

[Date]

[Taxpayer representative]

[Address]

[Address]

[Address]

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Re: Formal Ruling 16-\_\_

Dear [Taxpayer representative]:

This is a formal ruling for your client, [Taxpayer], regarding the applicability of sales and use tax to mobile, point-of-sale, electronic devices. This ruling is based upon representations in your letter dated [Date] and the enclosed materials, and your email to me, dated [Date].

### **RULING**

Vermont's sales tax applies to all charges by your client to its customers for access to the electronic devices, as these charges are for access to an "amusement device." Sales tax will also apply to your client's payments to the owner of the devices, as these charges will be rental paid for tangible personal property. Your specific questions are discussed and answered below.

### **FACTS**

[Taxpayer] (Company), operates restaurants in Vermont.

Company intends to pay a monthly charge to a Vendor for electronic Devices to be used in Company's restaurants. A Device is a [Device] with a touch screen, pre-programmed for certain

activities, such as providing a pictorial menu, allowing customers to order menu items, completing customer surveys, and allowing customers to pay the restaurant check directly through the Device. The Vendor will create, manage and modify the content and display of the Device.

A Device will be placed on every table, but use by customers will be optional. Certain uses will always be free to the customer, including viewing the menu, ordering and paying. Other uses may carry a charge, such as access to news, sports, social media, computer games, and music on the restaurant's playlist. During a "pilot" trial phase, the Company will charge customers only game fees, but no fees for other uses of the Device. Customer charges for use of the Device will be shown as a line item on the restaurant bill. It is estimated that 80 percent or more of Company's customers will use only the free functions on the Device.

Company and the Vendor agree that Company will be responsible for collection of the revenue from the Device and payment of applicable state or local taxes imposed on the customer access charges, if any.

In addition to the Vendor's monthly charge to Company for the Devices, the Vendor may also charge Company a monthly commission on the customer charges for the Device. Company may also be required to pay Vendor a portion, or all, of the revenue generated by the customer charges for the Device.

Alternatively, the Vendor may opt not to charge Company a monthly amount for the Devices, but instead require Company to remit to the Vendor all of the customer charges for the Device, up to a maximum amount, with revenue in excess of that maximum to be shared between the Vendor and Company.

The primary purposes of the Device are to facilitate ordering, payment, and surveys, increase food and beverage sales, create faster table turnover, and increase customer satisfaction and loyalty.

You provided a copy of the proposed Agreement (“the Agreement”) between the Vendor and Company. Under paragraphs 2.3, 4.1 and 4.2 of the Agreement, the Vendor retains ownership of the Device, has the right to create, manage, and modify the content of the Device, and provides and updates the software content of the Device; and Company bears the risk of theft, loss or damage of the Device, other than normal wear and tear and beverage spilled on the Device. Under paragraph 3, Company may not disassemble or reverse-engineer the Device. Under paragraph 4.2, Company agrees to keep a broadband network operational at all times and provide DSL or other broadband connection, with VPN support. Under paragraph 2.4.3., Company may not remove any Device from a restaurant tabletop, and must timely report inoperable or malfunctioning Devices to the Vendor.

### QUESTIONS AND DISCUSSION

Based on your facts, you have asked several questions, which are answered here:

*1.a. Does Vermont sales tax apply to a fee for unlimited access to games stored on the Device? Yes. If so, is the fee categorized as a rental or a license to use tangible personal property? No.*

#### Law

Vermont’s sales tax is imposed on retail sales of “tangible personal property” and on various services and entertainments. 32 V.S.A. § 9771(1)-(8). Vermont’s sales tax is imposed on “access to any game or gaming or amusement machine, apparatus or device.” 32 V.S.A. § 9771(4).

#### Discussion

Sales tax applies to the fee which Company charges its customers for access to the Device which provides games and amusements.

The fee is not for rental of the Device to the customer. The customer is granted no possession or control over the Device. The customer may not remove the Device from the tabletop, or carry it away from the restaurant, or use it in any way other than for ordering or completing a customer survey, or for accessing certain amusements, at the table. Under the Agreement, Company itself may not remove a Device from a restaurant tabletop.

*1.b. Does Vermont sales tax apply to a fee for unlimited access to current news events and social media using the Device? Yes. If so, is the fee categorized as Internet access or nontaxable service? No.*

Law

Vermont's sales tax is imposed on "access to any game or gaming or amusement machine, apparatus or device." 32 V.S.A. §§ 9771(4).

Discussion

Here again, the fee to the customer is for access to a games and amusements Device, to use for access to news and social media. You have not described "current news events" or "social media" in detail. It is not clear whether these would be features provided on the Device by the Vendor or are Internet Web sites to which the customer would have access through the Device. Your second question here implies that the current news events and social media refer to Internet Web sites, available to the customer through use of the Device. In either case, the fee to the customer would be subject to sales tax, because the fee is charged for access to the game or amusement Device, and not for access to the Web site or for a service.

