STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HELIO, LLC	:	DECISION DTA NO. 825010
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 June 1, 2006 through February 28, 2009.	:	

Petitioner, Helio, LLC, filed an exception to the determination of the Administrative Law Judge issued on June 12, 2014. Petitioner appeared by Sutherland Asbill & Brennan, LLP (Eric S. Tresh, Esq., Zachary T. Atkins, Esq. and Andrew D. Appleby, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard in New York, New York on January 8, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly determined that additional sales tax was due on petitioner's sales of mobile telecommunications services.

II. Whether the Division of Taxation's imposition of sales tax on petitioner's sales of mobile telecommunications services violates the equal protection clauses of the New York State and United States constitutions.

III. Whether the Division of Taxation properly determined that sales tax was due on petitioner's recovery of the Federal Universal Service Fund fee.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and we omit finding of fact 67, which discussed findings of fact submitted by petitioner to the Administrative Law Judge. These facts are set forth below.

Petitioner's Corporate History

1. Petitioner, Helio, LLC, was a mobile virtual network operator (MVNO) that sold postpaid wireless mobile (mobile)[1] telecommunications services to customers in the continental United States, including New York, during the audit period.

2. Petitioner was acquired by Virgin Mobile USA, L.P., an indirect majority-owned subsidiary of Virgin Mobile USA, Inc. (Virgin Mobile), on August 22, 2008. Virgin Mobile was an MVNO that sold prepaid mobile telecommunications services before and after it acquired petitioner.

3. After acquiring petitioner, Virgin Mobile marketed and sold mobile products and services through petitioner and other affiliates under the "Helio by Virgin Mobile" brand.

4. Sprint Nextel Corporation (Sprint) acquired Virgin Mobile, and thus petitioner, in November 2009.

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[1]Both parties and the Administrative Law Judge use the terms wireless and mobile interchangeably to refer to wireless mobile telecommunications services. All such references have been modified to mobile telecommunications services for purposes of clarity.

Petitioner's Mobile Telecommunications Services

5. The mobile products and services marketed and sold by petitioner were marketed and sold together as plans, for which customers generally paid a fixed monthly charge (i.e., a flat rate).

6. The price of the plans offered by petitioner varied depending on the number of call minutes and products and services offered, but petitioner's plans were divided into two categories: "A La Carte" plans and "All-In" plans.

7. The A La Carte plans allowed customers to make interstate and intrastate voice calls and included ancillary services such as call waiting, call forwarding, caller ID, and voicemail. For example, petitioner's customers who purchased A La Carte 500 plans during the audit period paid $40.00 per month and received 500 call minutes each month.

8. A La Carte plans did not include data-based services such as internet access service, text messaging service, e-mail, or information services.

9. Petitioner's customers who purchased A La Carte plans were charged per-minute usage overage charges if they exceeded their allotted call minutes each month. The overage charges varied depending on the number of minutes over the amount allotted in a customer's plan. The overage charges were not part of the fixed monthly charge and were separately stated on the customers' invoices.

10. Petitioner submitted a portion of customer invoices for the audit period into the record. The invoices submitted for the A La Carte plan show that charges for voice overages are separately stated and indicate the telephone number, including area code, date, time and length of call, and amount charged for the overage.

11. Petitioner's customers who purchased A La Carte plans were charged per-minute charges for international calls.

12. Petitioner's customers who purchased A La Carte plans were charged per-kilobyte data usage charges for data usage outside of the plan. The customers' invoices for the A La Carte plans separately stated the charges for data usage.

13. Petitioner's customers who purchased A La Carte plans were charged overage charges or charges for usage outside of the plan for sending and receiving text messages.

14. Petitioner's All-In plans allowed customers to make interstate and intrastate voice calls and included ancillary services such as call waiting, call forwarding, caller ID, and voicemail. For example, petitioner's customers who purchased All-In 500 plans during the audit period paid $65.00 per month and received 500 call minutes each month.

15. All-In plans also included data-based services such as internet access service, text messaging service, e-mail, and information services.

16. Petitioner's customers who purchased All-In plans were charged per-minute overage charges if they exceeded their allotted call minutes each month. The overage charges varied depending on the number of minutes over the amount allotted in a customer's plan. The overage charges were not part of the fixed monthly charge and were separately stated on the customers' invoices.

17. Petitioner submitted a portion of customer invoices for the audit period into the record for the All-In Plan. The invoices show that charges for voice overages are separately stated and indicate the telephone number, including area code, date, time, and length of call, and amount charged for the overage.

