

Ruling 95-20

Vermont Department of Taxes

Date: December 11, 1995

Written By: Gloria Hobson, Business Taxes Policy Analyst

Approved By: Earle E. Fennessey, Deputy Commissioner of Taxes

This letter is in response to a questionnaire dated January 11, 1995 that was remailed to the Department on November 2, 1995. I do not know what happened to the original request and apologize for the delay in providing you with answers.

The questionnaire requested the Department issue its policy on certain facts. I found the response categories in the January 11, 1995 letter could not clearly address the tax issues and have outlined our positions in this letter. Enclosed with this letter is a copy of Vermont's sales and use tax law for your reference. "Client" will refer to the party making the sales described in each transaction. "Dealer" will refer to the Client's customer.

Transaction 1

Facts: Client solicits Vermont business through an employee visiting Vermont Dealers. Client sets up and maintains a data base of Dealer's customers which Client uses to print and mail service reminder mailers to Dealer's customers. The mailers contain coupons for Dealer services and Dealer determines wording on coupons. Client's employee visits Dealer monthly to review program effectiveness. All contracts are approved at Client's headquarters outside of Vermont. The employee has no authority to bind the Client.

Client charges Dealer a fee for initial data base set up, monthly data base maintenance fee, monthly consultation fee for employee visit, separate charge for mailers printed for Dealer, postage for sending mailer, shipping and handling to send mailers to bulk mailing house, and a deposit fee which represents an advance of the last month's anticipated charges. The deposit fee is rarely refunded. Client maintains the data base at its location in the Midwest. Client sets up data base information through information supplied by the Dealer which may be a computer tape or data entered manually by Client's personnel. Client also prepares and prints mailers at the non-Vermont location which are sent to a bulk mailing house also located outside Vermont. The sample agreement contract for transaction 1 shows separate charges for data base set up and maintenance, deposit, mailers including postage, shipping and handling fee, or modem fee.

Taxation: Transaction 1 contains both taxable and exempt charges. Computer and data processing services are exempt even when tangible personal property is transferred as

part of the service so long as no separate charge is made for the property and the value of the property is an inconsequential element in relation to the value of the service. 32 V.S.A. 9701(6). The sample Transaction 1 agreement itemizes fees for computer and data processing services separately from the charge for the mailers and costs to send out the mailers. Since the charges for services and tangible personal property are separately stated, only the fees for services - data base set up, maintenance, and consultation - are exempt.

The entire, separately stated mailer charges, which include postage, are taxable. Vermont taxes the sale of tangible personal property or use of tangible personal property in this state. 32 V.S.A. 9771(1) and 9773(1) & (3). The basis for the tax is the sales price to the customer. 32 V.S.A. 9701(4). The Dealer, a Vermont business, purchases the mailers which are then mailed into Vermont to the Dealer's customers. The purchase by a Vermont customer for subsequent use in Vermont triggers the sales and use tax. The delivery and use in this state activate the tax, not the location of the printing or mailing.

Shipping and handling charges are part of the sales price unless all of the following three criteria set forth in 32 V.S.A. 9701(4) are met:

- shipment is made directly to the purchaser
- charges are separately stated
- transportation occurs by means of common carrier, contract carrier, or U. S. mail

Since Dealer is the purchaser and charge is for shipment to the bulk mailing house, all three criteria cannot be met. The shipping and handling charges would be taxable. Materials purchased to create the mailers would be exempt in Vermont as property used in manufacturing under 32 V.S.A. 9741(14). Under the facts described in Transaction 1, the purchase of mailers from a stationery supplier on which Client prints information would also be exempt under Vermont law as a purchase for resale. 32 V.S.A. 9701(5).

If Client separately charges for components of the mailer, i.e., the mailer, printing on the mailer, mailing services, the tax consequences are:

- 1) Charge for the mailer is taxable as a retail sale of tangible personal property. 32 V.S.A. 9771(1).
- 2) Charge for printing on the mailer is taxable. As Client sells the mailers to the Dealer and then prints information, Dealer provides the property. This is taxable under 32 V.S.A. 9771(3) as printing of A...tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the... printing.
- 3) Charge for mailing services such as stuffing, bar coding, sorting is exempt as a service.

