

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HELIO, LLC</b>	:	DETERMINATION
for Revision of a Determination or for Refund	:	DTA NO. 825010
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Period June 1, 2006	:	
through February 28, 2009.	:	

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Petitioner, Helio, LLC, 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 June 1, 2006 through February 28, 2009.

A hearing was commenced before Timothy J. Alston, Administrative Law Judge, in New York, New York, on September 11, 2013 at 10:30 A.M., and continued to conclusion at the same location on September 12, 2013 at 9:15 A.M., with all briefs to be submitted by January 2, 2014, which date began the six-month period for the issuance of this determination. This matter was reassigned to Barbara J. Russo, Administrative Law Judge, pursuant to the authority of section 3000.15(f) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15[f]).

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).

## ***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 Federal Mobile Telecommunications Sourcing Act.

III. 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.

IV. Whether the Division of Taxation properly determined that additional sales tax was due on overage charges for voice services.

V. Whether the Division of Taxation properly determined that sales tax was due on internet access service.

VI. 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***

### **Petitioner's Corporate History**

1. Petitioner, Helio, LLC, was a mobile virtual network operator (MVNO) that sold postpaid wireless mobile 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

a MVNO that sold prepaid wireless mobile telecommunications services before and after it acquired petitioner.

3. After acquiring petitioner, Virgin Mobile marketed and sold wireless 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.

### **Petitioner’s Wireless Telecommunications Services**

5. The wireless 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 like 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 wireless telecommunications, based on the prevailing safe harbor percentages established by the FCC.

21. In 1997, the FCC established "safe harbor" percentages that providers of wireless voice service could use to report their percentage of interstate wireless telecommunications for FUSF contribution purposes. The safe harbor percentages for wireless 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 wireless 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 wireless 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 harbors 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 their records.

43. Petitioner and Virgin Mobile (after acquiring petitioner) both separately identified portions of fixed monthly charges attributable to interstate wireless 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 wireless 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 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 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 OPA 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 (ITFA).

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 wireless 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 wireless 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:

<b>Service/Item</b>	<b>Tax Amount</b>
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.”<sup>1</sup>

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

67. Petitioner submitted 82 proposed findings of fact. In accordance with the State Administrative Procedure Act § 307(1) (SAPA), petitioner’s proposed findings of fact 1 through 3, the first sentence of 4, 5 through 10, 13 through 16, the first sentence of 20, 22 through 25, the first sentence of 27, 29, 33 through 38, 40, 41, 48, 49, 62 through 66, 71, 72, and 80 through 82 have been substantially adopted and incorporated herein. Proposed findings of fact 11, 12, 26, 28, 30 through 32, 39, 42 through 44, 46, 47, 67, 69, 70, 73 through 76, 78 and 81 have been modified to more accurately reflect the record. The second sentence of proposed finding of fact 4 pertains to facts outside of the period at issue and is not relevant or material. Proposed findings of fact 17 through 19, the second sentence of 20, 21 and the second sentence of 27 are

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<sup>1</sup> The amount of tax determined due for fixtures and equipment was not raised as an issue in these proceedings and will not be addressed in this determination.

conclusions of law, and are not required to be ruled upon by SAPA. Proposed finding of fact 45 is conclusory. Official notice is taken of the OTPA Report eliminating the need for proposed findings of fact 50 through 56. Proposed findings of fact 57 through 61 are rejected as not relevant or material to the matter. Proposed findings of fact 68 and 77 are rejected as legal argument. Proposed finding of fact 79 is a repeat of proposed finding of fact 64. Additional findings have been made.

***SUMMARY OF THE PARTIES' POSITIONS***

68. Petitioner argues that the Division improperly imposed sales tax on interstate wireless voice service bundled with other services and sold for a fixed monthly charge. Petitioner contends that charges for its interstate wireless voice service, whether bundled with other services or separately stated, are not subject to New York sales tax and are exempt pursuant to Tax Law § 1105(b)(1)(B). Petitioner further argues that the Division's assessment of sales tax on its charges for interstate wireless voice service violate the federal Mobile Telecommunications Sourcing Act and the equal protection clauses of the New York State and United States constitutions.

69. Petitioner argues that the Division improperly assessed sales tax on its internet access service bundled with other services and sold for a fixed monthly charge. Petitioner also argues that the Division's assessment of sales tax on separately identifiable charges for internet access service violate the Tax Law and the federal Internet Tax Freedom Act.

70. Petitioner argues that the Division improperly imposed sales tax on its recoveries of FUSF contribution costs.



71. The Division argues that the entire amount of the fixed periodic charge petitioner bills its customers for access to its mobile telecommunications service is subject to sales tax pursuant to Tax Law § 1105(b)(2).

