

December 5, 2006

<name>
<company>
<address>
<city, state zip>

Formal Ruling 2006-08

Dear <name>:

You have requested a formal ruling on behalf of your employer, <company>, concerning the applicability of the sales and use tax to the use of computer software and services and to the remote monitoring and servicing of computer software.

First, you inquire whether sales tax should be charged on the sale of software subscriptions to <company> customers in Vermont. According to information provided by you in your letter and during our subsequent phone conversation, the software at issue is prepackaged and owned by a company in <state>. For a charge, <company> provides the software to its customers and loads the software remotely. <Company> does not charge a separate fee for installation of the software; customers are billed on a per-mailbox basis.

Vermont sales tax is imposed upon the sales price of tangible personal property sold at retail in this state. 32 V.S.A. § 9771(1).^{*} “Tangible personal property” specifically includes prewritten computer software. 32 V.S.A. § 9701(7); Reg. § 1.9701(7). “Prewritten computer software” means computer software that is not designed and developed by its creator to the specifications of a specific purchaser, and is taxable even when delivered electronically. Reg. § 1.9701(7). “Delivered electronically” means delivered to the purchaser by means other than tangible storage media. *Id.*

^{*} In 2003, the Vermont Legislature adopted sales and use tax laws, effective January 1, 2007, that enable the State to participate in the Streamlined Sales Tax Agreement (SSTA). Vermont is now a member state and is in the process of adopting new sales and use tax regulations to comport with additions and changes to the law and bring the State into compliance with the SSTA. The proposed regulations are projected to take effect in tandem with the changes in the law. Accordingly, although many aspects of the sales and use tax law remain unchanged, the information contained in this ruling is based upon Vermont statutory and regulatory law as of January 1, 2007.

Notwithstanding <company>'s method of billing its customers – charging a single per-mailbox monthly price for what it describes as a service or subscription – the focus of the transaction is the transfer by electronic delivery of prewritten computer software from <company> to Vermont customers in exchange for a consideration. Thus, the transaction is taxable. 32 V.S.A. § 9771 (retail sale of tangible personal property subject to sales tax). It is of no consequence that <company> characterizes payment for access to the software as a service or subscription charge, rather than a sale or lease. *See Mountain Cable Co. v. Dep't of Taxes*, 168 Vt. 454, 457 (1998) (cable industry could not “infect the tax code with an ambiguity simply by giving different names to the various fees it imposes”). Nor is it material that the customer does not ultimately take title to the software; the transfer of tangible personal property for a customer's use in exchange for consideration is subject to the tax. 32 V.S.A. § 9701(4) (“sales price” subject to tax is the total consideration “for which personal property or services are *sold, leased, or rented*, valued in money, whether received in money or otherwise”) (emphasis supplied). Moreover, though installation charges are not considered part of the sales price, 32 V.S.A. § 9701(4)(B)(iv), where they are not itemized or separately billed, the full amount charged is presumed subject to the sales tax. 32 V.S.A. § 9813(a) (“to prevent evasion of the tax . . . it shall be presumed that all receipts for property or services . . . are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax.”). Accordingly, the fee charged by <company> to its Vermont customers for use of the computer software is taxable.

Next, you ask whether the monthly fee charged by <company> for the remote monitoring and servicing of Vermont customers' servers and networks is subject to the tax. As you explained during our conversation, <company> monitors its customers' systems by placing a sentinel box – a device which enables <company> to conduct the remote monitoring – in the customer's home or office during the time the service agreement is in place. The box is removed when the servicing agreement ends. <Company> customers pay varying rates depending on the level of service they choose: <company> may provide remote monitoring only, remote monitoring and phone support, or remote monitoring, phone support, and a monthly onsite visit.

While the monitoring and servicing of customers' networks is not taxable under Vermont's sales and use laws, the use of the sentinel boxes by <company> during the course of the service agreement is subject to tax. If <company> purchases the boxes at retail in this state, <company> should pay sales tax on the purchase. 32 V.S.A. § 9771. If the boxes have not been subject to the sales tax for use in the state, <company> should remit the compensating use tax to the Department. 32 V.S.A. § 9773.

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 deletion is attached, and you may request that within thirty (30) days the Commissioner delete any further information that might identify the interested parties. The final discretion as to deletions rests with the Commissioner.

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.

Section 808 of Title 3 provides that this ruling will have the same status as an agency decision or an order in a contested case. You have the right to appeal this ruling within thirty days.

Sincerely,

Judith Henkin
Attorney for the Department

Approved this ____ day of _____, 2006.

Tom Pelham
Commissioner of Taxes