18. Petitioner's customers who purchased All-In plans were charged per-minute charges for international calls.

19. Petitioner's customers who purchased All-In plans were charged per-kilobyte data usage overage charges for data usage exceeding the amount included in the plan. The customers' invoices for the All-In plans separately stated the charges for data usage overage.

The Federal Universal Service Fund

20. Petitioner contributed to the Federal Universal Service Fund (FUSF) and filed Form 499-A Telecommunications Reporting Worksheets (the Worksheets) with the Federal Communications Commission (FCC) reporting revenue from 2006, 2007, 2008, and 2009. The Worksheets reported the portion of petitioner's annual revenue from mobile services that were attributable to interstate mobile telecommunications, based on the prevailing safe harbor percentages established by the FCC.

21. In 1997, the FCC established "safe harbor" percentages that providers of mobile voice service could use to report their percentage of interstate mobile telecommunications for FUSF contribution purposes. The safe harbor percentages for mobile providers like petitioner varied during the audit period. In June and July 2006, the safe harbor percentage was 28.5 percent. From August 2006 through July 2007, the safe harbor percentage was 37.1 percent. From August 2008 through February 2009, the safe harbor percentage was 28.5 percent.

22. Petitioner recovered its FUSF contribution costs from customers during the audit period. Petitioner used the safe harbor percentages to calculate the amount of FUSF contribution cost fee to charge to its customers.

Petitioner's Invoices

23. Petitioner's customers received monthly invoices during the audit period.

24. Petitioner submitted a portion of the invoices for the audit period into the record. The monthly invoices sent to petitioner's customers separately stated the fixed monthly charge for the services provided, amount attributable to voice and data usage overage charges, applicable taxes, fees and government surcharges, and petitioner's fees and surcharge recovery.

25. Petitioner recovered its FUSF contribution costs through a separately stated "Federal Universal Service" line-item charge on each customer invoice under the heading "HELIO Fees & Surcharge Recovery" or "HELIO Fees + Contribution Recovery Charges." The fee was charged to petitioner's customers based on the safe harbor percentages and not on the actual calls made by the customer. Even if a customer made no calls during a month of the plan, the customer incurred a fee for the FUSF contribution costs.

26. Each monthly invoice also provided the customer's call detail, which listed each call made or received during the billing cycle in chronological order and specified the number called, the rate code, call type, and duration. For calls made within the parameters of the plan, the call detail shows a zero dollar amount for airtime charges, additional charges and total charges. For calls made over the allotted minutes of the plan (overages), the call detail for each overage call specifies airtime charges, additional charges and total charges.

27. The call detail allowed each customer to identify whether the call was interstate, intrastate, or international by reference to the incoming telephone number (in the case of a call received by the customer) or outgoing telephone number (in the case of a call made by the customer).

28. After April 2007, petitioner began separately tracking overage charges for interstate and intrastate voice services on customers' invoices and in their billing data. Prior to mid-April 2007, the customer invoices indicate the charges associated with each overage call and each

overage call can be identified as interstate or intrastate based on the area code, but the total overage charges listed on the invoices and in the billing data combine both the interstate and intrastate overage charges.

29. Petitioner collected New York sales tax on charges for intrastate voice service sold during the audit period based on the safe harbor percentages. Petitioner did not collect tax on charges it deemed attributable to interstate voice service sold during the audit period.

30. In calculating the amount of New York sales tax to collect on charges paid by customers for mobile services, petitioner first determined the price of each service sold to customers as part of the fixed monthly charge for each A La Carte or All-In plan.

31. For example, if petitioner sold the A La Carte 500 plan, which did not include data, for $40.00 per month, and the All-In 500 plan for $65.00 per month, the $25.00 difference would reflect the amount petitioner charged its All-In customers for data-based services.

32. If petitioner did not separately sell a service sold as part of a fixed monthly charge, it looked to what other mobile providers were charging for the service and used that amount to allocate a portion of the fixed monthly charge to the service for New York sales tax purposes.

33. For example, petitioner did not sell call waiting, call forwarding, caller ID, or voicemail separately. It looked at what Sprint, AT&T, Verizon, and T-Mobile were charging for those services and used those amounts to allocate a portion of the fixed monthly charge to each service.

34. Once petitioner identified each non-voice service included in the plan and allocated a portion of the fixed monthly charge thereto, petitioner allocated the residual (i.e., the remainder of the fixed monthly charge) to voice service, without differentiating between interstate and intrastate voice services.

35. For example, in the case of the $40.00 A La Carte 500 plan, petitioner allocated $2.00 to voice network access, $1.00 to call waiting, $1.00 to call forwarding, $1.00 to caller ID, and $2.00 to voicemail. Petitioner allocated the remaining $33.00 to voice service.