72. The Division argues that petitioner's internet service is a component of the bundle sold by petitioner and is properly subject to sales tax. The Division further asserts that petitioner did not properly identify, account for and quantify the internet related receipts in order to unbundle internet charges from the other telecommunications charges.

73. The Division argues that it properly imposed sales tax on petitioner's recovery of the FUSF contribution fee from its customers. The Division contends that the contribution is an expense to petitioner of doing business that petitioner passes on to its customers and is part of petitioner's taxable receipts.

### ***CONCLUSIONS OF LAW***

A. Addressing first the period of October 1, 2008 through February 28, 2009, where the Division estimated the amount of tax due based on a projection of tax calculated from the prior periods, it is well established that the Division's authority to determine a taxpayer's sales tax liability by estimate procedures rests upon a finding that the taxpayer's books and records are inadequate to conduct a complete audit (*Matter of Chartair v. State Tax Commn.*, 65 AD2d 44, 46 [1978]). The Division is required to first request (*Matter of Christ Cella v. State Tax Commn.*, 102 AD2d 352, 354 [1984]) and thoroughly examine (*Matter of King Crab Rest. v. State Tax Commn.*, 134 AD2d 51, 53 [1987]) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 779 [1987], *lv denied* 71 NY2d 806 [1988]), in order to determine from verification drawn independently from within these records whether they are sufficient to support a complete audit (*Matter of*

*Meyer v. State Tax Commn.*, 61 AD2d 223, 226 [1978], *lv denied* 44 NY2d 645 [1978]). If the Division's examination establishes that the taxpayer's records are adequate and complete, the taxpayer is entitled to have its assessment calculated based upon a detailed audit of those records (*Matter of James G. Kennedy & Co. v. Chu*, 125 AD2d 773 [1986]; *Matter of Allied New York Services v. Tully*, 83 AD2d 727 [1981]; *Matter of Names in the News v. State Tax Commn.*, 75 AD2d 145, 147 [1980]; *Matter of Chartair v. State Tax Commn.*). When the taxpayer's records are incomplete and unreliable for determining accurate sales, the Division may resort to a test period audit using external indices (*Matter of Skiadas v. State Tax Commn.*, 95 AD2d 971, 972 [1983]; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576 [1982]).

In *Matter of Chartair v. State Tax Commn.*, the court stated:

Although there is statutory authority for the use of a 'test period' to determine the amount of tax due when a filed return is incorrect or insufficient (Tax Law § 1138, subd. [a]), resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (citations omitted). However, if records are available from which the exact amount of tax can be determined, the estimate procedures adopted by the respondent become arbitrary and capricious and lack a rational basis (citation omitted) (65 AD2d at 46).

The record reflects that petitioner's books and records were deemed adequate and that all records requested were made available. Due to the volume of the records, the Division performed a computer assisted audit using TAA personnel, who input raw data from petitioner's records into the Division's computer system and created a summary of petitioner's charges, which contained item codes and descriptions for the charges. When inputting the data, TAA personnel had a problem with the data for the period October 1, 2008 through February 28, 2009 due to a duplication of some of the invoice data. Communications between the auditor and TAA personnel indicate 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 ultimately decided to perform an estimate for this period, using a projection of the information from the earlier period. Petitioner did not sign a Test Period Audit Method Election form agreeing to an estimate for this period.

Prior to the conclusion of the audit, petitioner informed the auditor that it could provide the records for the estimated period where the records had been missing or duplicated during TAA's attempt to input the data. Despite the availability of the records, the auditor told petitioner that the Division would not use petitioner's records for this period because the Division would have to start the process over from the beginning.

The Division's resort to an estimate for the period of October 1, 2008 through February 28, 2009, without first reviewing petitioner's records available for that period to determine the sufficiency of those records, was improper. The Division must make a sufficient investigation of the records made available to it to justify a conclusion that the records were incapable of supporting a complete audit (*Matter of King Crab Rest. v. Chu.*; *Matter of A&J Parking Corp.*, Tax Appeals Tribunal, April 9, 1992). The Division cannot simply ignore a taxpayer's records and use an indirect method of estimating tax due if the taxpayer's records are readily available and provide an adequate basis on which to determine the amount of tax due (*Matter of Christ Cella, Inc. v. State Tax Commn.*; *Matter of Chartair, Inc. v. State Tax Commn.*).

