

FINAL PRIVATE LETTER RULING

REQUEST LETTER

19-004

On Tue, Jul 2, 2019 at 1:18 PM, NAME-1, EMAIL ADDRESS, wrote:

Good afternoon NAME-2,

Thank you for taking the time to discuss the application of the new marketplace facilitator law (SB 168, effective Oct. 1, 2019) to our client's two advertising business lines last month.

As discussed on the call, our client is prepared to begin collecting and remitting tax to the Utah State Tax Commission ("USTC") for third-party sales that are made through its marketplace platforms. In addition to those marketplace platforms, the client also has two distinct advertising service business lines that merely advertise third-party goods and services. For these advertising models, our client is compensated almost exclusively based on the number of clicks that an advertising merchant's ad receives and the client only knows whether a potential customer clicked on the link to the advertising merchant's website (i.e., the client does not know whether a sale was completed, the amount of the sale, the items within the sale, or the shipping address of the customer making the purchase). The client is never involved in the payment processing of the ultimate sale (if any) completed on the third-party merchant's website. As discussed, many other states have explicitly enacted laws to impose certain obligations on these "referral" business models.

The company is seeking informal written confirmation from the USTC that the "referrals" made via its two advertising service business lines do not give rise to a collection and remittance obligation to our client. We believe this is the case under Utah law (as amended by SB 168) for the following reasons:

The client does not "facilitate the sale of a seller's product through a marketplace that the person owns, operates or controls" for the referrals because the client does not do any of activities listed in Utah Code Ann. § 59-12-102(68)(a)(ii) (as amended by SB 168, effective October 1, 2019).

In addition, the client does not make any "sales" through either advertising business line. Any potential "sales" that may occur are traditional remote sales that take place on the third-party advertising merchant's website or platform after the referral is complete. Our client is not privileged to any such "sales" data for the vast majority of referrals made through the two advertising business lines.

Thank you for your time and attention to this matter. If you or your USTC colleagues need additional information from the client to consider this request for informal written confirmation, please do not hesitate to reach out.

NAME-1
Associate

LAW FIRM, ADDRESS

PHONE NUMBER, EMAIL

[WORDS REMOVED]

RESPONSE LETTER

August 21, 2019

NAME-1
LAW FIRM
ADDRESS
CITY, STATE
EMAIL

Dear NAME-1:

This letter is in response to your request for information for your unnamed client (“Client”). Client facilitates third-party sales through the Client’s marketplace. These sales are not at issue for this private letter ruling. Client also sells internet-based advertising of third-party merchants’ goods and services. For this advertising, the third-party merchants compensate Client based on either the number of clicks or the number of views that the advertisements receive. By clicking an advertisement, an internet user is transferred to a third-party merchant’s website, through which that internet user might choose to make a purchase from that third-party merchant.

You have asked about the applicability of 2019 Senate Bill 168, effective October 1, 2019, to Client for the sales by third-party merchants to internet users who have clicked on the advertisement linking the internet users with the third-party merchants’ websites. This private letter ruling applies 2019 Senate Bill 168 and concludes that Client does not have a Utah sales and use tax collection/remittance requirement for the sales by third-party merchants to internet users who have clicked on the advertisements linking the internet users with the third-party merchants’ websites.

I. Facts

You explained your facts, as follows:

[O]ur client is prepared to begin collecting and remitting tax to the Utah State Tax Commission (“USTC”) for third-party sales that are made through its marketplace platforms. In addition to those marketplace platforms, the client also has two distinct advertising service business lines that merely advertise third-party goods and services. For these advertising models, our client is compensated almost exclusively based on the number of clicks that an advertising merchant’s ad receives and the client only knows whether a potential customer clicked on the link to the advertising merchant’s website (i.e., the client does not know whether a sale was completed, the amount of the sale, the items within the sale, or the shipping address of the customer making the purchase). The client is never involved in the payment processing of the ultimate sale (if any) completed on the

third-party merchant's website. As discussed, many other states have explicitly enacted laws to impose certain obligations on these "referral" business models.

....

In response to questions, you explained the compensation that Client receives when Client is not compensated based on the number of clicks. More specifically, you explained that in those situations, Client is compensated based on the number of times an advertising merchant's advertisement is viewed.

II. Applicable Law

In general, Utah Code Ann. § 59-12-103(1) imposes sales and use taxes on sales of tangible personal property, on products transferred electronically, and on certain enumerated services when those sales are located in Utah.

In general, Utah Code Ann. § 59-12-107(2) requires certain sellers to pay or collect and remit Utah sales and use taxes.