In Transaction 1, Dealer is the consumer or customer of the goods and services sold by Client. Client is responsible, as a vendor of tangible personal property sold at retail, for collecting the sales or use tax from Dealer and remitting the tax to the Department. 32 V.S.A. 9701(9) and (14). Client must receive a certificate of authority from the Vermont Department of Taxes licensing the business to collect the tax prior to commencing business in Vermont. 32 V.S.A. 9707.

The deposit amount which represents an estimate of the last month's charges for the Dealer would not be taxable at the time of deposit. The deposit did not purchase tangible personal property for the Dealer, but secured the right to purchase the property at a later date. If Client charges the Dealer for taxable items out of the deposit, then the tax would be due at that time.

Transaction 1 separately charges for services and tangible personal property. However, if Client decided to make one monthly fee, the relative value of the tangible personal property to the value of the services would need to be determined before the exemption under 32 V.S.A. 9701(6) could apply.

Transaction 2

Facts: Client's employee solicits Dealers in Vermont to enter Client's program to promote Dealer's automotive services by providing coupons in a mailer. Dealer selects zip code areas and certain automobile types. Client obtains owners' names for the automobile type and within the selected zip code from a third-party data base. Dealer chooses the mailer layout from several existing designs or custom designs the format, the mailer size, and the service promotion. Production and printing of the mailers are contracted to a non-Vermont businesses by Client. The mailers are then forwarded to a mailing house to prepare and mail. All contracts are approved at the Client's headquarters outside of Vermont. The employee has no authority to bind Client.

Client charges Dealer a per piece charge for the mailers which includes postage. Client may also charge a lump-sum amount for minimum order quantity, data base purges, and similar services. Client collects one-half of the contract price when the contract is signed and the balance is due when the artwork for the mailers is complete. The sample Transaction 2 agreement shows the Dealer is invoiced for each mailer which includes set up, art design and layout, printing, folding, stamp and mailing. Additional charges shown on the sample agreement are for customer purges and for Acolor sep special picture.

Tax Consequences: The focus of Transaction 2 is the sale of a quantity of coupon mailers. With the exception of the customer purge charges which is a separately stated service, all other charges are for the production of tangible personal property for sale. Client does provide some services such as set up, art design, folding, and mailing, but these services are for the production of the coupon mailers and included in the sales price. The lump-sum minimum quantity charge reflects a higher cost per piece for smaller orders. Vermont's basis for sales and use tax is the sales price. 32 V.S.A. 9701(4).

The sales tax is due on the full contract price, less any customer purge charges, when the contract is signed. Businesses that have at least 65% of gross taxable sales on an installment basis may apply to the Commissioner of Taxes to remit the sales tax on the installment payments. 32 V.S.A. 9779 and Reg. 1.9779.

Other Tax Issues

Income Tax Withholding: Client has an employee who solicits business and makes follow-up visits in this state. Since the employee is deriving income from work in this state, Client should be withholding Vermont income tax from the employee's wages attributable to work in Vermont.

Corporate Income Tax: Client may have a Vermont corporate income tax liability. Public Law 86-272 restricts a state from imposing an income tax if the only business activity within the state consists of solicitation of orders for sales of tangible personal property where acceptance or rejection of orders occurs out of state and filled by shipment from a point outside of the state. The nexus test for taxation when the corporation sells services is not governed by Public Law 86-272. Since Client has income-producing activity and employees performing services in this state, there is a sufficient nexus to require filing a Vermont corporate income tax return.

Application for Vermont Business Account Number: Enclosed with this letter is an application for a Vermont business account number to be completed by Client. Also enclosed is the publication "A Guide To Vermont Business Taxes" which provides a brief explanation of the business taxes.

Please call the Division of Taxpayer Services at (802)828-2551 if you need further information or fax your questions to Tax Examiner, Taxpayer Services, at (802)828-2720.

This ruling is issued solely to your business and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling 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 statute or regulations.