The Division's refusal to review petitioner's records for this period appears to be based on the interest of expediency, because, according to the audit log, they "would have to start the process from the beginning." However, expediency or inefficiency does not give the Division the authority to ignore available records and instead estimate the amount of tax due (*see Matter of Marine Midland Bank, N.A.*, Tax Appeals Tribunal, May 13, 1993; *Matter of Chartair v. State*

*Tax Commn.*). In *Chartair*, the Division justified its estimating the taxpayer's tax on similar grounds that a complete audit "would have been very time consuming, it would have been burdensome on the taxpayer, [and] it would have been a costly venture on the [Division] as well as the taxpayer" (*Matter of Chartair v. State Tax Commn.*, 65 AD2d at 47). The court rejected this position, stating:

The honest and conscientious taxpayer who maintains comprehensive records as required [by law] has a right to expect that they will be used in any audit to determine his ultimate tax liability (*id.*).

Accordingly, it must be found that the Division's refusal to review petitioner's books and records for the period October 1, 2008 through February 28, 2009 in order to first determine the sufficiency of those records, along with the Division's findings in its audit report that petitioner's records were, in fact, adequate, precluded it from resorting to an estimated method to determine the tax due for that period, and the tax assessed for the months of October 1, 2008 through February 28, 2009 is canceled.

B. Addressing the remaining periods at issue, Tax Law § 1105(b) imposes a four percent tax on:

(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.

The Division argues that pursuant to Tax Law § 1105(b)(2), petitioner's bundled voice services, including both intrastate and interstate services, sold for a fixed periodic charge are taxable. Petitioner, on the other hand, argues that the plain language of Tax Law § 1105(b) provides that charges for interstate voice service are not subject to New York sales tax. Petitioner asserts that Tax Law § 1105(b)(2) must be read together with § 1105(b)(1) and (3), and that when construed as a whole, the language of the statute does not impose tax on interstate wireless voice service, whether bundled or separately stated.

The rules of statutory construction require that a "statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent" (McKinney's Cons Law of NY, Book 2, Statutes § 97). However, where 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 [3d Dept 1995]). Statutory construction rendering language superfluous is to be avoided (*Matter of Branford House v. Michetti*, 81 NY2d 681, 688 [1993]).

A review of Tax Law § 1105(b)(2) reveals that the language is unambiguous and requires the collection and payment of sales tax on the full amount of fixed monthly charges for mobile voice services. Petitioner misconstrues Tax Law § 1105(b)(2) in stating that it implicates Tax Law § 1105(b)(1)(B) and arguing that a charge for a mobile telecommunications service that is nontaxable under subdivision (b)(1)(B) is necessarily nontaxable under subdivision (b)(2). Contrary to petitioner's argument, Tax Law § 1105(b)(2), as well as Tax Law § 1105(b)(1)(B) and (3), each address different aspects of how sales taxes apply to telephony. Tax Law

§ 1105(b)(1)(B) imposes a broad application of sales tax on most aspects of telephony,<sup>2</sup> including landlines and mobile services, and contains two explicit exceptions: (i) “interstate and international telephony,” and (ii) “any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision.” The second exception unambiguously provides that Tax Law § 1105(b)(1)(B) does not apply to any receipts for the sales of telecommunications services that are subject to taxation under Tax Law § 1105(b)(2). As a result of this exception, receipts from fixed periodic charges for mobile voice services subject to tax under Tax Law § 1105(b)(2) are not subject to Tax Law § 1105(b)(1)(B)’s exclusion for interstate telephony.

Petitioner’s argument also ignores the plain language of Tax Law § 1105(b)(2) in asserting that subdivision (b)(2) “says that charges for mobile telecommunications service sold by a home service provider [footnote omitted], including voice service are subject to tax to the extent they are taxable under subdivision (b)(1)(B) and sold for a fixed periodic charge” (petitioner’s brief at 23). Petitioner’s reading of subdivision (b)(2) ignores the use of the word “or” contained in that paragraph. Specifically, Tax Law § 1105(b)(2) imposes tax on:

[t]he 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 (emphasis added).

Each word in the statute must be given effect and the word “or” cannot be ignored. “It is a well-settled principle of statutory construction that every word in a statute is to be given effect and to be presumed to have some meaning” (*Matter of Friss v. City of Hudson Police Dept*, 187

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<sup>2</sup> The term telephony and telegraphy includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals (20 NYCRR 527.2[d][2]). “The words ‘of whatever nature’ indicate that a broad construction is to be given the terms describing the items taxed” (20 NYCRR 527.2[a][2]).

AD2d 94, 96 [3d Dept 1993]). When “or” is used in a statute, it is a “disjunctive particle . . . indicating an alternative and it often connects a series of words or propositions presenting a choice of either” (*Matter of Gerald R.M.*, 12 AD3d 1192, 1194 [4th Dept 2004]). The use of the disjunctive “or” indicates that subdivision (b)(2) applies to voice services and nonvoice services (i.e. “any other services”) sold for a fixed periodic charge, and the reference to subdivision (b)(1)(B) is only applicable to the nonvoice “other services.” As such, the exclusion for interstate telephony applies only to other nonvoice services sold for a fixed periodic charge.