36. In the case of the $65.00 All-In 500 plan, petitioner allocated $2.00 to voice network access, $1.00 to call waiting, $1.00 to call forwarding, $1.00 to caller ID, and $2.00 to voicemail. As noted above (***see*** Finding of Fact 31), petitioner allocated $25.00, the difference between the A La Carte 500 and All-In 500 plans, to data-based services like internet access service, text messaging service and information services.

37. After determining the portion of each fixed monthly charge that was attributable to data-based services, petitioner allocated portions of the price differential amount to the different data-based services, each of which had a unique service code in petitioner's accounting system, based on costs. For example, petitioner determined that the $25.00 price differential between the All-In 500 and A La Carte 500 plans was attributable to data-based services. Of that amount, petitioner attributed approximately $13.86 to internet access service (referred to as "Data Transmission" in its accounting system), $0.43 to e-mail, $7.39 to information services and $3.33 to messaging service.

38. After determining the portion of each fixed monthly charge attributable to data-based services, petitioner allocated the remaining $33.00 to voice service. Petitioner further allocated the amount of the charge for voice service between interstate and intrastate voice services using the prevailing safe harbor percentages established by the FCC for FUSF purposes.

39. For example, petitioner allocated 28.5 percent of the $33.00 voice charge to interstate voice service, or $9.41, for the periods July 2006 through August 2006 and August 2008 through

February 2009. Petitioner allocated the remaining 71.5 percent of the $33.00 voice charge to intrastate voice service, or $23.60, during the same periods.

40. After petitioner determined the amount of the charge for intrastate voice service sold as part of a fixed monthly charge, petitioner collected and remitted New York sales tax on the calculated intrastate charges.

41. Petitioner collected New York sales tax on charges for intrastate voice service sold as part of fixed monthly charges based on the safe harbor percentages established by the FCC. Petitioner also collected sales tax on voice overage charges that were attributable to intrastate voice service.

42. Prior to mid-April 2007, petitioner used the safe harbor percentages established by the FCC for FUSF purposes to determine the portion of each total overage charge attributable to interstate and intrastate voice service. After mid-April 2007, petitioner's accounting system separately tracked the interstate and intrastate voice overage charges using the codes INTERI for interstate incoming calls, INTERO for interstate outgoing calls, INTRAI for intrastate incoming calls, and INTRAO for intrastate outgoing calls. Petitioner's billing data recorded the overages after mid-April 2007 using the item codes UV0003 and UV0004 for interstate overages and item codes UV0012 and UV0013 for intrastate overages. After mid-April 2007, petitioner collected New York sales tax on the voice overages attributable to intrastate voice service based on the specific charges for intrastate overages as reflected in its records.

43. Petitioner and Virgin Mobile (after acquiring petitioner) both separately identified portions of fixed monthly charges attributable to interstate mobile voice service and did not charge New York sales tax thereon. Petitioner and Virgin Mobile (after acquiring petitioner)

independently determined how they would collect New York sales tax and ultimately used the same methodology to unbundle charges for interstate mobile voice service.

44. In 2005, SK-Earthlink, Inc. (SKE), a joint venture between SK Telecom Co., Ltd., and Earthlink, Inc., that ultimately became Helio, LLC, engaged Deloitte & Touche (Deloitte), a national accounting firm, to perform a state-by-state study and issue a report regarding the taxability of products and services sold for a fixed monthly charge.

45. Deloitte's report was to provide Deloitte's opinion regarding whether petitioner could separately apply state and local taxes to each of its products and services if those products and services were sold for a fixed monthly charge.

46. Deloitte concluded that, based on its review of the Tax Law, SKE could sell taxable and nontaxable products and services for a fixed monthly charge and collect tax on them separately for New York sales tax purposes. Deloitte also determined that federal law supported its conclusion and stated that:

> New York has adopted and is in conformance with the [federal] Mobile Telecommunications Sourcing Act. Therefore, a home service provider shall pay tax on the gross receipts from any charge that is aggregated with and not separately-stated from other charges for mobile telecommunications. Provided, however, that if the service provider uses an objective, reasonable and verifiable standard for identifying each of the components of the charge for mobile telecommunications service, then the provider may separately account for and quantify the amount of each component charge. N.Y. Tech. Serv. Bur. Memo. TSB-M-02(6)S (July 30, 2002).

