STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EASYLINK SERVICES INTERNATIONAL, INC.	:	DETERMINATION DTA NO. 821440
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2001 through May 31, 2004.	:	

Petitioner, Easylink Services International, Inc., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2001 through May 31, 2004.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 8, 2007 at 11:00 A.M., and continued to conclusion at the same location on November 2, 2007 at 10:30 A.M., with all briefs to be submitted by March 31, 2008, which date began the six-month period for the issuance of this determination. Petitioner appeared by KPMG, LLP (Arthur C. E. Burkard, Esq., of counsel, on August 8, 2007, and Russell D. Levitt, Esq., of counsel, on November 2, 2007 and on the briefs). The Division of Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner's sales of various types of electronic data services are subject to the imposition of sales and use taxes as taxable services of telephony and telegraphy pursuant to Tax Law § 1105(b)(1)(B).

II. Whether certain purchases of various items of tangible personal property, which the Division of Taxation during audit treated as exempt under the telecommunications exemption, may now be treated as taxable if petitioner prevails on Issue I.

III. Whether the Division of Taxation properly allocated receipts subject to tax between intrastate and interstate sales if it prevails on Issue I.

FINDINGS OF FACT

1. After a lengthy audit, with time charged to the case of 235 hours, the Division of Taxation (Division) calculated additional sales tax due from petitioner of $560,095.35 based upon "after audit" gross sales of $19,002,312.00, of which "after audit" taxable sales were $6,387,372.00, as compared to zero taxable sales reported. The audit report shows "an agreed amount" of $262,736.64 or 47% of the additional sales tax calculated due, which includes additional sales tax of $226,379.55 due on voluntary disclosure agreement (VDA) sales of $2,889,035.00, as detailed in Finding of Fact 5. This agreed amount also included sales tax due of $18,141.66 on purchases of assets totaling $213,431.29, and sales tax due of $18,215.43 on expense purchases totaling $214,299.17.

2. The disagreed portion, totaling $297,358.71, was asserted due against petitioner, Easylink Services International, Inc., by the issuance of four notices of determination, each dated March 28, 2005, as follows. The first notice, with an Assessment ID # L-025144336, asserted sales and use taxes due of $161,132.37, plus penalty and interest, on fax/telex sales for the period March 1, 2002 through May 31, 2004. The second notice, with an Assessment ID # L-025144337, asserted sales and use taxes due of $48,260.70, plus interest, on EDI (electronic data interchange) sales for the period March 1, 2001 through May 31, 2004. The third notice, with an Assessment ID # L-025144338, asserted sales and use taxes due of $85,187.22, plus interest, on

e-mail[1] services for the period March 1, 2001 through May 31, 2004. The fourth notice, with an Assessment ID # L-025144339, asserted sales and use taxes due of $2,778.42, plus interest, for the period March 1, 2001 through May 31, 2004, representing school district taxes due on the sale of telephony.

3. In March of 2003, prior to the commencement of the audit, petitioner by its representative, KPMG, LLP (KPMG), entered into a VDA for the period February 2001 through July 2002 with the Division. By KPMG's letter dated August 16, 2002, without disclosing petitioner's name, the business was described as "out-of-state" with the following operations:

> [Petitioner] is a global provider of outsourced electronic messaging services to enterprises and service providers. These services include teletypewriter exchange service, email, EDI [electronic data interchange] and fax messaging. The Taxpayer has employees present in New York State along with some computer servers and other equipment necessary to process and store its clients e-mail messages. The Taxpayer owns telecommunications equipment and leases transmission lines from independent third-party telecommunications providers as part of its operations.

4. Petitioner's business was purchased by Swift Telecommunications, Inc., for $50,000,000.00 from AT & T in February, 2001, where it had functioned as a division of AT & T under the name Easylink Services. The services provided by AT & T Easylink Services were described at the time of this purchase, in an announcement by International Telecommunications Intelligence, as follows:

> AT & T Easylink provides telex, fax, e-mail, EDI (B2B), and other *value-added* messaging services to over 30,000 business customers worldwide. It has operations in the US, UK, France, and Germany and direct interconnect agreements and leased-lines to 115 countries worldwide. (Emphasis added.)