The New York County Supreme Court recently addressed similar arguments in interpreting Tax Law § 1105(b) in *People v. Sprint Nextel Corp.* (41 Misc 3d 511 [Sup Ct, NY County 2013], *affd* 114 AD3d 622 [1st Dept 2014]). That case arose out of a qui tam action pursuant to the New York False Claims Act (State Finance Law § 189), wherein Empire State Ventures, LLC initially commenced an action alleging that Sprint failed to collect or pay New York sales taxes on receipts from the sale of certain wireless telephone services. The State of New York intervened and filed a superseding complaint, also alleging claims under the State Finance Law, the Tax Law and Executive Law. The State alleged, in part, that Sprint engaged in fraudulent or illegal activity, including failing to collect and pay sales taxes and submitting false sales tax filings in violation of Tax Law § 1105, and that Sprint violated Tax Law § 1105(b)(2), by failing to collect or pay New York sales taxes. The State’s complaint alleged that Sprint implemented a nationwide program of unbundling its mobile telecommunications offerings, treating part of its fixed monthly access charges for wireless voice services as if they were charges for interstate calls charged on a per-minute basis, failed to collect or pay New York sales taxes on the interstate calls, and submitted monthly tax statements only for the taxes collected for intrastate calls. Sprint brought a motion to dismiss, asserting that the plain language of the Tax Law

permits it to exclude from sales taxes the portion of its fixed monthly recurring access charges that is attributable to interstate voice services, even when said services are bundled with intrastate services. Sprint argued that Tax Law § 1105(b) must be construed in its entirety, including paragraphs (1), (2) and (3), and that when so construed, the plain language of section 1105(b) excludes interstate voice services from New York sales tax. In denying Sprint's motion to dismiss, the court found that Sprint's statutory construction was inconsistent with the plain language of the statute (*People v. Sprint Nextel Corp.* at 517).

The court found that Tax Law § 1105(b)(2) specifically applies to mobile telecommunications services that are voice services sold for a fixed periodic charge. The court further noted that the plain language of Tax Law § 1105(b)(1) expressly excludes receipts from telecommunications service that are taxable under § 1105(b)(2). Addressing the provision of Tax Law § 1105(b)(3), the court found that paragraph taxes receipts from intrastate mobile telecommunications charges incurred by New York customers while they are in any state. The court rejected Sprint's argument that Tax Law § 1105(b)(2) is restricted by section 1105(b)(1) and (3), stating: "Simply stated, nothing in the plain language of Tax Law § 1105(b)(1) or (3) addresses plaintiff's allegations that Sprint knowingly avoided New York sales taxes on the sale of mobile telecommunications services for a fixed monthly recurring access charge" (*People v. Sprint Nextel Corp.* at 517). Thus, contrary to petitioner's similar argument here, Tax Law § 1105(b)(1) and (3) are inapplicable to voice services sold for a fixed periodic charge.

Moreover, case law dictates that to determine the proper tax treatment of any service, including a telecommunications service, the analysis must focus on the service in its entirety as opposed to a review of components (*see Matter of Southern Pacific Communications Co.*, Tax Appeals Tribunal, May 14, 1991; *Matter of SSOV '81, Ltd.*, Tax Appeals Tribunal, January 19,



1995). The service at issue here, a mobile flat rate calling plan under either the A La Carte plans or All-In plans, provided a specified number of minutes for local and long distance usage for a fixed monthly charge, regardless of whether customers actually used petitioner's network during the month, how much they used it (up to the minute cap for the plan), and whether the calls made were interstate or intrastate. Petitioner's customers did not purchase a long distance (i.e. interstate) service, but rather purchased a specified number of minutes of access to an integrated telephone service that provided both local and long distance service (*see Matter of Penfold v. State Tax Commn.*, 114 AD2d 696 [1985]). The Division therefore properly determined that the receipts from petitioner's sale of mobile telecommunications services that are voice services, including both interstate and intrastate voice services, sold for a fixed periodic charge are taxable pursuant to Tax Law § 1105(b)(2).

C. Petitioner further argues that the federal Mobile Telecommunications Sourcing Act (MTSA) preempts the Tax Law. The MTSA provides, in part, that:

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]).

In addressing a similar preemption argument raised in *People v. Sprint Nextel Corp.*, the court noted that federal law preempts state law “(1) where Congress has expressly preempted state law, (2) where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or (3) where federal law conflicts with state law (*People v. Sprint Nextel Corp.* at 519, *citing Pacific Capital Bank, N.A. v. Connecticut*, 542 F3d 341, 351 [2d Cir 2008]).

