

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
T-MOBILE NORTHEAST LLC	:	DETERMINATION
		DTA NO. 850185
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 December 1, 2015 through May 31, 2018.	:	

Petitioner, T-Mobile Northeast 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 December 1, 2015 through May 31, 2018.

A hearing was held in Albany, New York, before Kevin R. Law, Administrative Law Judge, on September 18, 2024, with all briefs to be submitted by February 7, 2025, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Eversheds Sutherland (US) LLP (Eric Tresh, Esq., Chelsea Marmor, Esq., and Elizabeth Cha, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Kaitlyn Smith, Esq., of counsel).

ISSUE

Whether the fees petitioner recovered from its customers for its contributions to the Federal Universal Service Fund are subject to sales tax pursuant to Tax Law § 1105 (b).

FINDINGS OF FACT

1. Petitioner, T-Mobile Northeast LLC, is a Delaware limited liability company with operations in New York.

2. Petitioner provides multiple services including internet access services, instant text messaging services and commercial mobile radio services (CMRS) to customers in New York.

3. Petitioner's instant text messaging services include multimedia messaging service (MMS) and short message service (SMS).

4. MMS is a service that sends pictures, audio and video clips and other graphic materials from one cell phone to another. MMS operates similar to email.

5. SMS is a service that sends text messages of up to 160 characters to and from cell phones.

6. Petitioner's CMRS include intrastate, interstate and international mobile telecommunications services.

7. Petitioner sells its services, including CMRS, instant text messaging services and internet access services together in packages for one charge (Service Plan or Service Plans).

8. The Service Plans vary in the amount of CMRS services, instant text messaging services and data services (internet access services).

9. Petitioner also sells interstate and international calling minutes that customers may purchase in addition to their Service Plan. Additional calling minutes are sold for an additional charge that is separately stated from the charge for the Service Plan on the customer's invoice.

10. Petitioner's bundle evaluation committee determines the price for each service in the Service Plan.

11. Petitioner is required to determine the price of each service in a Service Plan for its federal regulatory compliance and financial reporting.

12. The price for each service is recorded separately in petitioner's billing system and in its books.

13. During the test period (March 2017), petitioner's revenue from CMRS, instant text messaging and data services was as follows:

- a. CMRS: 35.77%
- b. Instant text messaging: 10.14%
- c. Data (internet access services): 54.09%.

14. Petitioner's federal regulatory compliance obligations include the Federal Universal Service Fund (FUSF and/or the Fund).

15. Petitioner is required to contribute to the FUSF pursuant to 47 USC § 254, because petitioner provides interstate and international wireless telecommunications services.

16. The amount petitioner is required to pay into the Fund is based on its interstate and international services revenue.

17. The rate at which telecommunications providers are required to pay into the Fund is called the contribution factor.

18. The contribution factor is a percentage set by the Federal Communications Commission (FCC). The contribution factor changes quarterly.

19. As part of its FUSF compliance, petitioner annually files FCC form 499-A, telecommunications reporting worksheet, (reporting [year] revenues) (form 499-A) with the Universal Services Administrative Company (USAC).¹

20. Petitioner filed as part of a consolidated group of affiliated entities.

21. On FCC form 499-A, petitioner reported its revenue from interstate and international services for the purpose of computing its mandatory contributions to the FUSF.

¹ USAC is a third-party designated by the FCC to administer the FUSF.

22. Petitioner's FUSF contributions are based on an analysis of its actual customer voice calling traffic, i.e., intrastate calls, interstate calls and international calls for a given period.

23. The call analysis is the ratio of interstate and international calls over all calls.

24. Petitioner prepares its call analysis to comply with its FUSF obligations, which require separately identifying the revenue from interstate and international services and intrastate wireless telecommunications services (intrastate services).

25. The amount petitioner is required to pay into the Fund is the product of the applicable contribution factor and its revenue from interstate and international services (*see* 47 USC § 254; 47 CFR §§ 54.706, 54.709).

26. In accordance with federal law, petitioner recovers some of its contributions to the FUSF through the FUSF Fees (*see* 47 CFR § 54.712 [a]).

27. The FUSF Fee equals the product of the call analysis and the applicable contribution factor. Petitioner applies that product (a percentage) to the charge for the interstate services charged to the customer. The resulting product is the FUSF Fee.