2019 Senate Bill 168 enacted Utah Code Ann. § 59-12-107.6 (effective 10/1/19). Section 59-12-107.6 (effective 10/1/19) requires marketplace facilitators to pay or collect and remit Utah sales and use taxes under certain circumstances. Section 59-12-107.6 (effective 10/1/19) states the following in part:

- (1) A marketplace facilitator shall pay or collect and remit sales and use taxes imposed by this chapter in accordance with Section 59-12-107:
 - (a) if the marketplace facilitator meets one or more of the criteria provided for in Subsection 59-12-107(2)(a) or (b); and
 - (b) on the sales the marketplace facilitator made on the marketplace facilitator's own behalf.
- (2)
 - (a) A marketplace facilitator shall pay or collect and remit sales and use taxes imposed by this chapter in accordance with Subsection (3) if the marketplace facilitator, in the previous calendar year or the current calendar year, makes sales of tangible personal property, products transferred electronically, or services on the marketplace facilitator's own behalf or facilitates sales on behalf of one or more marketplace sellers:
 - (i) that exceed \$100,000; or
 - (ii) in 200 or more separate transactions.
 - (b) For purposes of determining if a marketplace facilitator meets or exceeds one or both thresholds described in this Subsection (2), a marketplace facilitator shall separately total:

- (i) the marketplace facilitator’s sales; and
- (ii) any sales the marketplace facilitator makes or facilitates for a marketplace seller.

....

Additionally, 2019 Senate Bill 168 amended Utah Code Ann. § 59-12-102 to add definitions for “affiliate,” “marketplace,” “marketplace facilitator,” and “marketplace seller.” Section 59-12-102 (effective 10/1/19) states the following in part:

- (4) “Affiliate” or “affiliated person” means a person that, with respect to another person:
 - (a) has an ownership interest of more than 5%, whether direct or indirect, in that other person; or
 - (b) is related to the other person because a third person, or a group of third persons who are affiliated persons with respect to each other, holds an ownership interest of more than 5%, whether direct or indirect, in the related persons.

....

- (67) (a) “Marketplace” means a physical or electronic place, platform, or forum where tangible personal property, a product transferred electronically, or a service is offered for sale.
- (b) “Marketplace” includes a store, a booth, an Internet website, a catalog, or a dedicated sales software application.

- (68) (a) “Marketplace facilitator” means a person, including an affiliate of the person, that enters into a contract, an agreement, or otherwise with sellers, for consideration, to facilitate the sale of a seller’s product through a marketplace that the person owns, operates, or controls and that directly or indirectly:
 - (i) does any of the following:
 - [Subsections (68)(a)(i)(A)-(68)(a)(i)(I) enumerate certain activities.]
 - ... and
 - (ii) does any of the following:
 - [Subsections (68)(a)(ii)(A)-(68)(a)(ii)(E) enumerate certain activities.]
- (b) “Marketplace facilitator” does not include a person that only provides payment processing services.

- (69) “Marketplace seller” means a seller that makes one or more retail sales through a marketplace that a marketplace facilitator owns, operates, or controls, regardless of whether the seller is required to be registered to collect and remit the tax under this part.

....

Furthermore, 2019 Senate Bill 168 amended Utah Code Ann. § 59-12-102(120) (effective 10/1/19) to expand the definition of “seller” to include Subsection (120)(b). Section 59-12-102(120) (effective 10/1/19) (prior version at § 59-12-102(116)) defines “seller” as follows in part:

- (a) “Seller” means a person that makes a sale, lease, or rental of:
 - (i) tangible personal property;
 - (ii) a product transferred electronically; or
 - (iii) a service.
- (b) “Seller” includes a marketplace facilitator.

Utah Code Ann. § 59-12-102 (effective 10/1/19) defines other terms mentioned in this private letter ruling. “Person” is defined in § 59-12-102(89) (effective 10/1/19) (prior version at § 59-12-102(85)) as follows:

“Person” includes any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any county, city, municipality, district, or other local governmental entity of the state, or any group or combination acting as a unit.

“Sale” is defined in § 59-12-102(114) (effective 10/1/19) (prior version at § 59-12-102(110)) as follows in part:

- (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.

....

III. Analysis

In general, Utah Code Ann. § 59-12-103(1) imposes sales and use taxes on sales of tangible personal property, on products transferred electronically, and on certain enumerated services when those sales are located in Utah.¹ This private letter ruling assumes that at least some third-party merchant sales to Utah purchasers meet § 59-12-103(1). The sales meeting § 59-12-103(1) are generally subject to Utah sales and use taxes.

In general, § 59-12-107(2) requires certain sellers to pay or collect and remit Utah sales and use taxes. Under § 59-12-107.6(1) (effective 10/1/19), a marketplace facilitator has a collection and remittance requirement in accordance with § 59-12-107 if that marketplace facilitator has certain levels of sales in Utah. “Marketplace facilitator” is defined in § 59-12-102(68) (effective 10/1/19).

