[Date]

[Address]

Re: Formal Ruling 18-08

Dear [Deleted]:

This is a formal ruling for your company, [Taxpayer], regarding the applicability of sales and use tax to rentals of [items]. This ruling is based upon representations in your email dated [date], and in our telephone conversation of [date].

FACTS

[Taxpayer], (Taxpayer) has [deleted] business locations in Vermont and [deleted] in New Hampshire. Taxpayer is licensed to collect sales tax in Vermont. All of its employees are paid from one corporate account in Vermont. Taxpayer maintains a single Website for its business, on which it advertises all [deleted] locations. The Website lists a single billing office with an area code 802 telephone number.

Taxpayer sells and rents [items]. Rental customers sign contracts which indicate the address of the renter. Taxpayer collects rent at the beginning of the contract term and then periodically. A rental contract automatically renews at the end of each term, much like a newspaper subscription. A customer may obtain repairs and service of an [item] at a location other than where the [item] was purchased or rented, and may return an [item] from one business location

to another. Some customers go to Taxpayer's New Hampshire location to rent an [item] and enter a Vermont address on the rental contract.

You have asked whether Taxpayer is required to collect Vermont sales tax on a rental contract which is executed at your New Hampshire location for a customer with a Vermont address.

RULING

Taxpayer is required to collect Vermont use tax at its New Hampshire location on rentals of [items] when the renter address on the contract is in Vermont.

DISCUSSION

Vermont imposes a sales tax on retail sales of tangible personal property "in this State." 32 V.S.A. § 9771(a). A "retail sale" includes a rental of a [items]. 32 V.S.A. § 9701(5). A retail sale or rental of an [item] in New Hampshire is not "in this State," and would typically be "sourced" to New Hampshire, and so, not subject to Vermont sales tax. Vermont Department of Taxes Regulation (Reg.) § 1.9701(8) (Eff. Nov. 1, 2010).

Vermont, however, also imposes a use tax on property used in Vermont and on which no sales tax was paid. 32 V.S.A. § 9773. Most, if not all, states which impose a sales tax also impose a use tax. "The use tax is a compensating tax, designed to prevent the avoidance of sales taxes" when a customer travels to a non-tax or lower-tax state to make a purchase for use in his home (taxing) state. Wood v. MJ Kelley Co., 592 S.W. 2d 567, 570 (Tenn. 1980), *cert. den*. 447 U.S. 905 (1980). "Use" is defined broadly as "the exercise of any right or power over" the [items], so includes simply having possession of the [item] in Vermont. 32 V.S.A. § 9701(13).

Both the sales tax and the use tax are imposed on the purchaser, but must be collected by the "vendor." 32 V.S.A. §§ 9705, 9772(a), 9775, 9776, 9778; Bud Crossman Plumbing & Heating

v. Comm'r, 142 Vt. 179, 186–87 (1982) (The "tax is imposed on the purchaser of goods and services, not on the vendor; the latter is merely the collector of the tax on behalf of the state."). A "vendor" includes:

> (B) A person maintaining a place of business in the State and making sales, whether at that place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed by this chapter.

32 V.S.A. § 9701(9). [Taxpayer] maintains a place of business in Vermont and is making sales. It is therefore a "vendor" with regard to its sales (including rentals) "elsewhere" (such as, in New Hampshire) of [items] to "persons within Vermont" for "use" (possession) in Vermont. Under the statutes, Taxpayer is therefore required to collect use tax at its New Hampshire location on sales and rentals of [items] for use in Vermont. The Regulations provide, "Every seller of tangible personal property . . . who makes sales of property . . . the use of which is subject to tax, shall at the time of making the sales, collect the compensating use tax from the purchaser." Reg. § 1.9778.

If the vendor fails to collect tax due at the time of the transaction, the vendor becomes personally and individually liable for the tax, plus penalty and interest. 32 V.S.A. § 9703(a). If the vendor is a corporation, the personal liability extends to corporate officers and agents whose duties include collection or reporting of the tax. Id.

Vermont's definition of "vendor," quoted above, raises the question of how Vermont is authorized to require a New Hampshire retailer to collect a Vermont tax on its sales in New Hampshire. The answer is that Vermont does not have that authority unless the New Hampshire retailer has some sufficient connection with the State of Vermont. Until recently, that connection had to be a physical connection, such as maintaining a place of business in Vermont or driving its delivery trucks over Vermont roads to deliver goods to its Vermont customers. This was the

holding of the Vermont Supreme Court in Rowe-Genereux, Inc. v. Vermont Dept. of Taxes, 138 Vt. 130 (1980). There, a New Hampshire retailer was held liable for collection of Vermont use tax on sales of furniture for use in Vermont. The retailer had no Vermont stores, was not registered to do business in Vermont, and had no agent, office or telephone listing in Vermont. But the retailer did advertise in a Vermont publication and over a Vermont radio station, and in a New Hampshire newspaper which circulated in Vermont and over New Hampshire radio stations which broadcast into Vermont. In addition, though the sales were made at its New Hampshire store, it delivered the items to its Vermont customers using its own trucks, driving over Vermont roads. The Court "note[d] that Rowe takes advantage of roads built and maintained by the State of Vermont." Id. at 138. The Court held that the Vermont advertising and deliveries were "substantial connections with Vermont" and were a presence "sufficient to require a seller to collect a use tax." Id. at 139. The Court also noted that the non-Vermont retailer would have to have knowledge that an item being purchased is for use in Vermont. In *Rowe*, the retailer knew it was for use in Vermont because the retailer was delivering the item to Vermont. [Taxpayer] will have knowledge that the [item] is for use in Vermont if the rental contract shows a Vermont location for the renter or [item]. If the customer does not rent, but purchases the [item], [Taxpayer] would not have knowledge of the intended place of use unless the customer asks that the [item] be delivered to a Vermont address or Taxpayer delivers it to a Vermont address or to its Vermont store for the customer to pick up there. If the customer purchases the [item] in New Hampshire and pays no sales or use tax at the time of the purchase, but then uses (possesses) the [item] in Vermont, the customer is liable for payment of the use tax. 32 V.S.A. §§ 9773, 9705.

The U.S. Supreme Court recently held that a physical presence is no longer required to impose an obligation to collect a state's sales or use tax, if the retailer has a substantial economic

presence in the state which arises from a sufficiently high level of sales "made through a pervasive Internet presence." S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094 (2018).

In the case of [Taxpayer], its Vermont presence is greater than the connections in either *Wayfair* or *Rowe-Genereux*, because [Taxpayer] operates two physical retail locations in Vermont. Vermont's statutory authority to obligate Taxpayer to collect Vermont use tax at its New Hampshire location is clearly affirmed by both the Vermont and the U.S. Supreme Courts.

Conclusion

When [Taxpayer] has knowledge that the sale or rental of an [item] is for use in Vermont, it must collect Vermont use tax and remit it to Vermont.

Note

It is also noted that a retailer may not advertise or suggest to a customer or to the public that transactions which are subject to Vermont sales and use tax become exempt simply because they occur at a New Hampshire location:

> § 9708. Restrictions on advertising
>
> (a) No person required to collect any tax imposed by this chapter shall advertise or hold out to any person or to the public in general, in any manner, directly or indirectly, that the tax is not considered as an element in the price or amusement charge payable by customer, or that he or she will pay the tax, that the tax will not be separately charged and stated to the customer or that the tax will be refunded to the customer.

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 the 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 taxpayer's name and any information which may identify the taxpayer. 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 taxpayer. 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.

_____ _____
Emily Bergquist Date

Approved:

Commissioner signed the original ruling on November 1, 2018.

_____ _____
Kaj Samsom Date
Commissioner of Taxes