28. Petitioner separately states the FUSF Fee on the customer's invoice. The fee is listed under the heading "T-Mobile fees and charges" and labeled as "Federal Universal Service Fund."

29. Petitioner is a registered New York sales tax vendor.

30. Petitioner charged its customers and remitted to the Division of Taxation (Division), sales tax on: (i) the charge for the intrastate, interstate and international CMRS included in the Service Plan; (ii) the charge for the instant text messaging services included in the Service Plan; and (iii) separately stated charges for intrastate services (i.e., intrastate services not included in the Service Plan).

31. Petitioner did not charge its customers or remit sales tax on: (i) the charge for internet access services (i.e., the data services included in the Service Plan); and (ii) separately stated charges for interstate and international services (i.e., interstate and international services not included in the Service Plan).

32. The Division audited petitioner's timely filed sales tax returns for the December 1, 2015 through May 31, 2018 reporting periods (Audit Period).

33. The Division selected a test period of March 1, 2017 through May 31, 2017.

34. On March 11, 2022, the Division issued a notice of determination, assessment identification number L-055452793 (notice), assessing additional sales and use tax of \$4,372,968.93 and interest of \$2,198,453.10. A portion of the tax asserted, in the amount of \$1,774,718.30, is attributable to the sales tax imposed on the recovered FUSF Fees.

35. At the hearing, petitioner presented John Barnes as a witness. Mr. Barnes testified regarding petitioner's products and services, invoicing, the audit, petitioner's sales tax filings and accounting, and its FUSF compliance, which include the FUSF Fees.

36. Petitioner also presented Professor Richard Pomp as a witness. Professor Pomp was admitted as an expert on the Mobile Telecommunications Sourcing Act (4 USC §§ 116-126) (MTSA) and the Internet Tax Freedom Act (47 USC § 151) (ITFA).

37. It was Professor Pomp's opinion that "charges for mobile telecommunications services" as defined by the Tax Law, does not include the FUSF Fees. As support for this opinion, Professor Pomp referred to the definition of "charges for mobile telecommunications services" contained in Tax Law § 1111 (l) (1), which is derived from the definition contained in the MTSA (*see* 4 USC § 124 [1]). Professor Pomp posited that because the MTSA does not apply to the obligations under section 254 of the Communications Act of 1934 (the FUSF fee

imposition statute) (*see* 4 USC 116 [b] [5]), FUSF Fees are not included within the definition of “charges for mobile telecommunications services” and, therefore, are not subject to sales tax by the Division.

38. The parties submitted a partial stipulation of facts and documents which have been substantially incorporated into the findings of fact herein. In addition, petitioner proposed 48 findings of fact. Proposed findings of fact 1 through 4, 6, 8, 11 through 29 and 32 through 35 are accepted. Proposed findings of fact 5, 7, 9, 10, 30 and 31 are accepted in part and rejected in part to more accurately reflect the record. Proposed findings of fact 36 through 45 have been omitted as they pertain to procedural history and are unnecessary.

39. Pursuant to the joint stipulation, the parties have agreed that the sole remaining issue is whether the FUSF Fees are subject to sales tax under section 1105 (b) of the Tax Law.

CONCLUSIONS OF LAW

A. Tax Law § 1105 (b) imposes sales 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 question presented is whether the FUSF Fee petitioner charged to its customers is included as a receipt from the sale of mobile telecommunications services under the Tax Law. As a matter of background, providers of interstate public telecommunications services such as petitioner are required to contribute a portion of their revenues to the Fund to ensure affordable telecommunications services to rural and low-income areas, schools, hospitals, etc. (*see* 47 USC § 254; 47 CFR § 54.706 [a]). Providers are specifically authorized to recoup their contributions from their customers (*see* 47 CFR § 54.712). As noted in the findings of fact, it is this line-item fee that is at the center of the present dispute.

B. Petitioner first asserts that the FUSF Fee is not a receipt for a charge for mobile telecommunications services and, therefore, is not subject to sales tax. Petitioner argues that because the term “charges for mobile telecommunications services” in Tax Law § 1111 (l) (1) was derived from the MTSA (*see* 4 USC § 124 [1]), and the MTSA excludes from its ambit the FUSF Fee pursuant to 4 USC § 116 (b) (5), the FUSF Fee is not included within the definition of “charges for mobile telecommunications services.” This argument is rejected. Petitioner has cited to no authority, other than Professor Pomp’s interpretation that FUSF Fees incurred by petitioner and specifically passed on to its customers were intended to be excluded from the definition of charges for mobile telecommunications services or that same should not be included as part of the taxable receipt for sales tax purposes. In fact, this interpretation is contrary to the Tax Appeal Tribunal’s holding in *Matter of Helio, LLC* (Tax Appeals Tribunal, July 2, 2015). It is this precedent that the Division relies upon and which controls in this matter. It is the Division’s contention, relying upon *Matter of Helio, LLC*, and *Matter of Penfold v State Tax Commn.* (114 AD2d 696 [3d Dept 1985]), that the separately stated FUSF Fees as reflected on

the customers' invoices are an expense or component of the whole service purchased and must be included as a receipt subject to taxation.

C. In *Matter of Helio, LLC*, the Tax Appeals (Tribunal) affirmed, without discussion, the determination of an Administrative Law Judge which held that the receipts in question, including the FUSF Fee, were taxable in their entirety where such charges were part of a bundle of services, some taxable and some exempt, for a flat fee pursuant to Tax Law § 1105 (b) (2). Recently, in *Matter of Time Warner Cable Info. Servs. (NY), LLC* (Tax Appeals Tribunal, May 20, 2025), the majority of the Tribunal held that the FUSF Fee, passed on to the petitioner's customers therein, is a receipt of the nontaxable service and, therefore, cannot be taxed. The petitioner therein was a provider of voice over internet protocol (VoIP) telephone services that sold, for a flat fee, combined intrastate and interstate telephone services as part of a bundled plan that was subject to tax pursuant to Tax Law § 1105 (b) (1). This matter and *Helio* are distinguishable from *Time Warner* as the services subject to tax in the former matters are mobile telecommunications services subject to tax pursuant to Tax Law § 1105 (b) (2). At issue in *Time Warner* are VoIP services taxable pursuant to Tax Law § 1105 (b) (1) and taxable and nontaxable components of a bundled service can be separately stated and unbundled thereunder (*see* TSB-M-17[3]C, [6]S). In point-of-fact, on its invoices *Time Warner* separated out a percentage of the "single charge" service plan attributable to interstate and international services (*see Matter of Time Warner Cable Info. Servs. (NY), LLC*, finding of fact 9). In *Time Warner*, it did not matter whether the FUSF Fee was viewed as an expense or part of the receipt, the effect was the same, it was not taxable because the service was nontaxable. In this matter, the whole charge is taxable pursuant to the plain language of Tax Law § 1105 (b) (2).

D. Petitioner has also asserted that subjecting the FUSF Fees to sales tax in the context of bundled plans, while not asserting same with respect to FUSF Fees attributable to separately stated interstate and international wireless service receipts, is violative of the equal protection clause of the United States Constitution. In addition, petitioner also alleges that the Division's policy of permitting unbundling of wireline services sold for a flat fee (*see* TSB-M-17[3]C, [6]S), but not allowing such unbundling of mobile telecommunications services amounts to an equal protection violation. Petitioner's arguments are rejected.

E. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. amend. XIV, § 1). The Equal Protection clause does not forbid classifications but simply prohibits governmental decision makers from treating differently persons who are in all relevant respects alike (*see Nordlinger v Hahn*, 505 US 1, 10 [1992]). In this case, petitioner has not established an equal protection violation because there are inherent differences in how bundled mobile telecommunications services are taxed versus how separately billed intrastate, interstate and international mobile telecommunications services are taxed, as well as differences in how bundled landline or VoIP telecommunications services are taxed. More importantly, the MTSA specifically contemplates the differences in how bundled and unbundled mobile telecommunications services are taxed and allows for such differing treatment (*see* 4 USC §§ 117 [b]; 123). Accordingly, petitioner has failed to establish an equal protection violation based upon the record herein.

F. The petition of T-Mobile Northeast LLC is denied and the March 11, 2022 notice of determination is sustained.

DATED: Albany, New York
August 7, 2025

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE