid or charged to access a database may exempt the education resources* and interactive community from taxation, it would likely not have the same effect on the document drafting tools. If the Commission believes that this exemption would in fact provide a basis for exempting Memberships by, for instance, determining that the true object of Membership subscriptions is access to an exempt database of education resources and interactive community features, we respectfully request the opportunity to supplement this ruling request to that effect.

(Emphasis added.)

In response to your footnote 7, the exemption found in Utah Code § 59-12-104(78), for amounts paid or charged to access a database, would not exempt the amounts paid or charged for the separate sale of the online educational resources that are downloadable for offline viewing, as explained below.

As explained previously in this subsection, the separate sale of the online educational resources that are downloadable for offline viewing might involve downloads of the Company’s articles, audio recordings, and audio-video recordings.

Subsection 59-12-104(78) exempts from Utah sales and use taxes the following:

[A]mounts paid or charged to access a database:

- (a) if the primary purpose for accessing the database is to view or retrieve information from the database; and
- (b) not including amounts paid or charged for a:
  - (i) digital audiowork;
  - (ii) digital audio-visual work; or
  - (iii) digital book . . .

For the online educational resources that are downloadable for offline viewing, the amounts paid or charged might be “to access a database,” as required in § 59-12-104(78). Also, “the primary purpose for accessing the database [might be] to view or retrieve information from the database,” as required in § 59-12-104(78)(a). Thus, the requirements of § 59-12-104(78)(a) might be met.<sup>10</sup>

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<sup>10</sup> Because of the limited facts presented, it is not possible to make a definitive determination concerning the application of § 59-12-104(78)(a) to the facts.

However, even assuming § 59-12-104(78)(a) is met, the requirements of § 59-12-104(78)(b) are not met. Subsection (78)(b) excludes from the exemption “amounts paid or charged for a . . . digital audiowork [or for a] digital audio-visual work.” Section 59-12-102(35) and (36) define “digital audio-visual work” and “digital audio work,” as follows:

- (35) "Digital audio-visual work" means a series of related images which, when shown in succession, imparts an impression of motion, together with accompanying sounds, if any.
- (36)(a) "Digital audio work" means a work that results from the fixation of a series of musical, spoken, or other sounds. . . .

The Company’s audio recordings are digital audio works. The Company’s audio-video records are digital audio-visual works. Thus, the amounts paid or charged for the online educational resources that are downloadable for offline viewing are also amounts paid or charged for digital audioworks or digital audio-visual works for purposes of § 59-12-104(78)(b). Thus, the amounts paid or charged for the online educational resources that are downloadable for offline viewing meet the exclusion found in § 59-12-104(78)(b). Therefore, the amounts paid or charged for the online educational resources that are downloadable for offline viewing do not meet the exemption found in § 59-12-104(78).

9. *If the Online Educational Resources that are Not Downloadable for Offline Viewing and Are Viewable Only While Online Were Sold Separately, the Benefit Would Not be Taxable Under § 59-12-103(1).*

If the Company were to sell separately the online educational resources that are not downloadable for offline viewing but are instead viewable only while online, the Company would be selling a service that is not subject to Utah sales and use taxes.

Items that are not downloadable but are available only for online viewing are not products transferred electronically. Section 59-12-102(95)(a) defines “product transferred electronically” as “a product *transferred* electronically that would be subject to a tax under this chapter if that product was transferred in a manner other than electronically” (emphasis added). When a product is downloaded for offline viewing, the whole product is transferred. When a product is not downloadable for offline viewing but instead only viewable while online, the whole product is not necessarily transferred, especially with audio or audio-video products. Instead, only parts of the products are transferred or buffered for the online viewing.

Previous Commission decisions have distinguished between online viewing only and downloading a file for offline viewing.