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[1] According to Newton's Telecom Dictionary 20th Edition xxv [2004], "A word [sic] that's evolving is electronic mail. At first, it clearly was electronic mail. Then it moved to e-mail and now it seems to be morphing to email, i.e. it's becoming a real word." Nonetheless, in this determination, the term utilized to refer to "electronic mail" will be "e-mail."

Because Easylink was a recognizable name, Swift Telecommunications, Inc., continued to use the name for the business it purchased from AT & T, although there is some confusion in the record concerning petitioner's corporate name. The "legal name of vendor" shown on the sales tax returns dated December 27, 2002 filed by petitioner pursuant to its VDA is Swift Easylink Co., Inc. In contrast, petitioner's New York corporation franchise tax returns for 2001 through 2004 were filed under the name of Easylink Services International, Inc., and show a "date of incorporation" of January 31, 2001. To add to the confusion, petitioner's witness referred to his employer, which purchased Easylink from AT & T as "Mail.Com." In any event, the use of the term "petitioner" in this determination will reference the entity that came into existence when petitioner's business was purchased from AT & T in 2001.

5. Upon its purchase of the business from AT & T, petitioner initially collected sales tax from its customers on the services at issue, as AT & T had been doing. Pursuant to its VDA, as noted in Finding of Fact 1, petitioner remitted sales tax in the amount of $226,379.55 that it had already collected on taxable sales of $2,889,035.00. According to petitioner, it would have been too burdensome to refund such tax directly to its customers. However, since March 1, 2001, petitioner instituted a new program which operated on the belief that none of the services it provided were subject to sales tax.

6. Petitioner also filed sales tax returns for six quarters running from March 1, 2001 to August 31, 2002 pursuant to its VDA. These returns reported taxable sales as follows:

Sales Tax Quarter	Taxable sales reported
03/01/02-05/31/02	$1,103,619.00
06/01/01-08/31/01	1,018,279.00
09/01/01-11/30/01	406,993.00

12/01/01-02/28/02	360,144.00
03/01/02-05/31/02	-0-
06/01/02-08/31/02	-0-
Total	$2,889,035.00

The decreasing amounts of reported taxable sales in the succeeding quarters, as noted in the above table, reflected petitioner's position that none of the services it provided were of a nature subject to sales tax and that it was remitting, pursuant to its VDA, only sales tax that it had collected from its customers.

7. The Division's auditor performed a detailed examination of petitioner's electronic sales files for the month of December 2002, as agreed to by petitioner, for each of the three services at issue (i) fax and telex combined, (ii) EDI services, and (iii) e-mail services. The auditor viewed petitioner's receipts from the provision of secure communications between two terminals as telephony subject to sales tax, and he believed that all three services at issue fit into the taxable category of telephony. Relying on information in petitioner's annual reports, including Forms 10-K, the auditor determined that the services at issue provided by petitioner to its customers were not "enhanced" or "value added" services, but rather were "seamless transactions" with "no human intervention," with petitioner merely providing a "conduit" or a "network" for the transmission of information in "industry standard formats," and without "huge value added enhancement."

Fax and telex revenues

8. During the month of December 2002, the auditor calculated that out of total fax and telex revenues of $371,800.28, petitioner had New York telex and fax revenues, i.e., from an origination point in New York to a destination point in New York, of $42,617.75. His