In this case, Congress has not expressly preempted state law or legislated so comprehensively so as to occupy the entire field. Section 123(b) of the MTSA, which states that “[i]f a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation . . .” explicitly allows states to do just that. The MTSA does not prevent states from taxing both intrastate and interstate services (*see* 4 USC § 117[b]; § 118[2] ).

Determining whether the third basis for preemption, conflict between state and federal law, arose, the court noted that “[c]onflict preemption occurs when compliance with both federal and state law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress in enacting the federal law” (*People v. Sprint Nextel Corp.* at 519). There is no such conflict between the tax law at issue and the MTSA. The MTSA expressly authorizes taxing jurisdictions that do not otherwise subject aggregated mobile telecommunications services to taxation to tax said services, unless the provider can reasonably identify the charges not subject to tax. As discussed above, however, Tax Law § 1105(b)(2) does “otherwise subject charges for mobile telecommunications services to taxation” (4 USC § 123[b]), by imposing a four percent tax on receipts from fixed periodic charges for mobile voice services. There is no conflict between this provision and the MTSA (*see People v. Sprint Nextel Corp.*, 114 AD3d 622 [1<sup>st</sup> Dept 2014] [holding that “[c]ontrary to defendants’ interpretation, the Tax Law provision [Tax Law § 1105(b)(2)] is not preempted by the Federal Mobile Telecommunications Sourcing Act”]).

D. Petitioner argues that the Division’s refusal to allow wireless providers to unbundle interstate wireless voice service from other taxable services violates the equal protection clauses of the New York State and United States constitutions. Such a claim challenges the constitutionality of the law on its face, rather than an “as applied” basis. As noted above, Tax

Law § 1105(b)(2) is clear and unambiguous, and applies to all mobile telecommunications service providers for voice services sold for a fixed periodic charge. Petitioner's argument that wireless service providers are being treated differently under Tax Law § 1105(b)(2) than wireline providers under Tax Law § 1105(b)(1)(B) is a facial challenge to the statute. The Division of Tax Appeals lacks jurisdiction over constitutional challenges to statutes, which are presumed to be constitutional on their face (*see Matter of Eisenstein*, Tax Appeals Tribunal, March 27, 2003; *see also Matter of Geneva Pennysaver*, Tax Appeals Tribunal, September 11, 1989; *Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988).<sup>3</sup> Accordingly, while the Division of Tax Appeals has jurisdiction to consider constitutional challenges ("as applied") to the actions of the Division, this forum does not have jurisdiction to consider this particular argument advanced by petitioner.

E. Although it is determined, as discussed above, that Tax Law § 1105(b)(1)(B)'s exclusion for interstate telephony does not apply to receipts from fixed periodic charges for mobile voice services subject to tax under Tax Law § 1105(b)(2), the same does not hold true for petitioner's interstate overage charges.

The Division does not specifically address overage charges in its brief, other than arguing that all of the items incorporated into the bundle sold by petitioner are subject to taxation. However, the overage charges are not part of the "bundle" as the Division contends; the overages

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<sup>3</sup> It is noted that the United States Supreme Court articulated that: "As a general rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.' *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *See, e. g., Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)." (*Nordlinger v Hahn*, 505 US 1, 10 [1992]).

for voice service are not sold for a fixed periodic charge. Rather, they are separately stated on the invoices petitioner issues to its customers and the charges vary each month based on the minutes a customer uses over the amount allotted for a specific plan. Indeed, the Division's auditor conceded during the hearing that the overage charges were not part of the bundle. Since the charges for voice overages are not part of a fixed periodic charge and are instead separately stated, the receipts for these charges do not fall under the provisions of Tax Law § 1105(b)(2). Such charges fall under the purview of Tax Law § 1105(b)(1)(B) and are subject to the exclusion for interstate telephony.

The question then becomes whether petitioner met its burden of proving that the overage charges fall within the exclusion for interstate telephony. Petitioner bears the burden of proving entitlement to the exclusion (*see Matter of Savemart, Inc. v. State Tax Commn.*, 105 AD2d 1001 [1984], *appeal dismissed* 64 NY2d 1039, [1985], *lv denied* 65 NY2d 604 [1985]; *Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193 [1975], *lv denied* 37 NY2d 708 [1975]; *Matter of 677 New Loudon Corp.*, Tax Appeals Tribunal, April 14, 2010, *confirmed* 85 AD3d 1341 [2011], *affd* 19 NY3d 1058 [2012]).