Audit of Petitioner

47. Jeffry Issler (Mr. Issler or the auditor), a Tax Auditor I with the Division of Taxation (Division), was assigned petitioner's audit on March 21, 2008. Mary Kaminski (Ms. Kaminski), a Tax Auditor II with the Division, was Mr. Issler's supervisor on the audit. Michael Gross (Mr.

Gross), a Tax Auditor III and Section Head with the Division, was Ms. Kaminski's supervisor during the audit.

48. Upon reviewing petitioner's business records, including sales and capital records, the auditors concluded that said records for the audit period were adequate and in an auditable condition. The auditors also determined that there were adequate internal control procedures in the sales and capital portion of petitioner's business operation. All records requested for the audit were made available. The Division's audit report notes that sales invoices were provided when requested; sales invoices were issued to every customer; sales invoices were dated and legible; and sales invoices were prenumbered.

49. A computer-assisted audit was performed using Technology Assist Audits (TAA) personnel because the volume of the information provided by petitioner was more than Mr. Issler could review by himself. The data was sent to TAA personnel who summarized the information based on records that petitioner provided. TAA provided a summary of all charges to Mr. Issler, which contained item codes, item descriptions and charges. Mr. Issler reviewed the summary and determined which items were taxable, nontaxable or should be purged. Mr. Issler did not know what some of the item codes and descriptions stood for. In reviewing the information, Mr. Issler reviewed "some" of the invoices provided by petitioner.

50. For the period October 1, 2008 through February 28, 2009, the Division estimated the tax due based on a projection of tax calculated from the periods ending May 2006 through September 2008. TAA had a problem inputting the data for the period October 1, 2008 through February 28, 2009 because some of the invoice information was duplicated. Communications between the auditor and TAA personnel indicated that when TAA ran into a problem with duplicated data for this period, they reviewed a sample of ten bills and found that one bill had

duplicated data. Based on the issue of duplications in the sample, the Division determined to perform an estimate for this period. A signed Test Period Audit Method Election form was not obtained from petitioner. Prior to the conclusion of the audit, petitioner informed the auditor that it could provide the records for the estimated period where the data had been missing or duplicated. The auditor told petitioner the Division would not use the records because the Division would have to start the process from the beginning according to TAA. The Division estimated the tax for the period October 1, 2008 through February 28, 2009 in the amount of $96,115.64.

51. On October 1, 2008, during the course of the audit, petitioner filed a refund claim in the amount of $182,125.00 for sales tax paid on sales that were subsequently written off for bad debt purposes. Of that amount, the Division approved a refund of $180,494.53 but denied the remaining $1,630.47.

52. During a field appointment, Mr. Issler found that petitioner did not charge New York sales tax on the full amount of the fixed monthly charges for A La Carte and All-In plans.

53. Petitioner informed Mr. Issler that it was able to separately identify the amount charged to its customers for interstate voice service using the safe harbor percentages established by the FCC for FUSF purposes and that petitioner was able to separately identify the amount charged to its customers for internet access service. However, Mr. Issler indicated to petitioner that he believed that bundled charges were taxable in their entirety.

54. Mr. Issler based his determination that bundled charges were taxable in their entirety on his review of the Tax Law, discussions with other Division employees, a technical services memorandum issued by the Division in 2002, TSB-M-02(6)S (the 2002 TSB-M), an informational guidance statement issued by the Division in 2007 (NYT-G-07[3]S), a regulation

and a report issued by the Division entitled Report on the Taxation of the Telecommunications Industry in New York State (the OTPA Report). Mr. Issler testified that he "might have looked" at Tax Law § 1105.

55. Mr. Gross testified that the 2002 TSB-M is unclear as to whether unbundling is permitted (1) when components of a fixed monthly charge are broken out on a customer invoice, or (2) when components of a fixed monthly charge are broken out using a provider's books and records.

56. Mr. Issler testified that he was not familiar with the Mobile Telecommunications Sourcing Act (MTSA) or the Federal Internet Tax Freedom Act.

57. Mr. Issler conceded that charges for interstate voice service and internet access service, if separately stated, are not subject to New York sales tax.

58. Mr. Issler determined that line-item charges to customers for the recovery of petitioner's FUSF contribution costs, which were separately stated on customer invoices, are subject to New York sales tax. Mr. Issler's basis for taxing the recovery of petitioner's FUSF contribution cost was that it was a cost of doing business for petitioner that was being passed on to the customers.

59. Petitioner identified and separately stated interstate and intrastate overage charges after mid-April 2007. Mr. Issler stated in the Division's audit report that the Division was unable to make any adjustments for the interstate mobile voice service overage charges before the statute of limitations expired.

60. Despite concluding initially that overage charges for international voice calls were taxable, Mr. Issler later made a downward adjustment of $120,446.62 to the amount of tax

determined due because said overage charges were separately stated on petitioner's customers' invoices and on the billing data.

61. The Division assessed additional tax on petitioner's sales of interstate mobile voice service included in the plans and internet access service. The Division assessed tax on overage charges attributable to voice service and internet access, and line-item recoveries of petitioner's FUSF contribution costs.

62. The Division did not provide petitioner with a breakdown as to how much additional tax it was assessing on each of petitioner's services. Petitioner calculated a breakdown of the additional tax assessed as follows:

Service/Item	Tax Amount
Interstate voice (in bundle)	$432,918.46
Interstate voice (overage)	$106,243.01
Internet (data transmission) (in bundle)	$290,223.34
Internet (data transmission) (overage)	$36,555.86
FUSF contribution recoveries	$126,420.66

63. The Division completed the audit of petitioner on or about April 20, 2012.

64. The Division issued a Statement of Proposed Audit Changes for Sales and Use Tax to petitioner on November 2, 2011, asserting tax due of $854,780.30 and interest in the amount of $236,782.11 for the audit period.

65. The Division issued a Notice of Determination to petitioner dated February 15, 2012, assessing additional tax of $854,780.30 and interest of $253,594.95 for the audit period. Of the $854,780.30 tax assessed, $853,322.84 was attributable to what the Division referred to in the audit report summary of tax due as "unsubstantiated exempt sales" and $1,457.46 was

attributable to what the Division referred to in the audit report summary of tax due as "fixtures and equipment."[2]

66. The Division imposed minium interest on the tax assessed and stated in the audit report that reasonable cause existed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first canceled the tax assessed for the period of October 1, 2008 through February 28, 2009 because the Division was not entitled to resort to an estimated method of determining tax due for that period, as it found petitioner's records adequate but refused to review the records.

Next, the Administrative Law Judge examined the question of whether petitioner's charges to its customers of a flat rate for both interstate and intrastate voice service were subject to tax in their entirety. The Administrative Law Judge reviewed the statute imposing the tax upon mobile telecommunication voice services "sold for a fixed periodic charge" (Tax Law § 1105 [b] [2]) and related provisions (Tax Law § 1105 [b] [1] and [3]). The Administrative Law Judge concluded that, based upon the unambiguous statutory language, petitioner's charges at a flat rate for a fixed period of time for mobile voice service were subject to sales tax in their entirety.

Having determined that the statute imposed tax upon the charges at issue, the Administrative Law Judge addressed the question of whether the MTSA preempts the Tax Law and requires that where a provider can identify charges not subject to tax that are part of a flat rate charge, the charges not subject to tax may be unbundled. The Administrative Law Judge explained that the MTSA provides that where certain charges for mobile telecommunications

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[2] The amount of tax determined due for fixtures and equipment was not raised as an issue in these proceedings and was not addressed in the determination.

services were not otherwise subject to tax in a given jurisdiction, and such nontaxable services were bundled with taxable services, the nontaxable services could be subject to tax as part of the bundle unless the provider of the services was able to reasonably identify the charges not subject to tax. The Administrative Law Judge concluded that the MTSA did not preempt the taxation of the charges at issue in this matter because: (1) Congress did not expressly preempt state law; (2) Congress did not legislate so comprehensively that there is no room left for state law on the subject; and (3) there was not a conflict between federal and New York law. As the MTSA explicitly provided for circumstances where charges were otherwise subject to tax in a given jurisdiction, there was no conflict and no preemption.

The Administrative Law Judge declined to rule on the constitutional question of whether mobile providers were being treated differently than landline providers under the statute, as such question was a facial challenge to the statute and the Division of Tax Appeals does not have jurisdiction to address such a challenge.

On the issue of whether petitioner's charges for overages were subject to sales tax, the Administrative Law Judge determined that such charges were separately stated and therefore were subject to tax under paragraph (b) (1) (B) of Tax Law § 1105 rather than paragraph (b) (2). Therefore, interstate charges for overages were excluded from taxation and petitioner was able to show which overage charges were interstate charges.

Similarly, the Administrative Law Judge found that both Tax Law § 1111 (*l*) (2) and the federal Internet Tax Freedom Act allow for nontaxable charges for internet access service to be unbundled where a provider can reasonably identify those charges. The Administrative Law Judge concluded that petitioner was able to reasonably identify its charges for internet access and that, therefore, such charges were not subject to sales tax.

Finally, the Administrative Law Judge concluded that the Federal Universal Service Fund (FUSF) fee imposed on petitioner and passed on to its customers was subject to sales tax as the fee was an integral part of the mobile telecommunications service provided to the customers. The Administrative Law Judge pointed out that customers were charged for this fee on every invoice whether or not they made any calls, much less any interstate or international calls, for the time period covered by their invoice.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue on exception that paragraphs (1), (2) and (3) of subdivision (b) of Tax Law § 1105 must be read and construed together in order to determine what telecommunications services are subject to sales tax and where those services are sourced for sales tax purposes. Petitioner contends that when these three paragraphs are read together, it becomes clear that its argument prevails. Petitioner states that Tax Law § 1105 (b) (1) provides the general framework that telecommunications services, both landline and mobile, are subject to sales tax with the exception of interstate and international telecommunication services. Petitioner then asserts that Tax Law § 1105 (b) (2) provides that mobile telecommunication services that are voice services remain subject to tax when sold for a flat rate regardless of whether or not sold with other services. With regard to Tax Law § 1105 (b) (3), petitioner asserts that the statute sources charges for mobile telecommunications to a customer's primary place of use and confirms that New York only taxes charges for mobile intrastate voice service. Petitioner then argues that as charges for interstate mobile telecommunications are not taxable in New York, the MTSA allows it to unbundle its interstate wireless service.

Petitioner also asserts that the Division's policy of allowing the unbundling of interstate and international voice telecommunications from intrastate mobile telecommunications for

landline services, while not allowing such unbundling for mobile services charged at a fixed periodic rate, violates the equal protection clauses of the New York and United States constitutions. Petitioner contends that its constitutional challenge relates to the application of Tax Law and that, therefore, the conclusion of the Administrative Law Judge that the Division of Tax Appeals was without jurisdiction to address a facial constitutional challenge was incorrect.

Finally, petitioner asserts that the FUSF fees that it passed on to its customers were the product of nontaxable interstate and international telecommunications services, as the original fees were calculated upon interstate and international telecommunications revenues. Thus, petitioner concludes that such fees, when charged to its customers, were specifically excepted from tax pursuant to Tax Law § 1105 (b) (1). Petitioner, while noting that determinations of Administrative Law Judges are not precedential, points to the rationale set forth by the Administrative Law Judge in ***Matter of XO New York, Inc.***, Division of Tax Appeals (Dec. 28, 2006) and requests that this Tribunal follow such rationale.

The Division counters that Tax Law § 1105 (b) (1) taxes all telecommunications services with two enumerated exceptions: (1) interstate and international telecommunications services, and (2) telecommunications services taxable pursuant to Tax Law § 1105 (b) (2). The Division asserts that telecommunications services taxable pursuant to Tax Law § 1105 (b) (2) consist of services sold for a fixed periodic rate that are voice services or other types of non-voice services taxable under Tax Law § 1105 (b) (1) regardless of whether they are intrastate or interstate and international charges. The Division asserts that Tax Law § 1105 (b) (3) sets forth an additional imposition of tax on intrastate mobile telecommunications in any state provided the customer's place of primary use of the mobile telecommunications service is in New York, and thus has no impact on the taxation of fixed periodic charges for mobile voice services under Tax Law § 1105

(b) (2). The Division asserts that as petitioner's charges for interstate voice service based upon a fixed periodic rate are taxable, the MTSA unbundling provisions provide no guidance in this matter.

With regard to petitioner's constitutional challenge, the Division maintains that as the Tax Law provides for the differential treatment complained of by petitioner, the Administrative Law Judge was correct in concluding that petitioner's challenge was a challenge to the statute itself and that, therefore, it did not fall within the jurisdiction of the Division of Tax Appeals.

The Division asserts that the Administrative Law Judge correctly decided the issue of the taxability of the passed-on FUSF fees because, although calculated based on interstate and international revenues, the charge bore no relation to interstate and international usage by the customer being billed. With regard to ***Matter of XO New York, Inc***., the Division notes that pursuant to Tax Law § 2010 (5), Administrative Law Judge determinations are not precedential and that, in any event, the facts set forth in that determination are distinguishable from the present case.

The Division did not file an exception with regard to the conclusions of the Administrative Law Judge canceling the tax assessed: (1) for the period October 1, 2008 through February 28, 2009; (2) on overage charges for voice services; and (3) on internet access service. Therefore, such issues are not before this Tribunal and are not addressed herein.