*1.c. Does Vermont sales tax apply to a fee for songs selected to be played in the restaurant? Yes. If so, is the fee categorized as a rental or a license to use tangible personal property? No. Or a digital product or a nontaxable service? No.*

Answer: The fee for the song, as described earlier, is a fee for access to an amusement Device; no service is being provided.

There is also no sale of a digital product, because Company is not selling to an "end user":

Law

Vermont's sales tax also applies to "specified digital products transferred electronically to an end user." 32 V.S.A. § 9771(8). "Specified digital products" is defined as:

(46) "Specified digital products" means digital audio-visual works, digital audio works, digital books, or ringtones that are transferred electronically.

(A) Digital audio-visual works: means a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

(B) Digital audio works: means works that result from the fixation of a series of musical, spoken, or other sounds, including ringtones.

(C) Digital books: means works that are generally recognized in the ordinary and usual sense as "books."

(D) Ringtones: means digitized sound files that are downloaded onto a device and that may be used to alert the customer with respect to a communication.

32 V.S.A. § 9701(46).

An "end user" is defined as:

(47) "End user" means any person other than a person who received by contract a product transferred electronically for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product, in whole or in part, to another person or persons.

32 V.S.A. § 9701(47).

"Transferred electronically" means "obtained by the purchaser by means other than tangible storage media." 32 V.S.A. § 9701(45).

Discussion

The songs at issue here are "specified digital products" because they are "digital audio works." The customer might be viewed as an "end user," because he or she is someone "other than the person who received [the song] by contract for further transmission or broadcast." But the customer does not "obtain" the song, and so the song is not "transferred electronically" to the

customer; the customer may select a song from the restaurant's play list, to be played in the restaurant. For this reason, the fee for the play of the song is not subject to sales tax under Subsection (8) of Section 9771.

*2. If a single premium content fee is charged for unlimited access to games stored on the Device, unlimited access to current new events and social media and song elections, how will the Department view this single fee? As a taxable charge for an amusement.*

A single fee for access to the amusements available through the Device is a fee for access to an amusement device and subject to sales tax.

*3. Is the Vendor's monthly charge to Company for use of the Device subject to sales tax as a lease of tangible personal property? Yes. If so, and the Vendor is not registered to collect and remit this tax, may Company self-accrue use tax on the amount deemed as rental payment to the Vendor? Yes.*

#### Law

Vermont's sales tax applies to the rental of tangible personal property. 32 V.S.A. §§ 9771(1), 9701(4)(A). The sales tax is imposed on the sales price. 32 V.S.A. § 9701(5). "Sales price" is the consideration for property or services "sold" or "leased." 32 V.S.A. § 9701(4)(A).

#### Discussion

The Vendor will transfer to Company for a fee the possession and use of the Devices, but the Vendor will retain ownership of the Devices and control of their content. This arrangement is a lease of the Devices to Company. Leases of tangible personal property are subject to sales tax. The fees paid by Company to the Vendor for the Devices is the consideration for the leased property. Sales tax will be imposed on the fees paid by Company to the Vendor for the Devices.

If the Vendor is not registered to, and does not, collect Vermont sales tax, Company will be liable for payment of use tax on the Vendor fees.

4. *Are premium content fees collected from customer and paid as commissions to the Vendor, who retains title to the Devices, subject to tax as a fee for the rental of the Devices? Yes. If so, and the Vendor is not registered to collect and remit the tax, may Company self-accrue use tax on the amount deemed as rental payments to the Vendor? Yes.*

There is only one Agreement between Company and the Vendor, and that is for Company's use of the Devices, as programmed and updated by the Vendor. All payments from Company to the Vendor under the Agreement are therefore for Company's use of the Devices. The fact that some of Company's customers will use only the free features of the Device and some will pay for the games and amusements available through the Device does not alter the fact that Company is paying the Vendor for rental of the Devices to use in Company's restaurant. See In Re Merrill Theatre Corporation Sales and Use Tax, 138 Vt. 397, 399 (1980) (Fees paid by Merrill Theatre to suppliers of movies for commercial exhibition were rental fees, even if "calculated upon a percentage of admissions charged" and not "on a flat fee basis.").

If the Vendor is not registered to, and does not, collect Vermont sales tax, Company will be liable for payment of the tax on the Vendor fees. 32 V.S.A. §§ 9705, 9773(1).

5. *Will Company be subject to any additional registration or licensing requirements for each Device, other than sales and use tax business registration? No.*

There are no other registration or licensing requirements under Title 32 which apply to Company with regard to its rental of the Devices from the Vendor and charges to its customers for access to the Devices.

### **GENERAL PROVISIONS**

Issuance of this ruling is conditioned upon the understanding that neither the taxpayer nor a related taxpayer is currently under audit or involved in an administrative appeal or litigation concerning the subject matters of this ruling. This ruling is issued solely to the taxpayer 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 see 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.

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.

You have the right to appeal this ruling within 30 days. 3 V.S.A. §§ 808, 815.

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Emily Bergquist

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Date

Approved:

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

\_\_\_\_\_  
Date