calculation was based upon an assumption that a New York customer with a billing address in New York meant the telex and fax transaction *originated* in New York State. In addition, if the electronic sales files indicated a *destination* of New York for the New York customer's telex or fax, the auditor concluded that the transaction was between New York points and therefore *intrastate* and subject to the imposition of New York sales tax. The auditor's detailed review of the electronic sales file for December 2002 for fax and telex combined also disclosed that petitioner had receipts from interstate/international transactions of $222,798.43, so that its total receipts from telex and fax which had "known" originations and destinations was $265,416.18 ($42,617.75 plus $222,798.43). He then calculated an intrastate percentage of 16.0570 by dividing "known" intrastate revenues of $42,617.75 by the total "known" intrastate/interstate/international revenues of $265,416.18. Since petitioner's total fax and telex revenues for December 2002 were $371,800.28, the auditor could not determine from his review of the electronic sales file the destination for fax and telex revenues of $90,897.41 (total fax and telex revenue of $371,800.28 less known intrastate/interstate/international revenues of $265,416.18). He calculated that $14,595.35 was additional revenue from *intrastate* communications by applying the intrastate percentage of 16.0570 to the receipts of $90,897.41 for which he could not determine the destination of the fax and telex services. The auditor then computed total taxable New York sales of $72,699.79 in December 2002 from petitioner's fax and telex services: intrastate revenues of $42,617.75, plus estimated intrastate revenues of $14,595.35, plus access fees and minimum commitment fees of New York customers of $15,486.69. The auditor then utilized the intrastate percentage of 16.0570 to compute tax due for the other months included in the audit period, which resulted in the issuance of the Notice of Determination dated March 28, 2005 asserting sales and use taxes due of $161,132.37, plus

penalty and interest. Penalty was imposed because petitioner's accountant advised it in writing that fax and telex revenues "appear to be taxable," and since the auditor believed it was clear under the Division's regulations that fax and telex services were taxable as telephony.

Electronic data interchange (EDI) revenues

9. The auditor followed a similar methodology in estimating petitioner's revenue during the audit period from its provision of EDI services, a standardized form of e-mail, the taxability of which he candidly conceded was "not as clear as fax and telex." Nonetheless, he believed EDI services were properly treated as telephony since EDI was *telecommunication* between two points. With regard to EDI, petitioner's customers were often manufacturing companies that used petitioner's EDI services for the electronic exchange of purchase orders and invoices.

10. During the month of December 2002, petitioner's EDI revenues totaled $38,019.09, of which $1,141.72 were from an origination point in New York to a destination point in New York. Once again, the auditor assumed that a New York customer with a billing address in New York meant, in this instance, that the EDI originated in New York. His detailed review of the electronic sales files for EDI revenues for the month of December 2002 also disclosed receipts from interstate/international transactions of $3,194.94, so that petitioner's total receipts from EDI services which had "known" originations and destinations were $4,336.66 ($1,141.72 plus $3,194.94). He then calculated an intrastate percentage of 26.3272 by dividing "known" intrastate revenues of $1,141.72 by the total "known" intrastate/interstate/international revenues of $4,336.66. Since petitioner's total EDI revenues for December 2002 were $38,019.09, the auditor could not determine from his review of the electronic sales file the destination for EDI revenues of $27,839.51 ($38,019.90 less $4,336.66). He calculated that $7,329.36 were additional receipts from intrastate communications by applying the intrastate percentage of

26.3272 to the receipts of $27,839.51 for which he could not determine the destination of the EDI services. The auditor then computed total taxable New York sales of EDI services for the month of December 2002 of $14,314.00: intrastate revenues of $1,141.72, plus estimated intrastate revenues of $7,329.36, plus access fees and minimum commitment fees of New York customers of $5,842.92. The auditor then utilized the intrastate percentage of 26.3272 to compute tax due for the other months included in the audit period, which resulted in the issuance of the Notice of Determination, dated March 28, 2005, asserting sales and use taxes due of $48,260.70 plus interest.

Revenue from e-mail services

11. During the month of December 2002, petitioner had total revenue of $112,703.45 from the provision of e-mail services. The auditor determined that receipts from such services were properly treated as taxable on the basis that e-mail was also *telecommunications* between two points and therefore *telephony* subject to tax. He emphasized that petitioner "was not an internet service provider [ISP]," and e-mail services were exempt from taxation only "when provided as part of internet access." He did not view e-mail as "data transmission" but nonetheless determined it was taxable as "two computers communicating."

12. Petitioner's electronic sales files for e-mail revenue did not contain any information on the e-mail destinations. As a result, the auditor estimated the percentage of e-mail revenues with New York destinations as follows. He calculated petitioner's total "intrastate revenues" of $87,013.70 by adding petitioner's New York taxable revenue from fax and telex services of $72,699.79 and its New York taxable revenue from EDI services of $14,314.00. He then determined that these intrastate revenues represented 21.2322% of petitioner's total EDI, fax and telex revenues of $409,819.37. Applying 21.2322% against petitioner's total e-mail revenues

from its New York customers of $112,703.45, the auditor computed e-mail *intrastate* revenues subject to tax of $23,929.46. The auditor then utilized the intrastate percentage of 21.2322 to compute tax due for the other months included in the audit period, which resulted in the issuance of the Notice of Determination dated March 28, 2005 asserting sales and use taxes due of $85,187.22 plus interest.

13. In determining his allocation of petitioner's receipts between intrastate and interstate revenues, the auditor did not view the fact that all the data transmissions were routed through petitioner's facility in Missouri, where petitioner's servers or networks were maintained, as relevant since Missouri "was not the ultimate destination."

14. In auditing petitioner's purchases of fixed assets, the auditor treated as exempt from the imposition of sales tax the following purchases of what he considered to be telecommunication equipment:

Vendor	Invoice date	Invoice amount	Description
CP America	4/18/01	$14,370.00	Rackmount computers for telex switch
CP America	6/12/01	$10,696.00	Rackmount computers for telex switch
EC Datacom Limited	6/19/01	$175,500.00	75 emulator cards
EC Datacom Limited	10/18/01	$65,183.55	Installation of telex exchange

15. In auditing petitioner's recurring expenses, the auditor treated the following purchases of cable assemblies and cables as exempt from sales tax based upon his belief that "petitioner was providing a telecom service:"

Vendor	Invoice date	Invoice amount	Description
Vari Tronics	2/03/03	$909.59	Cable assemblies
Vari Tronics	1/31/03	$278.64	Cables

Vari Tronics	1/31/03	$377.64	Cable assemblies

16. The audit of petitioner's fixed assets was a detailed audit covering the entire period at issue. However, for recurring purchases, the auditor projected a taxable percentage based upon his detailed examination of one sales tax quarter, December 1, 2002 through February 28, 2003 as noted in Finding of Fact 14.

17. Petitioner's customers can access its network at various node locations in the United States, including one in New York, as well as in the United Kingdom, Canada, Israel and Australia, and some customers may access petitioner's network by utilizing certain internet protocols. But no matter where petitioner's network is accessed in the world, the electronic data was transmitted during the audit period at issue to its facility in Bridgeton, Missouri,[2] where petitioner performs the particular services requested by its customers. Petitioner utilizes a "data kit" system for transporting any type of message to its Missouri location where all of its processing takes place. Once any type of message gets to Missouri, it is stored.

18. The e-mail service offered petitioner's customers was "a completely secured" and closed "proprietary" system, which was isolated from the public internet. In providing e-mail service to a customer, petitioner might add logos or a letterhead to a particular e-mail that was transmitted by a customer to its facility in Missouri, and then petitioner would deliver such enhanced e-mail to various e-mail addresses designated by its customer. Many customers valued the security provided by petitioner so that the destinations for their e-mail could be controlled. Petitioner utilized standard message internet protocol (SMIP) for getting on the internet to deliver

[2] In 2006, petitioner moved the processing facility in Missouri to its New Jersey headquarters in Piscataway.

its customers' e-mail. SMIP was utilized by petitioner in lieu of packet switching, an earlier technology for messaging, which it had used in the past.

19. The facsimile (fax) service provided by petitioner is different from a traditional telephony fax. In petitioner's case, there is no fax machine at the customer's location sending individual faxes. Rather, the customer transmits text messages or information in a data file to petitioner's facility in Missouri where petitioner processes the information and converts it into a fax format. For example, petitioner may put a logo or headings or signatures on the message transmitted, and then it would deliver such enhanced electronic transmission to multiple locations as a "broadcast fax" or might deliver it, by utilizing the internet, as an e-mail message to designated recipients.

20. With reference to telex services, there is one transmission to petitioner from its customer and then another transmission via petitioner's network to the recipient. A telex is a communication in an authoritative format relied upon throughout the business world, usually in banking, insurance and maritime industries, as a valid transmission of information. For example a bank might send a letter of credit via telex to another bank.

21. With reference to EDI services, a structured or standardized form of e-mail, petitioner receives information at its Missouri facility from its customers that is to be provided to a supplier or a manufacturer. Petitioner processes the information into a standardized EDI format called "a wrapper," which can then be processed as an order by a vendor. Petitioner does not merely route a purchase order from its customer to a vendor or supplier. In addition, petitioner offers a "popular Fax-To-EDI service if [the customer] want[s] to transmit forms in TIFF and PDF formats and remain confident each data field will find a home at the other end."

22. In conjunction with the services it provides to its customers, petitioner purchases telecommunication services, and does not view itself as a telecom provider. Petitioner is not regulated by the Federal Communications Commission, which considers it a value added network. Further, none of petitioner's services during the period at issue were taxable by the Internal Revenue Service for the then existing federal excise tax or subject to the universal service charge because they were all enhanced services specifically exempt from federal excise tax. Further, there is never a single transaction processed through petitioner's network. Every transaction comes into its network and is stored in some fashion for further processing in Missouri. Diginet, Inc., which is a competitor of petitioner's, provides services almost identical to the services petitioner provides, except Diginet, Inc., does not perform EDI services.

23. Petitioner submitted 102 proposed findings of fact. Proposed findings of fact 2, 3, 6 through 17, 19 through 28, 30 through 37, 40 through 50, 67 through 71, 73 through 78, and 81 through 101 are accepted and incorporated into this determination.

Proposed finding of fact 18 is accepted but restricted to petitioner's fax services, which was the subject of the testimony upon which the proposed fact was based.

Proposed finding of fact 29 is accepted but with the limitation that the testimony was not clear whether it was referencing petitioner's telex services or fax services.

Proposed finding of fact 1 is not accepted on the basis of irrelevancy and an insufficient evidentiary basis to find that "for *all* relevant periods at hand," petitioner was headquartered in Piscataway, New Jersey.

Proposed findings of fact 4, 5, 51 through 66, and 102 are rejected because they are more in the nature of legal conclusions, or legal analysis of related case law, or ultimate findings of fact best addressed in the Conclusions of Law.

Proposed findings of fact 38, 39, and 72 are rejected because they pertain to the evaluation of the testimony of petitioner's witness, Peter Macaluso, and are best addressed in the Conclusions of Law when his credibility is discussed.

Proposed findings of fact 79 and 80 are rejected to the extent they state that petitioner is an internet service provider.

SUMMARY OF THE PARTIES' POSITIONS

24. Petitioner relies upon 20 NYCRR 527.2(d)(4) which states that "a service is not considered telephony or telegraphy if either of these services is merely an incidental element of a different or other service purchased by the customer." It also notes that an advisory opinion issued to Diginet, Inc., (Diginet, Inc. f/k/a/ Graphnet, Inc., TSB-A-99[18]S, April 8, 1999) supports its position. Like Diginet, Inc., petitioner contends it "is not selling telecommunication services or facsimile services, but rather is selling various services that are excluded from the imposition of sales and use tax as non-enumerated services." Like Diginet, petitioner's receipt of electronic data from its customers and the ultimate transmission to its customers' designated recipients "is not one continuous transmission, but rather a series of storage and processing functions followed by a separate and distinct transmission or series of transmissions, of processed data to the ultimate destination." Petitioner emphasizes that it "processes" the data received from its customers:

> [P]etitioner assembles and processes the customer-supplied data for transmission worldwide. Petitioner converts the customer's file format to the appropriate format for delivery based on the customer's specifications. In addition, Petitioner performs mail merging, form overlay and automatic broadcast functions. These services transform an ordinary message into a highly customized and enhanced communication for its customers.

Consequently, since its fax/telex services are "value added services," petitioner maintains that its receipts from such "enhanced" fax/telex services may not be subject to tax under 20 NYCRR 527.2, which treats *simple* facsimile transmission services as telegraph services subject to tax under Tax Law § 1105(b). Petitioner invokes the first telegraph message sent in May 1844 by Samuel Morse if the Division of Taxation is allowed to impose sales tax on its receipts from e-mail services: "What hath God wrought?" It complains that the Division's "repeated use of the word telecommunications" ignores the sales tax law, which imposes tax on telephony and telegraphy but not telecommunications and complains that the Division never clearly states whether petitioner's services subjected to tax are telephony *or* telegraphy. Petitioner maintains they are neither.

