

Ruling 95-13

Vermont Department of Taxes

Date: August 17, 1995

Written By: Mary L. Bachman, General Counsel

Approved By: Betsy Anderson, Commissioner of Taxes

You have requested a formal ruling on the application of the Vermont sales and use tax law to the business activities of [Company]. This ruling relies on the description of those activities conveyed in your "Request for Advisory Opinion" which was sent with your cover letter to the attention of George Phillips at the Vermont Department of Taxes on September 16, 1994.

Facts: [Company] manufactures and sells business forms. [Company] is registered to do business in fifty states. [Company] is planning to expand its business by offering its services as a "facilitator" with respect to goods and services which its customers order from other suppliers. Specifically, the customer will place all orders with [Company] which will then contact the appropriate third party supplier and direct that supplier to deliver the goods or services directly to the customer. All ordering will be done electronically through [Company's] proprietary software. Both the customer and the supplier will be on the network. The customer will have the ability to access the software program whenever it requires goods or services to be provided and will transmit orders for all such goods and services to [Company] electronically through this program. [Company] will electronically pass along the orders to the appropriate third party supplier or to [Company] manufacturing plants for those products which [Company] is capable of providing. Third party suppliers will drop-ship the goods directly to the customer in accordance with the order sent by [Company] on behalf of the customer. [Company] will neither take possession nor title to goods shipped pursuant to this program. The passage of title to such goods as well as other terms of sale will be dependent upon the provisions of the customer's agreement with the particular third party supplier. Products manufactured by [Company] will be sent from the manufacturing plant directly to the customer or to a warehouse if so directed by the customer.

Third party suppliers, invoices for orders placed through this program will be sent to [Company] rather than to the customer. [Company] anticipates that invoices from third party suppliers will reflect sales or use-tax if the shipments are made to customers located in states in which the third party supplier is registered to do business. Taxes will not be reflected on the supplier invoice if goods are shipped to states where the supplier is not registered. [Company] will accumulate the invoices from third party suppliers and periodically prepare a summary invoice for each customer which will include all participating third party supplier invoices for the period involved as well as invoices for goods and services sold to the customer by [Company]. The customer will pay

[Company]for all of its supplies regardless of the source of such supplies. [Company] will pay third party suppliers, including any taxes reflected on invoice received by [Company] from third party suppliers. Payment by [Company] to suppliers may be in advance of payment by the customer to (Company) but will more likely be made after the customer pays [Company]. [Company] will not accrue or invoice customers for use tax on any third party supplier invoices involved in this program which do not themselves reflect sales or use tax.

[Company] will charge the applicable sales or use tax on all goods that it manufactures and sells to customers. With respect to goods supplied by third parties, it is anticipated that [Company] will reflect in its summary invoice to customers line items showing the amounts due for goods provided to the customers by such suppliers. The summary invoice will also have a separate entry entitled "vendor taxes charged" or a similar phrase which will represent the taxes which were billed to the customer on the invoice sent to [Company] by the third party supplier. [Company] does not anticipate remitting sales or use taxes directly to the respective tax jurisdictions with regard to third party supplied goods. Payment of the tax will be passed through to the appropriate third party supplier.

You indicate that [Company] will collect the appropriate sales or use tax from its customers on the charge for its services as the facilitator of supply procurement as will as for the goods [Company] itself supplies to the customer.

Issues: You have asked the following questions:

1. Will [Company] be liable for sales and use tax due on sales of third party supplier goods and services where ordering and invoicing are done through [Company]?
2. Will the State treat the customer's payment of "vendor taxes charged" items on [Company] invoices as a payment of the sales/use tax due on the transaction?
3. If [Company]'s invoice to its customer included the amount of tax charged by the third party supplier but did not separately state the amount of tax, will the customer be treated as having paid the tax upon payment of such invoice?
4. What taxes should be charged by [Company] on its one time license fee and on the fee charged for the providing of this ordering/invoicing service?
5. Is the tax on such service dependent upon the location of the customer or where [Company] provides such service?

Ruling: It is assumed that (Company) has sufficient contacts with the State of Vermont to constitute "nexus" for sales tax purposes.

1. [Company] is liable for and must collect and remit sales tax on tangible personal property for which it receives orders and bills customers.

32 V.S.A. § 9771 imposes the sales tax on retail sales of tangible personal property in this state. A retail sale means "the sale of tangible personal property to any person for any purpose other than for resale." 32 V.S.A. § 9701(4). "Sale" means "any transfer of title or possession or both...conditional or otherwise, in any manner or by any means whatsoever for a consideration or any agreement therefore". 32 V.S.A. § 9701(5). [Company's] activities, receiving orders, directing the fulfillment of such orders and billing and receiving payment with respect to such orders, constitute retail sales subject to sales tax. Persons required to collect tax include every vendor of taxable tangible personal property or services. 32 V.S.A. § 9701(14). A "vendor" includes a person making sales of tangible personal property or services, the receipts from which are taxed by this chapter. [Company] is a vendor of all the property purchased through it. It is similar to a catalogue company which has no inventory of its own, but sells the inventory of many suppliers.

Even if [Company] were not the vendor of goods and services supplied by third parties, [Company] is jointly responsible with the "vendor, distributor...from whom he obtained tangible personal property sold by him" for the collection and payment of tax pursuant to 32 V.S.A. § 9704.

2. When an invoice itemizes sales tax and that invoice is paid by a customer, the customer has discharged its obligations under the sales tax law and it is the duty of the vendor to remit the tax to the state.
3. When an invoice does not separately state sales tax, payment of the invoice does not discharge the customer from liability for the tax. 32 V.S.A. § 9778 states that "[i]f the purchaser is given any sales slip, invoice, receipt or other statement or memorandum of the price...the tax shall be stated, charged and shown separately on the first of the documents given to him." [Company] must separately state the amount of tax due on the invoices provided to its customers.
4. Sales tax must be charged on [Company's] one-time license fees for use of its computer software if the software was transferred to the customer in tangible form, as on a tape or disk. No sales tax is due with respect to the fee charged for providing its invoicing service.

Vermont imposes a five percent sales tax on receipts from the retail sale of tangible personal property in Vermont. 32 V.S.A. § 9771. Under Vermont law, a sale is defined as "any transfer of title or possession or both,...lease or license to use or consume, conditional or otherwise..." 32 V.S.A. § 9701(6). In Vermont, tangible personal property is personal property which may be seen, weighed, measured, felt, touched or in any other manner perceived by the senses...." 32 V.S.A. § 9701(7).

Therefore, the transfer for value of a license to use tangible personal property is taxable since the right to use the property cannot be separated from the property itself. See *Chittenden Trust Company v. King*, 143 Vt. 271, 465 A.2d 1100 (1983); *Mt. Mansfield Television v. Commissioner of Taxes*, 133 Vt. 284, 336 A.2d 193 (1975). If the software program is transferred to the customer in a tangible form, therefore, sales tax should be collected. However, if the program is transferred

electronically no tax is due on the transaction. *Chittenden Trust Company v. King*, supra.

With respect to the taxability of the invoicing service, no tax is due on computer and data processing services even if tangible personal property, such as an invoice, is transferred as part of such service transaction as long as no separate charge is made for this tangible personal property and as long as the value of the tangible personal property transferred is essentially an inconsequential element in relation to the value of the service transaction. As noted above, however, tax must be collected with respect to the tangible personal property sold through (Company)].

5. Any tax due on fees charged for the invoicing service would depend on whether there was also a transfer of consequential property in Vermont.

This ruling is issued solely to your firm 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.