July 8, 2013

Re: § 58.1-1821 Application: Retail Sales and Use Tax

Dear *****:

This will reply to your letter in which you seek correction of the retail sales and use tax assessment issued to ***** (the 'Taxpayer") for the audit period March 2008 through August 2011. I apologize for the delay in responding to your request.

FACTS

The Taxpayer is in the business of selling and servicing commercial food service equipment. The Department's audit disclosed that the Taxpayer made exempt sales that were not supported by valid certificates of exemption. The Taxpayer also made purchases for which tax had not been paid to vendors or accrued and remitted to the Department. The Taxpayer disagrees with the audit results and has submitted additional documentation related to certain sales. The Taxpayer is seeking a revision of the Department's assessment.

DETERMINATION

Exemption Certificates

Virginia Code § 58.1-603 imposes a tax upon every person who engages in the business of selling at retail or distributing tangible personal property in Virginia.

Virginia Code § 58.1-623 A provides:

All sales or leases are subject to the tax, until the contrary is established. The burden of proving that a sale, distribution, lease, or storage of tangible personal property is not taxable is upon the dealer unless he takes from the taxpayer a certificate to the effect that the property is exempt under this chapter.
Virginia Code § 58.1-623 B provides, in pertinent part:

The certificate mentioned in this section shall relieve the person who takes such certificate from any liability for the payment or collection of the tax, except upon notice from the Tax Commissioner that such certificate is no longer acceptable. Such certificate shall be signed by and bear the name and address of the taxpayer; shall indicate the number of the certificate of registration, if any, issued to the taxpayer; shall indicate the general character of the tangible personal property sold, distributed, leased, or stored, or to be sold, distributed, leased, or stored under a blanket exemption certificate; and shall be substantially in such form as the Tax Commissioner may prescribe.

Title 23 of the Virginia Administrative Code (VAC) 10-210-280 A interprets Va. Code § 58.1-623 and states that "a certificate that is incomplete, invalid, infirm or inconsistent on its face is never acceptable, either before or after notice." Pursuant to Public Document (P.D.) 01-36 (4/11/01), when a dealer it afforded the opportunity to secure exemption certificates to support untaxed sales after the performance of an audit, the Department's long-standing policy is to more closely evaluate the validity of the certificate.

Originally, the Taxpayer made exempt sales that were disallowed because there were no valid or properly completed exemption certificates supporting the sales. The Taxpayer has acquired and submitted updated resale exemption certificates that the auditor has reviewed and approved as valid. Based on a review of these certificates, most of the sales will be removed from the sample computation.

There are points that must be addressed, however, in relation to three particular resale exemption certificates. One resale certificate reflected the use of a customer's federal identification number (FEIN) in place of the customer's Virginia retail sales and use tax registration number. Another customer listed a number that appeared to be a registration number, but was not recognized by the auditor as a valid registration number. The last issue reflected a customer's resale exemption certificate that was complete in all respects, but did not list the purpose for which the certificate was presented.

The resale exemption certificate listing the FEIN is acceptable. In P.D. 12-155 (10/4/12) reference was made to P.D. 11-8 (1/20/11) in which, for the purpose of that response, the use of the FEIN was not appropriate for use on the Form ST-10 because the certificate was not otherwise complete and a specific 10-digit registration number was in use for the audit period at issue in that response. The Tax Commissioner advised that unlike the situation in P.D. 11-8, the Virginia certificate of registration number includes the FEIN as a part of the registration number. The Tax Commissioner concluded that the use of the FEIN on the resale
certificate of exemption Form ST-10 would not invalidate the good faith acceptance of the resale certificate with the provision that no other deficiencies are found on the resale exemption certificate. Accordingly, in this instance, the use of the FEIN is acceptable since the resale certificate was correct in every other manner.

The resale exemption certificate listing the partial registration number will also be accepted in this instance only, since the certificate is correct in all respects and further investigation has revealed that in light of the customer's error, the Department was able to verify the customer's registration in the Department's records. The sales represented by this certificate will also be removed from the Department's audit sample. The Taxpayer should advise, its customers that a complete registration number is required when future resale exemption certificates are presented.

The resale exemption certificate for sales in line items 56 through 79 is not acceptable. The resale certificate that was presented is incomplete and does not indicate if the customer's purchases were for resale, lease or rental, or to be used as packaging materials that are marketed with the product being sold by the customer. Accordingly, this certificate is incomplete and remains unacceptable. The sales will remain in the sample.

**Repair Services**

The auditor was unable to determine if certain sales by the Taxpayer were for the sale of taxable fabrication or nontaxable repair services. Documentation submitted by the Taxpayer and reviewed by the auditor indicates that these particular sales represent separately charged repair services to a customers' tangible personal property. Such charges are not taxable based on the provisions of *Va. Code* § 58.1-609.5 2. Accordingly, the Department's audit sample will be revised to remove these sales.

**Nontaxable Finance Charges**

The auditor determined that the invoices related to this issue included taxable charges that were not identifiable. The Taxpayer has submitted documentation that demonstrates that the character of the charges at issue are nontaxable financing charges directly related to credit extended on sales under conditional sales contracts or other conditional deferred payment contracts. These invoices will also be removed from the Department's audit based on the definition of "sales price" as provided in *Va. Code* § 58.1602.

**Travel Charges**

In certain sales invoices, the auditor was unable to determine if the travel charges were related to exempt labor services or in conjunction with the sale of tangible personal property. The auditor held the charges taxable. In P.D. 96-88 (5/14/96),
the Tax Commissioner determined that charges for employee travel and accommodation expenses are exempt from the retail sales and use tax if the purpose of the trip is merely to provide exempt services to customers on site. The Taxpayer has submitted documentation that reflects that the travel charges at issue were charged in relation to services where no tangible personal property was sold to the customer. Accordingly, these invoices will also be removed from the Department's audit.

CONCLUSION

Based on this determination, the audit will be returned to the field audit staff for the required revisions. A revised audit report and updated assessment will be issued. The revised balance must be paid within 30 days from the date of the revised consolidated bill to avoid the accrual of additional interest and an additional 20% post amnesty penalty on the tax due under the terms of Virginia’s Amnesty Program.

The Code of Virginia sections, regulation and public documents cited are available on-line in the Laws, Rules and Decisions section of the Department’s website located at www.tax.virginia.gov. If you have any questions regarding this matter, please contact ***** in the Office of Tax Policy, Appeals and Rulings, at *****.

Sincerely,

Craig M. Burns
Tax Commissioner