25. The Division, relying on its regulation at 20 NYCRR 527.2(d)(2), contends that the term "telephony and telegraphy" includes "the use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." It argues that petitioner "provides a network upon which its customers can communicate by computer or electronically with one another," which is properly considered "telephony and telegraphy" under Tax Law § 1105(b). Therefore, it properly imposed sales tax on petitioner's receipts from its customers of "minimum access charges" and "unit charges" for the transmission of messages. The Division argues vigorously that the "core of the product is the delivery of messages" because petitioner does not change "the substance of the message." Pointing to the descriptions of petitioner's business in its annual reports including 10-K forms, the Division argues that petitioner is in the business of delivering messages, and in its reports emphasizes its "seamless," efficient and speedy service. With regard to fax and telex services which petitioner was collecting sales tax on, penalty is properly imposed because petitioner was "advised during the audit that they should be collecting

tax" on such services and its accounting firm also advised petitioner that such services were taxable. Further, the e-mail services provided by petitioner were not provided in conjunction with the provision of internet access where the charge would not be subject to tax.

CONCLUSIONS OF LAW

A. Initially, it must be made clear that at issue in this matter is *not* whether petitioner had receipts from *telecommunication services*, which are subject to the imposition of sales tax. Rather, the issue is whether, under Tax Law § 1105(b), petitioner had receipts from the sale of "telephony and telegraphy and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service" that are subject to the imposition of sales tax.

B. Consequently, the pivotal question in this matter is whether the facts support a conclusion that petitioner has receipts from the sale of intrastate "telephony and telegraphy . . . of whatever nature" and not whether petitioner has receipts from the sale of "telecommunication services." Part of the confusion on this point results from Tax Law § 1115(a)(12-a) which provides the so-called "telecommunications exemption." This *exemption* from sales tax, as in effect *on or after September 1, 2000*, provides as follows:

> Tangible personal property for use or consumption directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. Such tangible personal property exempt under this subdivision shall include, but not be limited to, tangible personal property used or consumed to upgrade systems to allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. As used in this paragraph, the term "telecommunications services" shall have the same meaning as defined in paragraph (g) of subdivision one of section one hundred eighty-six-e of this chapter.

The definition of "telecommunications services" incorporated into the above "telecommunications exemption," is set forth in Tax Law § 186-e(1)(g) as follows:

> [T]elephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call-waiting and the like) and also include any equipment and services provided therewith. Provided, the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent."

C. In contrast to the broad definition of telecommunication services noted above, up until September 1, 2000, the "telecommunications exemption" did not include such an expansive definition of "telecommunications services." Rather Tax Law § 1115(a)(12), as in effect for the period prior to September 1, 1998, provided the following much narrower "telecommunications exemption" which was in essence merely an exemption for "telephone or telegraph central office equipment:"

> Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, *or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication,* but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas and solution mining activiites to the point of sale to the first commercial purchaser. (Emphasis added.)

In addition, for the two-year period running from September 1, 1998 to September 1, 2000, the statutory language at Tax Law § 1115(a)(12) provided the following, different but also narrowly

defined, "telecommunications exemption" which, again, was in essence an exemption for telephone or telegraph central office equipment:

> Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, *or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication or in receiving, amplifying, processing, transmitting and retransmitting telephone or telegraph signals,* but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser.

D. The analysis therefore shifts to determining what is meant by the terminology of "telephony and telegraphy" for purposes of Tax Law §1105(b), which, as noted in Conclusion of Law A, does *not* incorporate the type of modern, wide ranging definition of "telecommunications services" like the most recent version of the telecommunications exemption, effective September 1, 2000, as noted above, which expanded an exemption from the imposition of sales tax (***see Matter of Fastnet Corporation***, Tax Appeals Tribunal, March 16, 2006 [Tribunal discusses the expansion of the telecommunications exemption in 2000 to the benefit of internet service providers]).