OPINION

The primary issue in this case involves a disagreement between the parties as to the meaning of Tax Law § 1105 (b). As relevant to the taxation of telecommunications services, Tax Law § 1105 (b) provides:

> "(1) The receipts from every sale, other than sales for resale, of the following . . . (B) telephony and telegraphy and telephone and telegraph service of whatever nature ***except interstate and international*** telephony and telegraphy and telephone and telegraph ***service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision*** . . . .
>
> (2) The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, ***that are voice services, or any other services that are taxable under subparagraph (B) of paragraph one*** of this subdivision, sold for a fixed periodic charge (not separately stated), whether or not sold with other services.
>
> (3) The tax imposed pursuant to this subdivision is imposed on receipts from charges for intrastate mobile telecommunications service of whatever nature in any state if the mobile telecommunications customer's place of primary use is in this state" (***emphasis added***).

When construing a statute, the primary focus is on the intent of the Legislature in enacting the statute (***see Matter of Sutka v Conners***, 73 NY2d 395 [1989]; ***Matter of American Communications Tech. v State of N.Y. Tax Appeals Trib.***, 185 AD2d 79 [1993], ***lv granted*** 82 NY2d 653 [1993], ***affd*** 83 NY2d 773 [1994]). In the event that the language of a statute is unambiguous, the statute should be construed so as to give effect to the plain meaning of the words used (***New York State Assn. of Counties v Axelrod***, 213 AD2d 18, 24 [1995], ***lv dismissed*** 87 NY2d 918 [1996]). As noted by the Court of Appeals:

> "generalities of construction axioms neutralize one another, and courts inevitably return to the precise language of the enactment in an effort to give a correct, fair and practical construction that properly accords with the discernible intention and expression of the Legislature" (***Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.***, 83 NY2d 240, 244-45 [1994]).

The language of Tax Law § 1105 (b) (1), (2) and (3) is unambiguous and a practical construction of the statute leads to the conclusion that petitioner's charges for its mobile telecommunications voice services that are fixed charges for a specified period of time, are

taxable in total, including any part of those charges that might be for interstate and international mobile telecommunications voice services.

It is undisputed that, other than receipts from sales for resale, Tax Law § 1105 (b) (1) subjects all receipts from telecommunications services to sales tax, with the exception of receipts from interstate and international telecommunications services and receipts from telecommunications services subject to tax under Tax Law § 1105 (b) (2).[3]

What is contested in this matter is what is subject to tax under Tax Law § 1105 (b) (2), which provides that, other than sales for resale, the sale of mobile telecommunications "voice services, or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision, sold for a fixed periodic charge (not separately stated), whether or not sold with other services" are subject to tax. Specifically, the issue on which the parties do not agree is the meaning of the phrase "or any other services that are taxable under subparagraph (B) of paragraph one of this subdivision." Petitioner contends that this language actually excepts its charges for interstate and international mobile telecommunications voice services, in that charges for interstate and international telecommunications are specifically excepted from the telecommunications services subject to tax under subparagraph (B). The Division, on the other hand, contends that all mobile voice telecommunications services, intrastate or interstate and international, are subject to tax under paragraph 2 if they meet the other criteria.

The Administrative Law Judge agreed with the Division's interpretation of the statute and we concur. First, the plain language of the statute subjects to tax "all voice services" that are "sold for a fixed periodic charge." Petitioner does not contest that the service that is at issue here

[3] We do not find that Tax Law § 1105 (b) (3) has any effect on the issue of whether the services at issue in the present proceeding are taxable (***see People v Sprint Nextel Corp.*** (41 Misc 3d 511, 517 [2013], ***affd*** 114 AD3d 622 [2014]).

is exactly that. When subjecting "all voice services" to tax, the statute does not differentiate between intrastate or interstate and international service. The statute additionally taxes "any other services taxable under subparagraph (B)." We agree with the Administrative Law Judge that petitioner's interpretation would make the word "or" in the statute meaningless, and every word in a statute is to be attributed its common meaning (***Matter of Friss v City of Hudson Police Dept***, 187 AD2d 94, 96 [1993]). Accordingly, "any other services taxable under subparagraph (B)" must be services other than voice services, and do not include the interstate and international mobile telecommunications voice services at issue here (***see People v Sprint Nextel Corp.*** [where court found statutory construction arguments nearly identical to those made by petitioner herein to be "inconsistent with the plain language" of the statute]).

