STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

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

Following a hearing and the submission of briefs, Frank W. Barrie, Administrative Law Judge, issued a determination dated June 26, 2008, which granted the petition and canceled four notices of determination each dated March 28, 2008.

The Division of Taxation filed an exception to the determination and in a decision dated June 29, 2009, the Tax Appeals Tribunal remanded this matter to the administrative law judge with the following direction:

> Accordingly, it is ORDERED, ADJUDGED AND DECREED that petitioner's services are subject to sales tax pursuant to Tax Law § 1105(b)(1)(B) and that this case be remanded to an Administrative Law Judge to address whether the Division of Taxation properly allocated receipts subject to tax between intrastate and interstate sales.

Upon the submission, all briefs were to be filed by April 14, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared by Hodgson Russ LLP (Timothy P. Noonan, Esq., and Joshua K. Lawrence, Esq., of counsel). The Division of

Taxation appeared by Daniel Smirlock, Esq. (James Della Porta, Esq., of counsel). Administrative Law Judge Frank W. Barrie retired from state service during the pendency of this matter and the same was transferred to Arthur S. Bray, Administrative Law Judge. After review of the evidence and arguments, Judge Bray renders the following determination.

ISSUES

I. Whether the Division of Taxation properly allocated receipts subject to tax between intrastate and interstate/international sales.

II. Whether the imposition of a penalty may be addressed and, if so, whether a penalty was properly imposed.

FINDINGS OF FACT

The following findings of fact are incorporated herein from the decision of the Tax Appeals Tribunal in ***Matter of Easylink International, Inc.*** (Tax Appeals Tribunal, July 27, 2009).

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

2. The disagreed portion, totaling $297,358.71, was asserted due against petitioner, Easylink Services International, Inc., by the issuance of four notices of determination, each dated March 28, 2005, as follows. The first notice, with an Assessment ID # L-025144336, asserted sales and use taxes due of $161,132.37, plus penalty and interest, on fax/telex sales for the period March 1, 2002 through May 31, 2004. The second notice, with an Assessment ID # L-025144337, asserted sales and use taxes due of $48,260.70, plus interest, on EDI (electronic data interchange) sales for the period March 1, 2001 through May 31, 2004. The third notice, with an Assessment ID # L-025144338, asserted sales and use taxes due of $85,187.22, plus interest, on e-mail services for the period March 1, 2001 through May 31, 2004. The fourth notice, with an Assessment ID # L-025144339, asserted sales and use taxes due of $2,778.42, plus interest, for the period March 1, 2001 through May 31, 2004, representing school district taxes due on the sale of telephony.

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

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

4. Petitioner's business was purchased by Swift Telecommunications, Inc., for $50,000,000.00 from AT & T in February, 2001, where it had functioned as a division of AT & T

under the name Easylink Services. The services provided by AT & T Easylink Services were described at the time of this purchase, in an announcement by International Telecommunications Intelligence, as follows:

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

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

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

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

Sales Tax Quarter	Taxable sales reported
03/01/02-05/31/02	$1,103,619.00
06/01/01-08/31/01	1,018,279.00
09/01/01-11/30/01	406,993.00
12/01/01-02/28/02	360,144.00
03/01/02-05/31/02	-0-
06/01/02-08/31/02	-0-
Total	$2,889,035.00

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

7. The Division's auditor performed a detailed examination of petitioner's electronic sales files for the month of December 2002, as agreed to by petitioner, for each of the three services at issue (i) fax and telex combined, (ii) EDI services, and (iii) e-mail services. The auditor viewed petitioner's receipts from the provision of secure communications between two terminals as telephony subject to sales tax, and he believed that all three services at issue fit into the taxable category of telephony. Relying on information in petitioner's annual reports, including Forms 10-K, the auditor determined that the services at issue provided by petitioner to its customers were not "enhanced" or "value added" services, but rather were "seamless transactions" with "no human intervention," with petitioner merely providing a "conduit" or a "network" for the

transmission of information in "industry standard formats," and without "huge value added enhancement."