E. A good starting place is the Division's sales tax regulations at 20 NYCRR 527.2(d), which define "telephony and telegraphy" as follows:

> (1) The provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephony and telegraphy.
>
> (2) The term telephony and telegraphy includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.

* * *

Example 4: Facsimile transmission services are telegraph services . . . .

* * *

(4) A service is not considered telegraphy or telephony if either of these services is merely an incidental element of a different or other service purchased by the consumer.

Example 6: A company offers its customers a protective service using a central station alarm system, which transmits signals telegraphically. The customer is purchasing a protective service.

F. Furthermore, the definition of telephony and telegraphy for purposes of Tax Law § 1105(b)(1)(B), which imposes sales tax on specified services, must be interpreted as these terms are "commonly understood" (***see Cortland-Clinton v. Dept of Health***, 59 AD2d 228, 399 NYS2d 492 [1977] [where there was no *statutory* definition of a word, resorting to the dictionary to define the term as it is commonly understood was proper]). According to Newton's Telecom Dictionary 20th Edition [2004], which provides a "telecom" definition, "telegraphy" means "aging data transmission technique characterized by maximum data rates of 75 bits per second and signaling where the direction, or polarity, of DC current flow is reversed to indicate bit states." While "telegraphy" is defined in a customary dictionary as "the use or operation of a telegraph apparatus or system for transmitting or receiving communications" (Webster's Ninth New Collegiate Dictionary 1212 [1983]). In addition, the Tax Appeals Tribunal in ***Matter of Sprint International Communications Corp.*** (July 27, 1995), citing the court in ***Holmes Elec. Protective Co. v. McGoldrick*** (262 App Div 514, 30 NYS2d 589, 593, [1941] ***affd*** 288 NY 635, [1942]) in distinguishing e-mail service from telegraphy noted that telegraphy "consists

essentially of 'the mere transmission of communications, the service of the telegraph company being completed when the message has been transmitted'."

G. Further, Tax Law § 1105(b)(1)(B) does not create an exemption from the imposition of sales tax, but rather, it delineates certain service activities subject to tax. As a result, in analyzing this provision, which may be viewed as an "imposition statute," any ambiguity is construed against the Division and in favor of the petitioner (***see Matter of Penn York Energy Corp.***, Tax Appeals Tribunal, October 1, 1992). As a result, any vagueness or ambiguity about the terminology of "telephony and telegraphy" must be construed in favor of petitioner.

H. Consequently, applying this narrower definition of telegraphy and telephony to the facts of this matter, with the understanding that any vagueness or ambiguity must be construed in favor of petitioner, it is concluded that the activities of petitioner at issue constitute nontaxable services and do not constitute telephony or telegraphy. This conclusion comports with the persuasive reasoning articulated in the advisory opinion issued to petitioner's competitor Diginet, Inc. (Diginet, Inc. f/k/a/ Graphnet, Inc., TSB-A-99[18]S, April 8, 1999). Although advisory opinions have no binding effect, there is no bar to adopting the reasoning articulated in an advisory opinion, if persuasive (***cf Matter of Nathel***, Tax Appeals Tribunal, August 31, 1995). Therefore, it is concluded that like the similar services provided by petitioner's competitor, Diginet, Inc., the enhanced electronic data services provided by petitioner are not telegraphy and telephony and are not among the enumerated services upon which sales tax is due. Like Diginet, petitioner's activities constitute, in the language of the advisory opinion, "nontaxable services which merely include the transmission of documents in petitioner's efforts to provide the services that the customer has requested." In sum, the Division's argument that the enhanced electronic data services provided by petitioner are telephony or telegraphy is rejected (***see also Matter of***

Sprint International, Tax Appeals Tribunal, July 27, 1995 [Tribunal decided that "telemail service" was not telephony or telegraphy, noting that with regard to electronic mail: "At no time is there an interactive session between the originator of the message and the addressee" since the addressee must access the electronic mailbox to receive the e-mail]).