The record shows that after April 2007, petitioner identified and separately stated interstate and intrastate overages. The Division's auditor concedes this in the audit report but states that he was unable to make any adjustment to this area before the statute of limitations on assessments would expire. Although Mr. Issler stated during the hearing that the Division wanted to see more information before making an adjustment for interstate overages, his testimony is contradicted by the audit report, which states that petitioner identified and separately stated overages after April 2007 and also indicates that all records requested were provided. There is no indication in the audit file that the Division requested additional information before it could make an adjustment

of the post-April 2007 voice overages. Mr. Issler acknowledged during the hearing that he did not tell petitioner that he needed more information to make the adjustment to exclude interstate overages that were separately stated.

Moreover, a review of the documentary evidence, together with petitioner's testimony, confirms that the voice overages after April 2007 were separately stated and identifiable in petitioner's books and records. Specifically, a review of the records shows that after mid-April 2007, petitioner's accounting system separately tracked the interstate and intrastate voice overage charges using the codes UV0003 and UV0004 for interstate overages, with the code INTERI indicating interstate incoming calls and INTERO for interstate outgoing calls, and used the billing code UV0012 and UV0013 for intrastate overages, with the code INTRAI for intrastate incoming calls and INTRAO for intrastate outgoing calls. These overage charges and codes are, in turn, reflected on the summary of all charges created by TAA personnel based on petitioner's books and records. Petitioner showed, through its billing data, that these codes can be traced back to the specific charges on each customer's invoice, that each invoice separately states each overage call, indicates the telephone number, including area code, of the call, and attributes separate charges to each overage. As such, petitioner has met its burden of proving that the overage charges for interstate calls after April 2007 qualify for the exclusion for interstate telephony under Tax Law § 1105(b)(1)(B) and the Division erroneously assessed tax on these charges.

F. For voice overage charges up to April 2007, the evidence shows that, like the voice overage charges after April 2007, these overage charges are not sold for a fixed periodic charge as part of the "bundle." Instead, these overage charges vary per billing period, based on the customer's call time that exceeds the number of allotted minutes in a particular plan. As with the

post-April 2007 voice overages, since these charges are not part of a fixed periodic charge and are instead separately stated, the receipts for these charges do not fall under the provisions of Tax Law § 1105(b)(2), but are instead subject to Tax Law § 1105(b)(1)(B) and the exclusion therein for interstate telephony.

Although these charges were separately stated from the recurring monthly charge for the wireless plans, until mid-April 2007, petitioner's billing data did not distinguish between interstate and intrastate voice overage charges. For this time period, 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 overage, and collected and remitted tax on the portion of the charges it determined was attributable to intrastate voice overages. In reviewing the summary of charges created by TAA personnel from petitioner's billing data, the Division's auditor determined that the entire amount of overage charges were subject to sales tax. Other than reviewing the summary of charges to make this determination, the auditor reviewed only "some" of the invoices available.

In support of its calculation of the amount of voice overage charges that petitioner contends are attributable to interstate overages up to April 2007, petitioner presented books and records that it maintained in the regular course of business to identify the charges for interstate and intrastate overages. Specifically, petitioner presented invoices for this time period that show the voice overages are separately stated from the regular recurring monthly charges for the wireless plan. The invoices show that each overage call detail indicates the charge associated with the overage call, and the overage call can be identified as interstate or intrastate based on the area code. Although the total overage charges listed on the invoices lump together both the interstate and intrastate voice overage charges and the billing data for this period did not

distinguish the voice overages between interstate and intrastate, the total overages can be separately identified by the call detail contained in each invoice. Moreover, the overage charges in the billing data can be traced back to each invoice, based on the account number and statement date, and the overages can in turn be identified by the call detail within the invoice to determine whether the overage was for an interstate or intrastate call. Petitioner has thus shown from its books and records the separate and distinguishable charges for interstate and intrastate overages for the period up to April 2007.

As noted above, the federal MTSA provides that where a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation, and if the charges are aggregated with charges that are subject to taxation, the charges for the nontaxable 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]). Interstate telephony is not “otherwise subject” to taxation under Tax Law § 1105(b)(1)(B). Although petitioner’s billing data for the period up to April 2007 aggregated the nontaxable charges for interstate overages with the taxable charges for intrastate overages, petitioner has identified, through its books and records the portion of the voice overage charges that are interstate and thus not subject to taxation. As such, petitioner has met its burden of proof to identify the portion of voice overage charges for the period up to April 2007 that qualify for the exclusion for interstate telephony under Tax Law § 1105(b)(1)(B) and the Division erroneously assessed tax on these charges.

G. Petitioner argues that its internet access services are not subject to New York sales tax. The Division argues that petitioner’s internet access service was a component of the bundle, i.e.,

it was not separately charged, and thus the entirety of petitioner's receipts, including charges for internet, are subject to sales tax.

Tax Law § 1115(v) provides that:

Receipts from the sale of Internet access service, including start-up charges, and the use of such service, shall be exempt from the taxes imposed under this article. For purposes of this subdivision, the term "Internet access service" shall mean the service of providing connection to the Internet, but only where such service entails the routing of Internet traffic by means of accepted Internet protocols. The provision of communication or navigation software, an e-mail address, e-mail software, news headlines, space for a website and website services, or other such services, in conjunction with the provision of such connection to the Internet, where such services are merely incidental to the provision of such connection, shall be considered to be part of the provision of Internet access service.

While receipts from internet access service are exempt from sales tax pursuant to Tax Law § 1115(v), internet access service when sold together with other taxable services for a fixed periodic charge may be taxable as part of the receipts from the sale of mobile telecommunications service (*see* Tax Law § 1105[b][2]; §1111[l]). Tax Law § 1111(l) provides that:

(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 . . . 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 on 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. . . .* (emphasis added).

Despite the specific provision in Tax Law § 1111(l) that allows a home service provider to separately account for and quantify the charges for internet service, even if the internet service is sold with other services for a fixed monthly charge, the Division argues that by adopting bundling, and including internet in the bundle, petitioner has rendered the entirety of its receipts subject to state sales tax. Such argument ignores the explicit language of Tax Law § 1111(l)(2). Pursuant to this provision, so long as the home service provider uses an objection, reasonable and verifiable standard to identify the component of the charge attributable to internet service, the charge for such service is not subject to tax. (*Id.*)

In 1998, the federal Internet Tax Freedom Act (ITFA) was enacted, establishing a moratorium on state and local taxes on internet access (Pub L 105-277, 112 Stat 2681, 47 USC § 151 note, amended by Pub L 107-75, Pub L 108-435, and Pub L 110-108).<sup>4</sup> Despite this general prohibition on taxation of internet access, the federal law allows taxing jurisdictions to impose tax on internet access charges if the charges are aggregated with other charges that are subject to

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<sup>4</sup> For purposes of the federal moratorium, internet access means a service that enables users to connect to the internet to access content, information, or other services. The definition includes the purchase, use, or sale of telecommunications by an internet service provider to provide the service or otherwise enable users to access content, information, or other services offered over the internet. It also includes incidental services such as home pages, electronic mail, instant messaging, video clips (i.e., movie previews and portions or short clips of a complete video), and personal electronic storage capacity. These services are included in the federal moratorium regardless of whether they are furnished as part of the internet connection service, or if they are purchased and furnished separately. (*Id.*)

taxation. Like Tax Law § 1111(*I*)(2), ITFA allows providers of internet access service to unbundle the internet charges from the other taxable charges:

If charges for Internet access are aggregated with and not separately stated from charges for telecommunications or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business (47 USC § 151 [note § 1106]).

Thus, both the Tax Law and ITFA allow for service providers to separately account for internet charges that are aggregated with other charges, so long as the internet charges are reasonably identifiable.

The Division incorrectly contends that petitioner utilized the safe harbor for the basis of its computations for purposes of identifying and unbundling internet charges, arguing that petitioner did not identify the prevailing retail price or tie it to activities of the customer, and did not identify, account for and quantify the internet related receipts. Contrary to the Division's argument, the evidence shows that petitioner identified charges attributable to the internet access service pursuant to the requirements of Tax Law § 1111(*I*)(2) and ITFA. The evidence establishes that petitioner separately sold plans with and without internet service (the All-In and A La Carte plans, respectively). Petitioner attributed the difference in price between the All-In and A La Carte plans with the same number of calling minutes to the data-based internet services. The price differential was based on the cost petitioner charged for the internet access service. From this amount, petitioner identified portions of the charge attributable to the different data based services (data transmission, e-mail, information service and messaging service). Since petitioner was able to identify the component of the monthly charges for mobile telecommunications service that was attributable to the charges for internet access service, such

charges did not constitute receipts from charges for mobile telecommunications services subject to tax under Tax Law § 1105(b), and the Division improperly assessed tax on such internet access charges.

The record further establishes that petitioner separately charged data overage charges to customers who exceeded the amount of data (internet access) allowed in their plan. In the case of customers who purchased the A La Carte plan, which did not include internet access, customers were charged separately, outside of the monthly plan fee, if they used internet services. For customers who purchased the All-In plan, which included a specific amount of data (internet) usage based on kilobytes, customers were separately charged additional, separately stated data overage charges if they exceeded the amount of kilobytes allotted in the plan. These overage or outside-of-plan charges were based on the amount of kilobytes used. Because these charges were separately stated on petitioner's customers' invoices and were not "aggregated with . . . other charges for mobile telecommunications service" (Tax Law § 1111[*f*][2]), they are not included with the taxable receipts enumerated in Tax Law § 1111(*l*). Instead, such internet overage charges are exempt under Tax Law § 1115(v) and ITFA, and the Division erroneously assessed tax on these charges.

H. The final issue is whether the federal Universal Service Fund (FUSF) fee which is imposed on petitioner and then passed on to petitioner's customers is subject to sales tax under Tax Law § 1105(b). Telecommunications companies are required to pay a specific percentage of their interstate and international revenues into the FUSF (47 CFR 54.706). The percentage is called the contribution factor (47 CFR 54.709). The FCC established a safe harbor for calculating the percentage of interstate revenues of wireless telecommunications providers for universal service contribution purposes. Instead of reporting their actual interstate and

international end-user telecommunications revenues, wireless carriers may report a fixed percentage of revenues. In June and July 2006 and August 2008 through February 2009, the safe harbor percentage was 28.5 percent. From August 2006 through July 2007, the safe harbor percentage was 37.1 percent. Petitioner used the safe harbor percentages for calculating the percentage of its interstate revenues for universal service contribution purposes. Companies are not required by the FCC to recover their contributions from their customers. However, they are permitted to do so (47 CFR 54.712). Petitioner recovered its FUSF contribution costs from its customers through a separately stated line-item charge on each customer invoice.

Petitioner did not collect or remit sales tax on its charges for the FUSF fee. Petitioner argues that the charges are exempt because they were not incurred in exchange for the provision of any services or products. Petitioner further argues that the charges are exempt because they are based on interstate and international end-user telecommunications revenue and as such qualify for the interstate exclusion under Tax Law § 1105(b)(1)(B). The Division argues the charge is taxable as part of the taxable receipt of the sale of telecommunications service in New York.

In deciding whether the charge for the FUSF fee was included as a part of petitioner's sale of mobile telecommunications services, the analysis is guided by New York case law addressing the imposition of sales and use tax on services (*Matter of Penfold v. State Tax Commn.*; *Matter of Building Contrs. Assoc. v. Tully*, 87 AD2d 909 [1982]; *Matter of Woolworth Co.*, Tax Appeals Tribunal, December 1, 1994). In order to determine a service's taxability, the analysis employed by the New York courts and the Tax Appeals Tribunal focuses on the service in its entirety, as opposed to reviewing the service by components or by the means in which the service is effectuated (*Matter of SSOV '81, Ltd.*).

For example, in *Matter of Penfold v. State Tax Commn.*, the petitioner was engaged in the business of furnishing refuse removal services. The refuse was disposed of at various landfills for which a dumping fee was charged by the landfill owners. The dumping fee was separately itemized on the bill the petitioner sent to its customers and sales tax was not charged on this portion of the bill. The Division determined that, in addition to the taxability of the removal service, the fee charged for dumping was also taxable. The petitioner argued that this was a separate, nontaxable service. The Court rejected the taxpayer's argument, holding that only one service, i.e., the removal of refuse, was purchased. The Court went on to find that the disposal of that refuse was an integral aspect of that service and could not be reasonably reckoned as separate (*Matter of Penfold v. State Tax Commn.*).

Similar to the taxpayer in *Matter of Penfold v. State Tax Commn.*, petitioner here is selling one service, a mobile telecommunications service. The fee is an integral part of that service in that petitioner has chosen to pass that cost onto its customers, and includes it as a cost of the services provided. Moreover, petitioner charges the FUSF fee to its customers regardless of their usage. Petitioner's FUSF contribution is based on the safe harbor percentage and not on their actual interstate end-user telecommunications revenue. The amount does not correlate to the actual amount of interstate calls made by petitioner's customers. Rather, the percentage is applied to the cost of the plan to calculate the fee the customer will pay. The customer pays the fee regardless of the customer's actual interstate usage. Indeed, even if a customer makes no calls for the month he is still charged for the FUSF fee, as can be seen in the invoices submitted by petitioner. The fee is thus merely a part of the whole service purchased (*Matter of Penfold v. State Tax Commn.*), and is not exempt as interstate telephony. As such, the Division properly imposed sales tax on petitioner's charges for the FUSF contribution fee.

I. The petition of Helio, LLC, is granted to the extent indicated in Conclusions of Law A, E, F, and G, but is in all other respects denied. The Division is directed to recompute the Notice of Determination dated February 15, 2012 accordingly, and as so modified, the notice is sustained.

DATED: Albany, New York  
June 12, 2014

/s/ Barbara J. Russo  
ADMINISTRATIVE LAW JUDGE