PLR 16-005, which was discussed previously in Subsection III.A.7., involved the sale of memberships that provided multiple membership benefits. In addition to the membership benefits that were downloadable and discussed in the Subsection III.A.7., the membership benefits of PLR 16-005 also included the following benefits which were not downloadable for offline use: “VIDEOS BENEFIT—viewing without downloading movies and TV shows

streamed over the Internet” and “MUSIC BENEFIT—listening to, without downloading, music streamed over the Internet.” PLR 16-005 concluded that these benefits would not be subject to Utah sales and use taxes if the company in PLR 16-005 had sold these membership benefits separately from the other membership benefits which were downloadable for offline use.

PLR 12-002, another prior Commission decision, involved news articles, streamed music, and streamed video.<sup>11</sup> In PLR 12-002, a company sold customers “access to an online, internet-based news website.” The content of that news website included articles, music streams, and video streams. In PLR 12-002, the Commission concluded that the sales of the “News Service” were not subject to Utah sales and use taxes. However, the Commission warned in footnote 1 that the ruling of PLR 12-002 did “not apply to electronic subscriptions to news magazines.” The Commission explained, “In such situations, the news magazines’ content is transferred to the customers and the customers are not merely viewing the content via the internet.”

In summary, the analysis of the online educational resources that are not downloadable for offline viewing but are instead viewable only while online is consistent with the analyses of PLR 16-005 and PLR 12-002.

*10. The Taxability of the Membership Benefits if Sold Separately are Summarized Below.*

If the five items were sold separately, their taxability would be as follows:

<u>Item</u>	<u>Utah Sales Tax Treatment</u>
● PROFESSIONAL Document Drafting Software	Taxable
● Interactive Community	Not taxable
● In-Person Educational Resources	Not taxable
● Online Educational Resources—downloadable for offline viewing	Taxable
● Online Educational Resources—not downloadable for offline viewing; viewable only while online	Not taxable

*11. The Taxability of the Five Items When Sold Together for One Nonitemized Price*

Next, the sales taxability of the five items sold together must be analyzed. The five items sold together are “distinct and identifiable” and “sold for one nonitemized price,” so their sale

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<sup>11</sup> See above note 2.

meets the definition of “bundled transaction” found in § 59-12-102(18)(a). Section 59-12-103(2)(d)(iii)(A) provides the following:

[T]he entire bundled transaction is subject to taxation . . . unless: . . . the seller is able to identify by reasonable and verifiable standards the tangible personal property, product, or service that is not subject to taxation . . . from the books and records the seller keeps in the seller’s regular course of business . . .

Thus, if the Company knows the values of the items not subject to tax versus the value of the items subject to tax, then only the portion of the bundled transaction relating to the taxable items will be subject to Utah sales and use taxes. Otherwise, the entire purchase price of the five items of the membership will be subject to Utah sales and use taxes.

### **B. Prospective Enforcement is Appropriate for Your Situation.**

Based on the facts and circumstances of your unique situation, the Commission finds that prospective enforcement of Utah sales and use tax collection is appropriate for the sales of the memberships. Your request letter dated December 13, 2016, was received by the Office of the Commission on March 16, 2017. This private letter ruling is being issued over one year later. This delay in our response to you along with the complexity of your issue justify prospective enforcement. Thus, as of **thirty (30) days from** the date of this **amended** private letter ruling, the Company is obligated to collect Utah sales and use taxes on the Company’s sales of the memberships to Utah Customers.

### IV. Conclusions

The Company’s sales of memberships to Utah Customers are subject to Utah sales and use taxes. The Company’s sale of a membership is a bundled transaction. The sales of the following items if sold separately would be subject to tax:

- PROFESSIONAL Document Drafting Software
- Online Educational Resources—downloadable for offline viewing

The sales of the following items if sold separately would not be subject to tax:

- Interactive Community
- In-Person Educational Resources
- Online Educational Resources—not downloadable for offline viewing; viewable only while online

For the bundled transaction, if the Company knows the values of the items not subject to tax versus the value of the items subject to tax, then only the portion of the bundled transaction

relating to the taxable items will be subject to Utah sales and use taxes. Otherwise, the entire purchase price of the five items of the membership will be subject to Utah sales and use taxes.

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](mailto: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,

Rebecca L. Rockwell  
Commissioner

RLR/aln  
17-003 Amended

cc.  
[WORDS REMOVED]