Further support for this interpretation of the statute is found in the related statute Tax Law § 1111 (*l*). Tax Law § 1111 contains special provisions for computing receipts subject to tax. Subdivision (*l*) sets forth those provisions specifically relating to computing receipts from "charges for mobile telecommunications services," as follows:

> "(1) Receipts from the sale of mobile telecommunications service provided by a home service provider shall include 'charges for mobile telecommunications services.' Such term shall mean any charge by a home service provider to its mobile telecommunications customer for (A) commercial mobile radio service, and shall include property and services that are ancillary to the provision of commercial mobile radio service (such as dial tone, voice service, directory information, call forwarding, caller-identification and call-waiting), and (B) any service and property provided therewith.
>
> (2) ***With respect to services or property described in subparagraph (B)*** of paragraph one of this subdivision, internet access service, any mobile telecommunications service which the mobile telecommunications customer originates in a foreign country to the extent included in the fixed periodic charge, ***any interstate or international telephony or telegraphy or telephone or telegraph service of whatever nature which is not a voice service***, and any property or service which is not telephony or telegraphy or telephone or telegraph service of whatever nature, ***a home service provider shall collect and pay over***

> ***tax, and a mobile telecommunications customer shall pay such tax, on receipts from any charge that is aggregated with and not separately stated from other charges for mobile telecommunications service. Provided, however, if such home service provider uses an objective, reasonable and verifiable standard for identifying each of the components of the charge for mobile telecommunications service, then such home service provider may separately account for and quantify the amount of each such component charge.*** If a home service provider chooses to so separately account for and quantify and separately sells any such property or service, then the charge for such property or service shall be based upon the price for such property or service as separately sold. If a home service provider chooses to so separately account for and quantify and does not separately sell such property or service, then the charge for such property or service shall be based upon the prevailing retail price of comparable property or service sold separately by other home service providers. In any case, the charge for such property or service shall be reasonable and proportionate to the total charge to the mobile telecommunications customer. ***Such charges for such services or property, as the case may be, will not constitute receipts from charges for mobile telecommunications services subject to tax under subdivision (b) of section eleven hundred five of this article***. Nothing herein shall be construed to exempt from tax or subject to tax any such service or property otherwise subject to tax or exempt from tax under this article.
>
> (3)(A) Any charge for a service or property billed by or for a mobile telecommunications customer's home service provider shall be deemed to be provided by such mobile telecommunications customer's home service provider.
>
> (B) Charges for mobile telecommunications service that are provided or deemed to be provided by a mobile telecommunications customer's home service provider shall be sourced to the taxing jurisdiction where the mobile telecommunications customer's place of primary use is located, regardless of where the mobile telecommunications service originates, terminates or passes through" (Tax Law § 1111 (*l*) [***emphasis added***]).

This provision on how to calculate receipts parallels the statutory construction adopted in this decision. Specifically, it allows for unbundling of "any interstate or international telephony or telegraphy or telephone or telegraph service of whatever nature which is not a voice service," from taxable mobile telecommunications services. Thus, it specifically does not allow for the unbundling of mobile telecommunication voice services from a fixed periodic charge.

Petitioner argues that it does not assert that it is entitled to unbundle its interstate and international voice telecommunications services based upon Tax Law § 1111 (*l*), but rather that

the provisions of the MTSA allow it to unbundle such services. As it relates to the current issue, the MTSA provides:

> "***If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation*** and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business" (4 USC § 123 [b]) (***emphasis added***).

Petitioner's argument is premised upon charges for interstate and international mobile voice telecommunications "sold for a fixed periodic charge" not being subject to tax in New York. As we have determined that such charges are taxable in New York, New York otherwise subjects these charges to tax and the unbundling provisions of the MTSA are inapplicable to the circumstances present in the instant matter.

The equal protection argument asserted by petitioner is also premised upon the assertion that charges for interstate and international mobile voice telecommunications "sold for a fixed periodic charge" are not subject to tax in New York. We find no basis in petitioner's equal protection argument as we have concluded that all mobile telecommunications services sold for a fixed periodic charge are subject to tax. Furthermore, the Administrative Law correctly and adequately addressed this issue.

Finally, with regard to the FUSF fees issue, we find that the Administrative Law Judge adequately and correctly dealt with this issue. However, we will address petitioner's contention that it is well settled law in New York, based upon the determination of an Administrative Law Judge, that such fees are not subject to tax and that there is "no compelling justification" for abandoning this "settled law." As noted by petitioner, a determination of an Administrative Law Judge "shall not be considered as precedent" (Tax Law § 2010 [5]). Clearly, there is no well

settled law on this issue in New York, as there can be no settled law based upon a determination that is not precedential.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Helio, LLC is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition is granted to the extent indicated in conclusions of law A, E, F and G of the Administrative Law Judge's determination, but is in all other respects denied; and

4. The Division of Taxation is directed to recompute the notice of deficiency dated February 15, 2012 in accordance herewith, and as so modified, the notice is sustained.

DATED: Albany, New York
July 2, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner