



State of Vermont  
Department of Taxes  
133 State Street  
Montpelier, VT 05633-1401

Agency of Administration

[Date]

[Address]

Re: Formal Ruling 19-01

Dear [Deleted]:

This is a formal ruling for your company, [Taxpayer], regarding the applicability of sales and use tax and meals tax to its sales of [cookies]. This ruling is based upon representations in your letter dated [Date], and the enclosed materials.

### **FACTS**

[Taxpayer], Taxpayer, is an [out of state] corporation with its operations located in [City, State]. Taxpayer is the manufacturer and retailer of items such as [cookies] in various sizes and flavors. Its products are fully cooked food items which are individually wrapped, labeled and sold for human consumption. These food items are not sold heated, and utensils are not included.

Taxpayer publishes and distributes a catalogue of its products. It accepts orders for its products from Vermont residents using Taxpayer's own Website or using Amazon's Website, or by telephone at Taxpayer's [State] place of business. Taxpayer ships its food products to customers using common carriers. Taxpayer has no offices, employees, inventory or property in Vermont.

You have asked:

1. Does Taxpayer's sale of food into Vermont create sales tax nexus?
2. If Taxpayer has Vermont nexus, is Taxpayer required to register with the Vermont Department of Taxes for sales or use tax purposes?



3. Are Taxpayer's products exempt from Vermont sales and use tax?

4. If Taxpayer has nexus and its sales of food products are exempt from Vermont sales and use tax, must Taxpayer file a zero return each month with Vermont?

## **DISCUSSION**

### **Sales tax**

Vermont imposes a sales tax on retail sales of "tangible personal property." 32 V.S.A.

§ 9771(1). Sales of "food" are exempt from the tax. 32 V.S.A. §§ 9701(7), (31); 9741(13).

Taxpayer's sales of [cookies] qualify as sales of "food" and are therefore not subject to Vermont sales and use tax. Taxpayer is therefore not required to collect sales or use tax on these sales.

Only persons required to collect sales and use tax are required to register with the Department.

32 V.S.A. § 9707(a). Taxpayer therefore has no obligation to register with the Department. Only

persons required to collect sales or use tax are obligated to file a return. 32 V.S.A. § 9775.

Taxpayer therefore has no obligation to file a return showing a \$0 tax liability.

If Taxpayer's annual sales of [cookies] to Vermont destinations total at least \$100,000 or 200 transactions, Taxpayer will meet the definition of "vendor." 32 V.S.A.

§ 9701(9)(F). The Supreme Court recently held that a seller that meets or exceeds this level of sales into the destination state "undoubtedly maintain[s] an extensive virtual presence" in the state and

"Thus, the substantial nexus requirement of Complete Auto is satisfied." S. Dakota v. Wayfair,

Inc., 138 S. Ct. 2080, 2099 (2018). Thus, if Taxpayer meets or exceeds this level of sales of

[cookies], it will have nexus with Vermont. If Taxpayer meets this nexus threshold through sales of its nontaxable [cookies], and then sells any amount of taxable TPP into Vermont, it will be

obligated to register with the Department and to collect and remit Vermont sales tax on those sales of TPP.

If Taxpayer meets the nexus threshold, it would technically qualify as a "noncollecting vendor," because it would not be collecting sales tax on its sales of (nontaxable) [cookies]. 32 V.S.A.

§ 9712. A noncollecting vendor must notify its customers whose purchases total \$500 or more that they may have a use tax liability. The Department at this time is not treating a non-Vermont business as a noncollecting vendor under Section 9712 if its only sales into Vermont are of exempt food.

#### Meals tax

Vermont imposes a meals tax on “taxable meals.” This tax is, in essence, Vermont’s sales tax on restaurant meals and other prepared food. 32 V.S.A. Chapter 225. Meals tax does not apply to sales of prepackaged nonheated food when sold by other than a “restaurant.” 32 V.S.A.

§ 9202(10)(B), (C). Meals tax does not apply to sales of grocery-type items furnished for take-out, including single-serving bakery items sold in quantities of three or more. 32 V.S.A.

§ 9202(10)(D)(i). Under these rules, Taxpayer’s sales of prepackaged [cookies] are not sales of taxable meals and are not subject to Vermont meals tax.

Since Taxpayer is not selling “taxable meals,” Taxpayer is not an “operator.” 32 V.S.A. § 9202(4). Taxpayer therefore has no obligation to register with the Department as a meals tax “operator,” 32 V.S.A. § 9271, and no obligation to file a meals tax return showing a \$0 tax liability, 32 V.S.A. § 9243(a).

#### Bundled sales subject to sales tax

Your catalogue shows a number of packages of [cookies] which are packaged in reusable [deleted] and customized tins and boxes with the customer’s personalized photo, message or business logo, and sold for a price higher than the same food sold in your regular paperboard boxes. If sold separately, the special tins and boxes would be sales of TPP, subject to Vermont sales tax. 32 V.S.A. § 9771(a).

A combined sale at one price for two or more distinct products, one of which is subject to sales tax and one of which is not, may be a “bundled transaction” subject to sales tax on the single, non-

itemized price. Vermont Department of Taxes Regulations, (Reg.) § 1.9701(4)-3 (Eff. Nov. 2010). “Incidental packaging” is not considered a distinct product. Reg. § 1.9701(4)-3.A.1. Your regular paperboard boxes are incidental packaging; the special tins and boxes are not incidental packaging. The food packaged in special tins and boxes sells for approximately 12 to 25 percent more than the price for the same food items in the incidental packaging. A sale is not a bundled transaction if the bundle includes “food and food ingredients” and the “sales price of the taxable tangible personal property is fifty percent or less of the total . . . sales price” of the bundle. The price of your food appears to be more than fifty percent of the total price for the specially-packaged items. If so, none of these items are bundles subject to sales tax.

#### Answers to your questions

Based solely on the sales of [cookies] you describe, and assuming no other sales into or activities in Vermont, the answers to your questions are as follows:

1. **Question:** Does Taxpayer’s sale of food into Vermont create sales tax nexus?

**Answer:** Taxpayer’s mail-order sales of prepackaged [cookies] into Vermont will not create sales and use tax nexus unless annual sales in Vermont meet or exceed \$100,000 or 200 transactions.

2. **Question:** If Taxpayer has Vermont nexus, is Taxpayer required to register with the Vermont Department of Taxes for sales or use tax purposes?

**Answer:** For Taxpayer’s sales of prepackaged [cookies], Taxpayer is not required to register with the Department for collection of sales and use tax or meals tax, even if its annual sales meet or exceed \$100,000 or 200 transactions. If Taxpayer’s food sales exceed this threshold, Taxpayer will need to register and file sales and use tax returns only if it is also selling taxable TPP in Vermont.

3. **Question:** Are Taxpayer’s products exempt from Vermont sales and use tax?

**Answer:** Taxpayer's mail-order sales of prepackaged [cookies] are exempt from Vermont sales and use tax and meals tax.

**4. Question:** If Taxpayer has nexus and its sales of food products are exempt from Vermont sales and use tax, must Taxpayer file a zero return each month with Vermont?

**Answer:** For Taxpayer's sales of prepackaged [cookies], Taxpayer is not required to file a Vermont zero-tax return for sales and use tax or for meals tax.

**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 January 25, 2019.***

\_\_\_\_\_  
Kaj Samsom  
Commissioner of Taxes

\_\_\_\_\_  
Date