Fax and telex revenues

8. During the month of December 2002, the auditor calculated that out of total fax and telex revenues of $371,800.28, petitioner had New York telex and fax revenues, i.e., from an origination point in New York to a destination point in New York, of $42,617.75. His calculation was based upon an assumption that a New York customer with a billing address in New York meant the telex and fax transaction *originated* in New York State. In addition, if the electronic sales files indicated a *destination* of New York for the New York customer's telex or fax, the auditor concluded that the transaction was between New York points and, therefore, *intrastate* and subject to the imposition of New York sales tax. The auditor's detailed review of the electronic sales file for December 2002 for fax and telex combined also disclosed that petitioner had receipts from interstate/international transactions of $222,798.43, so that its total receipts from telex and fax which had "known" originations and destinations was $265,416.18 ($42,617.75 plus $222,798.43). He then calculated an intrastate percentage of 16.0570 by dividing "known" intrastate revenues of $42,617.75 by the total "known" intrastate/interstate/international revenues of $265,416.18. Since petitioner's total fax and telex revenues for December 2002 were $371,800.28, the auditor could not determine from his review of the electronic sales file the destination for fax and telex revenues of $90,897.41 (total fax and telex revenue of $371,800.28 less known intrastate/interstate/international revenues of $265,416.18). He calculated that $14,595.35 was additional revenue from *intrastate* communications by applying the intrastate percentage of 16.0570 to the receipts of $90,897.41

for which he could not determine the destination of the fax and telex services. The auditor then computed total taxable New York sales of $72,699.79 in December 2002 from petitioner's fax and telex services: intrastate revenues of $42,617.75, plus estimated intrastate revenues of $14,595.35, plus access fees and minimum commitment fees of New York customers of $15,486.69. The auditor then utilized the intrastate percentage of 16.0570 to compute tax due for the other months included in the audit period, which resulted in the issuance of the Notice of Determination dated March 28, 2005 asserting sales and use taxes due of $161,132.37, plus penalty and interest. Penalty was imposed because petitioner's accountant advised it in writing that fax and telex revenues "appear to be taxable," and since the auditor believed it was clear under the Division's regulations that fax and telex services were taxable as telephony.

Electronic data interchange (EDI) revenues

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

10. During the month of December 2002, petitioner's EDI revenues totaled $38,019.09, of which $1,141.72 were from an origination point in New York to a destination point in New York. Once again, the auditor assumed that a New York customer with a billing address in New York meant, in this instance, that the EDI originated in New York. His detailed review of the electronic sales files for EDI revenues for the month of December 2002 also disclosed receipts

from interstate/international transactions of $3,194.94, so that petitioner's total receipts from EDI services which had "known" originations and destinations were $4,336.66 ($1,141.72 plus $3,194.94). He then calculated an intrastate percentage of 26.3272 by dividing "known" intrastate revenues of $1,141.72 by the total "known" intrastate/interstate/international revenues of $4,336.66. Since petitioner's total EDI revenues for December 2002 were $38,019.09, the auditor could not determine from his review of the electronic sales file the destination for EDI revenues of $27,839.51 ($38,019.90 less $4,336.66). He calculated that $7,329.36 were additional receipts from intrastate communications by applying the intrastate percentage of 26.3272 to the receipts of $27,839.51 for which he could not determine the destination of the EDI services. The auditor then computed total taxable New York sales of EDI services for the month of December 2002 of $14,314.00: intrastate revenues of $1,141.72, plus estimated intrastate revenues of $7,329.36, plus access fees and minimum commitment fees of New York customers of $5,842.92. The auditor then utilized the intrastate percentage of 26.3272 to compute tax due for the other months included in the audit period, which resulted in the issuance of the Notice of Determination, dated March 28, 2005, asserting sales and use taxes due of $48,260.70 plus interest.

Revenue from e-mail services

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

part of internet access." He did not view e-mail as "data transmission" but nonetheless determined it was taxable as "two computers communicating."

12. Petitioner's electronic sales files for e-mail revenue did not contain any information on the e-mail destinations. As a result, the auditor estimated the percentage of e-mail revenues with New York destinations as follows. He calculated petitioner's total "intrastate revenues" of $87,013.70 by adding petitioner's New York taxable revenue from fax and telex services of $72,699.79 and its New York taxable revenue from EDI services of $14,314.00. He then determined that these intrastate revenues represented 21.2322% of petitioner's total EDI, fax and telex revenues of $409,819.37. Applying 21.2322% against petitioner's total e-mail revenues from its New York customers of $112,703.45, the auditor computed e-mail *intrastate* revenues subject to tax of $23,929.46. The auditor then utilized the intrastate percentage of 21.2322 to compute tax due for the other months included in the audit period, which resulted in the issuance of the Notice of Determination dated March 28, 2005 asserting sales and use taxes due of $85,187.22 plus interest.

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

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

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

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

Vendor	Invoice date	Invoice amount	Description
Vari Tronics	2/03/03	$909.59	Cable assemblies
Vari Tronics	1/31/03	$278.64	Cables
Vari Tronics	1/31/03	$377.64	Cable assemblies

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

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

utilized by petitioner in lieu of packet switching, an earlier technology for messaging, which it had used in the past.

18. The facsimile (fax) service provided by petitioner is different from a traditional telephony fax. In petitioner's case, there is no fax machine at the customer's location sending individual faxes. Rather, the customer transmits text messages or information in a data file to petitioner's facility in Missouri where petitioner routes the information via a fax format.

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

20. With reference to EDI services, a structured or standardized form of e-mail, petitioner receives information at its Missouri facility from its customers that is to be provided to a supplier or a manufacturer. Petitioner routes the information into a standardized EDI format called "a wrapper," which can then be processed as an order by a vendor. In addition, petitioner offers a "popular Fax-To-EDI service if [the customer] want[s] to transmit forms in TIFF and PDF formats and remain confident each data field will find a home at the other end."

21. On the remand, petitioner submitted a series of proposed findings of fact. These findings of fact have been rejected for the reasons set forth in the Conclusions of Law. It is noted that proposed finding of fact 16 is also rejected because it is an improper attempt to shift the burden of proof from petitioner to the Division.

CONCLUSIONS OF LAW

A. Before proceeding to the merits of the issue on allocation, it is necessary to examine the current posture of this proceeding. This matter was remanded to an Administrative Law Judge to address the issue of whether the Division properly allocated receipts between intrastate and interstate sales. However, before issuing this directive, the Tribunal analyzed the issue of whether petitioners's sales of various types of electronic data services should be treated as taxable sales of telephony and telegraphy pursuant to Tax Law § 1105(b)(1)(B). Prior to engaging in this analysis, the Tribunal modified the findings of fact of the Administrative Law Judge by deleting certain portions of the determination that pertained to the purported processing, conversion and storage services offered to petitioner's customers in Missouri. In its opinion, which followed, the Tribunal quoted the applicable statute and regulations and then held:

> that the record indicates that the services provided by petitioner were merely a conduit for the transmission of information. We agree with the Division that the fact that petitioner bills its customers on a message basis is indicative of a charge to a customer for each message that it transmits. As we held in ***Matter of Fastnet Corp.*** (Tax Appeals Tribunal, March 16, 2006), the acceptance and delivery of data resembles the role of a traditional telephone or telegraph company and, thus, such services are taxable as telephony or telegraphy.
>
> Accordingly, it is ORDERED, ADJUDGED AND DECREED that petitioner's services are subject to sales tax pursuant to Tax Law § 1105(b)(1)(B) . . . .

B. Petitioner's proposed findings of fact must be considered with the forgoing framework in mind. The holding of the Tribunal constitutes the law of the case and may not be relitigated or negated (***see*** Siegel, NY Prac § 448, at 756 [4th ed]). An examination of petitioner's brief on remand shows that its proposed findings of fact were presented in order to support its argument that petitioner's services were interstate or international in nature and were not allocable to New

York. Since this position is directly contrary to the holding of the Tribunal, the proposed findings of fact offered to support this argument are also rejected.

C. There are three services in issue - fax and telex, EDI and e-mail. These services will be discussed seriatim. With respect to the fax and telex revenues, the record shows that based upon a review of petitioner's electronic sales files for the month of December 2002, the auditor proceeded on the assumption that a New York customer with a New York billing address showed that the fax and telex transaction originated in New York. Further, if the electronic sales files indicated that New York was the destination for the telex or fax, the Division concluded that the transaction was intrastate and subject to New York sales tax. The auditor then calculated an intrastate percentage of 16.0570 by dividing the known intrastate revenues by the known intrastate/interstate/international revenues.

The auditor was unable to determine from his review the destination for certain fax and telex revenues. Therefore, he calculated additional estimated intrastate communications by multiplying these revenues by the intrastate percentage. Total New York taxable sales were determined by adding the known intrastate revenues plus the estimated intrastate revenues plus access fees and minimum commitment fees of New York customers. The intrastate percentage was then used to compute the tax due for the remaining months of the audit period.

D. In its brief, petitioner states that it does not dispute that the allocation method utilized by the Division was reasonable given the records presented. Petitioner's brief does mention that the assumption that all of petitioner's transactions originated in New York discounts the technology that allows a customer to access the network from locations throughout the world. Further, utilizing the estimated ratio to fax and telex transmissions delivered to STMP mailboxes

does not take into account the fact that recipients can retrieve stored messages from throughout the world. Petitioner submits that the appropriate allocation is 100 percent interstate because the technical aspects of the transmissions ostensibly establish that all of petitioner's transmissions originate from the Bridgeton, Missouri, facility and preclude petitioner's receipts from being intrastate in nature.

E. With respect to the audit methodology, it has been repeatedly held that when estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, ***cert denied*** 355 US 869). Since petitioner does not dispute the conclusion that the audit method was reasonable, further discussion of this point is unnecessary. Petitioner's remaining argument is inconsistent with the holding of the Tribunal in this matter and is rejected as it contravenes the principle of law of the case.

F. In order to determine the amount of tax due on electronic data interchange (EDI) revenues, the auditor followed the same methodology and assumed that a New York customer with a New York billing address meant that the EDI originated in New York. The record shows that during the month of December 2002, petitioner's EDI revenues were $38,019.09 and that, of this amount, $1,141.72 were from communications that began and ended in New York. The Division also found receipts from interstate and international transactions of $3,194.94 resulting in total receipts that had known originations and destinations of $4,336.66. Based on this information, the Division calculated an intrastate percentage of 26.3272 by dividing the known intrastate revenues by the total known intrastate/interstate/international revenues. Since the Division could not determine from the available information the destination for a certain amount

of EDI revenues, it calculated an additional amount of intrastate receipts by applying the intrastate percentage to the amount of receipts for which it could not determine the destination of the EDI services. The Division calculated the total taxable sales of EDI services for the month of December 2002 by adding intrastate revenues, estimated intrastate revenues, access fees and minimum commitment fees. It then utilized the intrastate percentage to compute the tax due for the other months of the audit period.

G. On the remand, petitioner raises two distinct issues with respect to the allocation. First, petitioner submits that the Division failed to submit any evidence to substantiate how the auditor determined known and unknown destinations for EDI transmissions during the test period. According to petitioner, without the workpapers in the record detailing how the total intrastate and interstate/international totals were calculated, the methodology cannot have a rational basis and cannot be sustained. In response, the Division asserts that the interstate receipts issue was not raised in the petition or the hearing memorandum. The Division also alleges that petitioner received a set of the workpapers on audit and that it would be prejudiced by petitioner's failure to raise the allocation issue if the absence of the workpapers were held to be grounds for cancelling the tax. In response, petitioner contends that it spent a considerable period of time questioning the auditor about his methodology.

H. In ***Matter of Karay Restaurant Corporation*** (Tax Appeals Tribunal, December 10, 1998) the Tribunal noted:

> We have consistently held that the raising of new factual issues after the closing of the record is not permitted, since to do so would be prejudicial to the opposing party by depriving it of the opportunity to present evidence on the disputed issue (***see, Matter of Sandrich, Inc.,*** Tax Appeals Tribunal, April 15, 1993; ***Matter of Consolidated Edison Co. of New York,*** Tax Appeals Tribunal, May 28, 1992).

Here, the record shows that petitioner engaged in extensive questioning regarding whether any of the EDI transmissions should be allocated to New York. However, petitioner has not pointed to any portion of the record where it specifically questioned the calculation of known versus unknown destinations regarding EDI transmissions. Since the record is closed, this argument may not be considered since it would deprive the Division of an opportunity to present evidence on this issue.

I. Petitioner also argues that it is not possible to isolate an intrastate component because all EDI messages are processed and reformatted at its Missouri facility. It is further maintained that an intrastate component cannot be determined because the outgoing transmissions, whether placed in an electronic mailbox for subsequent retrieval by the recipient or handed off to a different third-party network, originate in Missouri. As set forth above, the Tribunal has expressly found that "such services are taxable as telephony or telegraphy." (***Easylink***) Under the circumstances, further consideration of an argument that such services are not taxable by New York is unwarranted.

J. The Division concluded that the receipts from e-mail services were subject to tax on the basis that the e-mail was telecommunications between two points and therefore telephony subject to tax. Since petitioner's electronic sales file for e-mail did not contain any information on e-mail destinations, the Division estimated the percentage of e-mail revenues with New York destinations. It then calculated petitioner's total intrastate revenue by adding petitioner's New York taxable revenue from fax and telex services to its New York taxable revenue from EDI services. The Division determined that these intrastate revenues constituted 21.2322% of

petitioner's total EDI, fax and telex revenues. Intrastate revenues subject to tax were computed by applying the percentage to petitioner's total e-mail revenues from its New York customers.

K. In its brief, petitioner presented extensive argument in support of its position that its e-mail services are inherently interstate and international in nature and that attempting to isolate an intrastate component violates established precedents. In response to this argument, the Division maintains that since petitioner bills for each message that is sent, these messages have a geographic terminus and are therefore distinguishable from the prior decisions of the Tribunal. In the alternative, the Division contends that assuming that petitioner's use of the internet as part of a telephony and telegraphy service converted the transmissions into a nontaxable service, petitioner has failed to identify what specific transmissions were sent via the internet and therefore failed to provide sufficient information to warrant an adjustment of the tax assessed.

L. It is clear from the decision in ***Easylink*** that the Tribunal accepted the Division's argument that the separate billing for each message shows that the services were conduits for the transmission of information and that such services were taxable. Petitioner has not presented any argument or information warranting an adjustment of the allocation of taxable transmissions.

M. In its remand, the Tribunal did not mention the issue of penalties. Petitioner contends that the issue of penalties may not be addressed because it was not mentioned in the remitter while the Division submits that the issue of penalties may be reviewed on the basis of certain correspondence and principles of judicial economy.

N. Petitioner is correct that, in general, a trial court may not go beyond the scope of a remitter (***Wiener v. Wiener***, 10 AD3d 362 [2d Dept 2004]). However, it is reasonable to infer that penalties should be addressed in this instance because it is obvious that the reason they were

not considered by the prior Administrative Law Judge was because the issue became academic upon the dismissal of the petition and cancellation of the notices. Simple logic compels a conclusion that the reversal of this holding revives the penalty issue and, therefore, consideration of this issue does not go beyond the scope of the remitter.

O. The record shows that penalty was imposed on the failure to collect tax on the fax and telex services because the Division felt that the regulations clearly state that fax and telex services are taxable as telephony in New York State. In addition, petitioner's accountants advised petitioner that the fax and telex services were taxable in New York State.

P. Tax Law § 1145(a)(1)(iii) provides that the penalty may be remitted if the failure to pay over the tax was due to reasonable cause and not willful neglect. In ***Matter of Evans*** (Tax Appeals Tribunal, June 1992, ***confirmed*** 199 AD2d 840 [3d Dept 1993]), the Tribunal disagreed with the taxpayer's interpretation of what constituted a personal place of abode but abated penalties because "the [taxpayer's] interpretation of the statute and regulations . . . , while in error, can be said to appear to a person of ordinary prudence and intelligence to be reasonable." Tax Law § 1105(b)(1)(B) imposes tax on telephony or telegraphy of whatever nature. Petitioner opined that neither fax nor telex could be considered telephony or telegraphy. Although petitioner's accountants initially opined that petitioner's services were taxable, they later changed their opinion. Further, the administrative law judge who initially heard this case also concurred with the opinion that petitioner's fax and telex services did not constitute telephony or telegraphy. Under the circumstances, it is concluded that petitioner's interpretation of the statute was reasonable and the failure to collect and pay tax on the fax and telex services was due to reasonable cause and not willful neglect.

Q. The petition of Easylink Services International, Inc. is granted to the extent of Conclusion of Law P and the Division is directed to modify the notices of deficiency accordingly; except as so granted, the petition is otherwise denied and the four notices of deficiency, each dated March 28, 2005 are sustained together with such interest as may be lawfully due.

DATED: Troy, New York
October 14, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE