

May 14, 2012

[REDACTED]

**Formal Ruling # 2012-02**

Dear [REDACTED]:

This is a formal ruling for [REDACTED], Inc., doing business in Vermont as [REDACTED]. You have requested a ruling regarding the applicability of sales and use tax to certain of [REDACTED] activities and products. This ruling is based upon representations in your letter of [REDACTED].

**FACTS**

[REDACTED], is a [REDACTED] corporation doing business in Vermont as [REDACTED]. [REDACTED] offers weight loss programs to subscribers over the Internet.

Through the [REDACTED] Web site, the subscriber can view a weekly weight-loss presentation and participate in interactive presentations and exchanges with [REDACTED] personnel. Through the Web site, subscribers track their weight loss and make private journal entries that are reviewed by [REDACTED] personnel. The Web site also allows subscribers to learn about diet, exercise, and recipes; access a calorie database, recipes and other information.

[REDACTED] does not sell food or other tangible personal property.

**DISCUSSION**

Vermont sales tax is imposed on several types of items, including “tangible personal property” and “specified digital products transferred electronically to an end user.” 32 V.S.A.

§ 9771(1), (8). "Tangible personal property" includes all "prewritten computer software." 32 V.S.A. § 9701(7). "Specified digital products" means "digital audio-visual works, digital audio works, digital books, or ringtones that are transferred electronically." 32 V.S.A. § 9701(46).

█████, through its Web site, provides subscribers with (1) weekly weight-loss presentations about diet and exercise; (2) interactive functions for the subscriber, such as tracking weight loss, and writing a journal with review of the journal by █████ personnel; and (3) access to information such as a calorie database and recipes.

Based on the brief description in your letter, █████ appears to be selling a nontaxable weight-loss educational program. The major components appear to be services. Two items may be subject to sales tax, but if provided as part of one transaction for a single non-itemized price, that single price may not be subject to sales tax, as more fully described below. We would require more details to determine the taxability of █████ products, but the general analysis is as follows:

(1) Weekly weight-loss presentations.

If the weekly weight-loss presentations are live presentations, they are not tangible personal property and not subject to sales tax. If the presentations are recorded they are digital audio-visual works which would be subject to sales tax as "specified digital products," unless they qualify as nontaxable under the "bundled transaction" rules described below.

(2) Interactive functions.

The interactive functions of tracking weight loss and journaling appear to be nontaxable services provided by █████ personnel. If, however, the subscriber is granted a license or similar right to use █████ prewritten software in these interactive functions, the charge for the prewritten software would be subject to sales tax, unless it qualifies as nontaxable under the "bundled transaction" rules described below.

Under legislation enacted in the 2012 legislative session, if █████ does charge the customer for prewritten software accessed for use through software run on underlying infrastructure that is not managed or controlled by the customer or by █████ or a related company, the Department will not assess sales or use tax on such charges made after December 31, 2006 and before July 1, 2013, and any such taxes already paid by █████ will be refunded upon request if within the statute of limitations and documented to the satisfaction of the commissioner. Sec. 52, H. 782, No. \_\_\_ of the Acts of 2011 Adj.

(3) Access to information.

The mere access to a calorie database, recipes and similar items are information services, and the charge for access to this information is not subject to sales tax. If, however, the information takes the form of a digital audio-visual work, digital audio work, or digital book, the charge for the specified digital products would be subject to sales tax.

Bundled Transaction

It is not clear from your letter whether the subscriber pays one price for use of and access to all the described █████ activities and products. If the subscriber does pay one non-itemized

price, then the transaction is "bundled." If each of the three types of activities and products are part of a "bundled" package sold to subscribers for a single price, the tax result may differ from taxability of the individual components, as follows:

First, the entire bundled transaction may be subject to sales tax, even if individual items in the bundle are not taxable:

A bundled transaction is the retail sale of two or more products, except real property and services to real property, where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price. A bundled transaction does not include the sale of any products in which the sales price varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction.

Except as otherwise provided by this regulation, sales tax must be collected on the selling price of a bundled transaction if any product included in the bundled transaction would be taxable if sold separately.

Dept. of Taxes Reg. § 1.9701(4)-3.

On the other hand, a bundled transaction will not be subject to sales tax if the otherwise taxable components are essential to the service being provided and the service is the true object of the transaction. Dept. of Taxes Reg. § 1.9701(4)-3(C)(1).

Finally, the bundle will not be subject to sales tax if the otherwise taxable components are a de minimis portion (ten percent or less) of the price of the bundle. Dept. of Taxes Reg. § 1.9701(4)-3(C)(3).

██████ products appear to fall into one of the last two categories, though without more detail it is not possible to determine this.

## GENERAL PROVISIONS

This ruling will be made public after deletion of the parties' names and any information which may identify the parties. A copy of this ruling showing the proposed deletions is attached, and you may request within 30 days that the Commissioner delete any further information that might identify the parties. The final discretion as to deletions rests with the Commissioner.

This ruling is issued solely to your firm and is limited to the facts presented, as affected by current statutes and regulations. Other taxpayers may refer to this ruling, when redacted to protect confidentiality, to determine the department's general approach, but the Department will

not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statutes or regulations.

\_\_\_\_\_  
Emily Bergquist

\_\_\_\_\_  
Date

Approved:

\_\_\_\_\_  
Mary N. Peterson  
Commissioner of Taxes

\_\_\_\_\_  
Date