Under § 59-12-102(68) (effective 10/1/19), a “marketplace facilitator” is a person that, first, meets the requirements found in Subsection (68)(a); second, performs at least one of the

¹ Utah Code Annotated §§ 59-12-211 through 59-12-215 provide the locations of various transactions.

activities listed in Subsection (68)(a)(i); third, performs at least one of the activities listed in Subsection (68)(a)(ii); and fourth, is not “a person that only provides payment processing services,” as provided in Subsection (68)(b). This private letter ruling will analyze the requirements found in Subsection (68)(a). Based on the conclusions from that analysis, this private letter ruling will not analyze the requirements found in Subsections (68)(a)(i) or (68)(a)(ii); those analyses are unnecessary for this private letter ruling.

Subsection (68) of § 59-12-102 defines “marketplace facilitator,” and Subsection (68)(a) states the following in part:²

“Marketplace facilitator” means a person, including an affiliate of the person, that enters into a contract, an agreement, or otherwise with sellers, for consideration, to facilitate the sale of a seller’s product through a marketplace that the person owns, operates, or controls . . .

The definition of “marketplace facilitator” uses the term “marketplace.” Subsection 59-12-102(67) (effective 10/1/19) defines “marketplace” as follows:

- (a) “Marketplace” means a physical or electronic place, platform, or forum where tangible personal property, a product transferred electronically, or a service is offered for sale.
- (b) “Marketplace” includes a store, a booth, an Internet website, a catalog, or a dedicated sales software application.

The definitions of “marketplace facilitator” and “marketplace” relate to the definition of “marketplace seller.” Subsection § 59-12-102(69) (effective 10/1/19) defines “marketplace seller” as follows:

“Marketplace seller” means a seller that makes one or more retail sales through a marketplace that a marketplace facilitator owns, operates, or controls, regardless of whether the seller is required to be registered to collect and remit the tax under this part.

You explained that Client will begin collecting and remitting Utah sales and use taxes for third-party sales made through the Client’s marketplace platforms. Client is the “marketplace facilitator” for these sales. These sales are made through the Client’s “marketplace(s).” The sellers for these sales are “marketplace sellers.” As a marketplace facilitator, Client has a

² The definition of “marketplace facilitator” uses the term “person.” “Person” is defined in § 59-12-102(89) (effective 10/1/19). Client is a person.

The definition of “marketplace facilitator” uses the term “affiliate.” “Affiliate” is defined in § 59-12-102(4) (effective 10/1/19). You have presented no facts suggesting that this private letter ruling involves affiliates.

The definition of “marketplace facilitator” uses the term “seller.” “Seller” is defined in § 59-12-102(120) (effective 10/1/19). “Sale” is defined in § 59-12-102(114) (effective 10/1/19). These terms are not at issue for this private letter ruling.

collection and remittance requirement under § 59-12-107.6(1) (effective 10/1/19), in accordance with § 59-12-107, for these sales.

The question for this private letter ruling, though, is whether Client is a marketplace facilitator for the sales made through third-party merchants' websites after internet users click on the advertisements for which Client is compensated.

This private letter ruling again considers the definition of "marketplace facilitator." Part of that definition is repeated below:

"Marketplace facilitator" means a person, including an affiliate of the person, that enters into a contract, an agreement, or otherwise with sellers, for consideration, to facilitate the sale of a seller's product **through a marketplace that the person owns, operates, or controls . . .**

§ 59-12-102(68)(a) (Emphasis added.) This analysis will now apply the above definition. For the sales made through the third-party merchant's websites after internet users click on the advertisements for which Client is compensated, Client is a "person . . . that enters into a contract . . . with sellers, for consideration, to facilitate the sale of a seller's product." However, that "sale of a seller's product" is **not** "through a marketplace that [Client] owns, operates, or controls." Instead, that sale occurs through the third-party merchants' websites. Therefore, Client is not a "marketplace facilitator" for purposes of those sales. Thus, Client does **not** have a collection and remittance requirement under § 59-12-107.6(1) (effective 10/1/19) for those sales.

IV. Conclusion

This private letter ruling concludes that Client is **not** a marketplace facilitator for purposes of the sales made through the third-party merchants' websites after internet users click on the advertisements for which the Client is compensated. Client does **not** have a collection and remittance requirement under § 59-12-107.6(1) (effective 10/1/19) for those sales.³

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

³ The Client agrees that it will have a collection and remittance requirement for the third-party sales made through the Client's marketplace. You explained that Client is prepared to begin collecting and remitting taxes for those sales.

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,

Lawrence C. Walters
Commissioner

LCW/aln
19-004