September 14, 2010

<REQUESTER>
<COMPANY>

Formal Ruling 2010-05

Dear <REQUESTER>:

You have asked for a formal ruling on behalf of your client, <COMPANY>. You request guidance on whether certain fees charged by <COMPANY> are subject to the Vermont sales tax. This ruling is based on the information that you have provided.

<COMPANY> is a <STATE 1> corporation that markets and sells <COMPANY PRODUCT NAME>. <COMPANY PRODUCT NAME> includes a software supported service that automates inventory, sales, parts, accounting, and other functions for car dealerships. The service includes customer support, forms programming, training, data conversion and other services. <COMPANY PRODUCT NAME> is also used to communicate with automobile manufacturers concerning items such as sales, data, parts and inventory.

The two primary components of <COMPANY PRODUCT NAME> are a software-supported dealer management service (the "Base Service") and 24/7 internet and phone-based customer support ("Support"). When customers purchase both components, they are separately itemized on the governing service agreements and invoices. The Base Service is fully operable and may be purchased without Support, if the customer so chooses.

<COMPANY> existing customers use the <COMPANY PRODUCT NAME> and related services through an Application Service Provider ("ASP") type model. For ASP customers, the software supporting the Base Service or base software, resides on servers owned and maintained by <COMPANY> in <STATE 2>. The Base Service includes (a) a nontransferable right to use the base software to access, add to, subtract from and otherwise use

the database containing that customer's data and (b) a commitment by <COMPANY> to maintain its servers and to backup and provide continuous access to the base software and customers' databases during the term of the agreement. Customers do not have the right to take physical possession or ownership of the base software.

The database servers are not dedicated to a specific customer. Customers are not allowed a specified amount of server space, specified server or a dedicated portion of a specified server. <COMPANY> can move customer data to different servers at different locations, add servers, delete servers or otherwise modify all aspects related to its hosting and storage of the customer data. <COMPANY> at all times controls where data is processed and stored, and the customers cannot add, delete, or otherwise modify the files stored on the servers other than through their use of the Base Service.

Set up and training on the Base Service is available to customers, who pay a one-time fee at the time of ordering depending on their specific facts and circumstances:

1. Set Up: The fee is charged to prepare, configure and set up the customer's data files on a <COMPANY> server and configure the initial business rules. The service is optional.
2. Training: The fee is charged for training on the Base Service. Included in the fee, but not broken out on the invoice, are all out-of-pocket costs for travel, lodging and meals incurred by <COMPANY> staff while providing the on-site training. The service is optional.
3. Data Migration: The fee is charged to migrate data from the format of the prior service provider. The fee is not applicable to all customers and is separately stated on invoices.
4. Forms Programming: The fee is charged for the initial programming of the customer's forms to function with the <COMPANY PRODUCT NAME>, if requested. The calculation for the Forms Programming Fee, based on the number of forms, is separately set forth in the purchase schedule.
5. Other: Any other fees charged, as specifically requested by the customer related to the installation of the software, not specifically identifiable to a group above.

In addition to these one-time fees, <COMPANY> negotiates and charges its customers an Application Service Fee and, if requested, a Support Fee, as follows:

1. Application Service Fee: This fee is for access via the internet and use of the base software for the Base Service solely for the customer's internal use and only at or from the customer's site. The fee also includes a commitment by <COMPANY> to maintain, and provide ongoing access to, servicers hosting the base software and the customer databases, and for any updates for the base software.
2. Support Fee: The fee is for 24/7 internet and phone support for the Base Service and other services a customer may be receiving from <COMPANY>.

You ask the following:

(1) Is the <COMPANY PRODUCT NAME> Application Service Fee subject to Vermont sales tax?

(2) Is the <COMPANY PRODUCT NAME> Support Fee subject to Vermont sales tax?

(3) Is the <COMPANY PRODUCT NAME> Set Up Fee subject to Vermont sales tax?

(4) Is the <COMPANY PRODUCT NAME> Training Fee subject to Vermont sales tax?

(5) Is the <COMPANY PRODUCT NAME> Data Migration Fee subject to Vermont sales tax?

(6) Is the <COMPANY PRODUCT NAME> Forms Programming Fee subject to Vermont sales tax?

(7) Are the <COMPANY PRODUCT NAME> Miscellaneous Fees subject to Vermont sales tax?

Vermont imposes a sales tax on the retail sale of tangible personal property in this state. 32 V.S.A. § 9771. Complimentary to the sales tax, use tax is imposed on tangible personal property purchased at retail for use within this state, on which no sales tax has been paid, and not otherwise entitled to exemption. 32 V.S.A. § 9773. Under Vermont law, "sale" includes leases and rentals. *See* 32 V.S.A. § 9701(4)(A) ("sales price" subject to tax is the total consideration for which property is "sold, leased, or rented").

The Vermont legislature has included "prewritten computer software" within the definition of "tangible personal property." 32 V.S.A. § 9701(7). Prewritten computer software is "computer software, including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser." Vt. Tax Regulation ("Reg.") § 1.9701(7)-2(A). Commonly referred to as "canned" software, prewritten computer software is typically created for general use for more than one purchaser, and is taxable even when delivered electronically. In addition, prewritten computer software includes software developed by specification of a particular purchaser, when offered for sale to someone other than that purchaser. *Id*.

The <COMPANY PRODUCT NAME> software falls within the definition of "prewritten computer software," and its sale in this state is a taxable transaction, even though it is accessed from a remote server. When customers pay the "sales price"[*] – the Application Service Fee –

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[*] "Sales price" is defined as "the total amount of consideration, including cash, credit, property, and services, for which personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without deduction for . . . [c]harges by the seller for any services necessary to complete the sale, other than installation charges." 32 V.S.A. § 9701(4).

they purchase the right to access and download software via the internet, with the ability to use the software to input data and commands from their own computers. *See* <COMPANY> Ruling Request p. 2 (customer purchases the "right to use the base software to access, add to, subtract from and otherwise use the database containing that customer's data"). Accordingly, the Application Service Fee is the charge for the right to use prewritten software, and is subject to tax. Optional separately stated charges for set up, training, data migration, and forms programming, however, are services, and are not subject to the sales and use tax.

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 interest 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 _____, 2010.

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Ellen Tofferi
Acting Commissioner of Taxes