I. Furthermore, the additional statutory language included in Tax Law § 1105(b)(1)(B), which references telegraphy or telephony "of whatever nature" does not alter this conclusion. The "nature" or "essence"[3] of petitioner's electronic data services simply was not telegraphy or telephony as those terms are commonly understood. Although the regulation at 20 NYCRR 527.2(a)(2) provides that the words "of whatever nature" contained in Tax Law § 1105(b) "indicate that a broad construction is to be given the terms describing the items taxed," they cannot transform into telegraphy or telephony a service which is something other than telegraphy or telephony (***see Matter of N.Y. State Cable Tel. Ass'n v. State Tax Com'n***, 59 AD2d 81, 397 NYS2d 205, 206 [1977] [Court noted that while cable television service involves "dissemination by electronic means of communications," which "telegraphy" in its broadest sense encompasses, the Division was not allowed "to encompass within one category of communication a different category of communication which to the mind of the ordinary individual would not be included therein"]). Similarly, the enhanced electronic data services provided by petitioner in this modern, technological age are properly viewed as one category of communication different and distinct from the category of communication of telephony or telegraphy. It is of import that the receipts from sales of telephony and telegraphy have been subject to the imposition of sales tax since 1965, some 43 years ago, decades prior to the age of the internet and the sophisticated electronic

[3] The term "nature" is commonly understood to mean "essence" (Webster's Ninth New Collegiate Dictionary 789 [1983]).

data services as provided by petitioner. In the fall of 2000, as noted in Conclusion of Law D, when Tax Law § 1115(a)(12-a) was amended to expand the telecommunications exemption, Tax Law § 1105(b) remained untouched. It is not for the Division to enlarge the meaning of telephony and telegraphy to something which the Legislature could easily have expressed when it expanded the telecommunications exemption but did not. New language cannot be imported into Tax Law 1105(b) to give it a meaning not otherwise found therein (***see*** McKinney's Cons Laws of NY, Book 1, Statutes § 94). In short, it is for the Legislature, if it so decides, to expand the range and reach of a statutory provision which imposes tax, especially in light of the extraordinary technological advances since it first imposed sales tax on receipts from telegraphy or telephony in 1965.

J. Since petitioner has prevailed on Issue I, it is necessary to address Issue II . As noted in Findings of Fact 14 and 15, during audit the Division treated as exempt from the imposition of sales tax certain purchases made by petitioner of "telecommunication equipment." The Division now asserts that if it is concluded that the services petitioner provides to its customers are not telegraphy or telephony of whatever nature, then it should be permitted to assert tax due on petitioner's purchases of fixed assets and recurring expenses, which during audit it treated as exempt pursuant to the telecommunication exemption, as detailed in Conclusion of Law B. This position by the Division reflects the confusion noted in Conclusion of Law B caused by the Division equating incorrectly the expansive definition of telephony or telegraphy specifically incorporated into the telecommunication exemption with the narrower definition of telephony or telegraphy, which is properly utilized in analyzing Tax Law § 1105(b) as discussed above. Consequently, the Division's request to assert tax due on purchases it treated as exempt during audit is rejected.

K. Since the testimony of Peter Macaluso, petitioner's one and only witness, provided the underpinning for the findings of fact made in this determination, it is noted that his testimony has been given credence. This is so despite the fact that he was a cautious witness, who was clearly prepped in anticipation of his testimony at the hearing, and as petitioner's vice president for finance and corporate controller, his testimony concerning the technological aspects of petitioner's services was not always clear. Nonetheless, the critical aspect of his credible testimony established the similarity of the services at issue to the services provided by petitioner's competitor, as discussed above in Conclusion of Law H. Further, as noted in Finding of Fact 4, from the very start, petitioner's electronic messaging services have been referenced as "value-added," which bolsters Mr. Macaluso's testimony that petitioner was not merely a conduit to deliver messages. This is so regardless of annual reports which described petitioner's business as delivering messages in a "seamless" fashion. Messages may be delivered by petitioner in a seamless fashion and yet be value-added or enhanced messages.

L. The petition of Easylink Services International, Inc. is granted, and the four notices of determination, each dated March 28, 2005, are canceled.

DATED: Troy, New York
June 26, 2008

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE