STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
VERIZON NEW YORK INC.	:	DECISION DTA NO. 829240
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 2008 through 2011.	:	

The Division of Taxation and petitioner, Verizon New York Inc., each filed an exception to the determination of the Administrative Law Judge issued on May 4, 2023. The Division of Taxation appeared by Amanda Hiller, Esq. (David Markey, Esq., of counsel). Petitioner appeared by Eversheds Sutherland (US) LLP (Eric S. Tresh, Esq., and Chelsea E. Marmor, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in support of its exception and in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in opposition to petitioner's exception and a brief in reply to petitioner's brief in opposition. Petitioner filed a reply brief. Oral argument was heard on January 30, 2025, in Albany, New York, which date began the six-month period for issuance of this decision.

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

ISSUES

I. Whether Tax Law § 184 imposes tax on the gross receipts of Verizon New York Inc. for the tax years ended December 31, 2008 through December 31, 2011.

II. If so, whether such taxation violates the Internet Tax Freedom Act of 2007.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have summarized finding of fact 27 for clarity and context. So modified, these facts are set forth below.

1. Petitioner, Verizon New York Inc. (Verizon), is incorporated in New York State.

2. During the tax years ended December 31,2008 through December 31, 2011, petitioner filed transportation and transmission corporation franchise tax returns on gross receipts, forms CT-184, and the transportation and transmission corporation MTA surcharge returns, forms CT-184-M.

3. Petitioner reported its gross receipts from sales of local telephone services on its forms CT-184.

4. Petitioner did not include its receipts from asymmetric digital subscriber line (ADSL), and fiber broadband aggregation services and fiber broadband access services (Fiber Broadband), (collectively, Verizon's services) and other Internet access services on its forms CT-184.

5. In addition, petitioner also filed the transportation and transmission corporation franchise tax returns on capital stock, forms CT-183, and transportation and transmission corporation MTA surcharge returns, forms CT-183-M, for the years at issue.

6. The Division of Taxation (Division) audited petitioner's forms CT-184 for the years 2008 through 2011 (audit period).

7. At the conclusion of the audit, the Division determined that petitioner was liable for additional tax pursuant to Tax Law § 184 on its gross receipts from Verizon's services and made other adjustments.

8. On December 20, 2018, petitioner paid $2,637,365.00 attributable to all adjustments at issue in the audit, other than the gross receipts from Verizon's services described in finding of fact 4.

9. On December 27, 2018, the Division issued a notice of deficiency, assessment number L-049302050 (notice), to petitioner in the amount of $12,046,229.00 in tax, plus interest and penalty, for additional tax pursuant to Tax Law § 184 and MTA surcharge due on Verizon's services for the audit period.

10. On March 25, 2019, petitioner filed a timely petition with the Division of Tax Appeals in protest of the notice.

11. A hearing was held on June 28, 2022.

12. Heather Marciszewski, Tax Auditor I, appeared at the hearing, on behalf of the Division. The Division decided to forego presenting a direct examination of the auditor and, instead, submitted an eight-page affidavit from her. There being no objection from petitioner, the auditor was sworn in as a witness and she affirmed that the contents of her affidavit were true and accurate. The auditor was subject to cross examination.

13. The auditor noted that her affidavit was created with the attorneys at the Division.

14. The auditor agreed that Verizon's services are Internet access services, however, not the Internet access services within the scope of the Internet Tax Freedom Act (ITFA). She reasoned that petitioner is not selling its services directly to the customer and, as such, the transactions do not constitute Internet access service. The auditor claimed that for petitioner's services to be exempted from tax liability under both Tax Law § 184 and the ITFA, petitioner must supply its services directly to the end-user of the services. The auditor concluded that

since petitioner sold its services to Internet Service Providers (ISPs), who then sold the services to the end-users, petitioner failed to qualify for an exemption from tax.

15. Petitioner presented three witnesses in support of its petition.

16. Mario Manniello currently serves as the Executive Director of Income and Transaction Tax Audits at Verizon Communications, Inc. Mr. Manniello testified that, during the audit period, he managed the team that was involved in the audit. He testified that Verizon's services constitute Internet access services.

17. Lance Koenders currently serves as the Vice President of Mobile Product Management at Verizon Communications, Inc. He testified that prior to his current position, he served in a variety of engineering and technical roles overseeing the development and deployment of the Internet, including network systems design, integration and expansion that built out the Internet for public use.

18. In his testimony, Mr. Koenders explained the Internet and how it operates, as well as Verizon's services and how they operate. He provided a demonstration on a computer to illustrate his testimony. He stated that the ADSL and Fiber Broadband services are the technology that allows access to the Internet. His opinion was that Verizon's services are Internet access services and interstate services. The Division declined the opportunity to cross examine Mr. Koenders.

19. The Internet is an interstate transport network that moves data around the world. Verizon's services are components of the Internet network that transmits information. ADSL is technology that delivers access to the Internet by transmitting information over copper wires. Fiber Broadband services are technologies that deliver access to the Internet by transmitting information over fiber optic cables.

20. ISPs purchase Verizon's services to provide access to the Internet to their customers.

21. ISPs' customers cannot access the Internet without Verizon's services.

22. Petitioner's final witness was Richard Pomp, a distinguished professor at the University of Connecticut School of Law and an adjunct professor at New York University School of Law.

23. Professor Pomp was heavily involved in the drafting and consideration of policy implications of the ITFA and was consulted by the United States Treasury Department on the ITFA. As such, he was admitted as an expert of the ITFA.

24. Professor Pomp explained that 25 years ago, no one fully comprehended the nature of the Internet. He explained that when the Internet was first viewed as an industry, the goal was to allow it an opportunity to grow before determining its taxability. He testified that in the enacted versions of the ITFA, the federal law provided certain protections that were revisited based on the growth of the Internet and the technology that drove it.

25. Professor Pomp stated that the ITFA intended to cast a wide net and extend the protection from tax as broadly as possible due to the many taxing jurisdictions in the country with differing taxing statutes. The drafters worried that the taxation of the Internet would not be even-handed applications of any potential law, given the multitude of jurisdictions and laws. He stated that there was a fear that one state would treat one kind of provider differently from another kind of provider, i.e., discrimination between provider to provider and then discrimination between Internet and non-Internet transactions.

26. In his opinion, Professor Pomp stated that the ITFA excluded four categories of taxes from its language: net income tax, capital stock tax, net worth tax and property tax. His

testimony was that the ITFA was intended to prevent broad-based taxation so that it would not deter growth and technological innovations to the Internet.

27. Pursuant to the State Administrative Procedure Act (SAPA) § 307 (1), both parties submitted proposed findings of fact to the Administrative Law Judge below. Petitioner submitted 41 proposed findings of fact, which the Administrative Law Judge generally incorporated into the findings of fact below to the extent that they were relevant and supported by the record. Similarly, the Division submitted 16 proposed findings of fact, which the Administrative Law Judge generally incorporated in the findings of fact to the extent they were supported by the record.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the requirements of Tax Law § 184 and found that petitioner did not meet its burden in demonstrating an entitlement to the statutory exclusion for gross receipts from sales of interstate telecommunications services sold for ultimate consumption. The Administrative Law Judge found that the Division correctly determined that the exclusion did not apply to petitioner which sells its services to ISPs, who in turn sell Internet service to customers who are the end-users of those services. Turning to the question of whether the tax authorized by Tax Law § 184 was preempted by the ITFA, the Administrative Law Judge concluded that it was and that the ITFA prohibited the state tax in question. Specifically, the Administrative Judge examined the purpose and text of the ITFA which placed a moratorium on state or local taxes on "Internet access" and provided a broad definition of that term which was amended to include "telecommunications services" used to provide Internet access. Based on this analysis, the Administrative Law Judge determined that petitioner's

services are Internet access services within the meaning of the ITFA whose gross receipts are preempted from taxation pursuant to that act.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Administrative Law Judge erred in finding that its services are taxable within the intent and meaning of Tax Law § 184. Specifically, petitioner contends that the Administrative Law Judge improperly applied an "end-user" test to its services and conflated this term with that of "ultimate consumption" contained in Tax Law § 184. Petitioner further contends that even if "ultimate consumption" is equated with "end user," that the ISPs are the ultimate consumers and end users of petitioner's services in question and therefore these services are excluded pursuant to Tax Law § 184.

On exception, the Division argues that the Administrative Law Judge incorrectly determined that the ITFA preempted the tax on petitioner's services imposed by Tax Law § 184. In support of its position, the Division contends that the services in question were not included in the definition of "Internet access" under the ITFA which would exclude receipts derived therefrom from being subject to state taxation. Specifically, the Division argues that the definition of "end user" used to apply Tax Law § 184 is applicable to the ITFA and that because petitioner was selling to ISPs and not supplying end users, the ITFA does not apply. Second, the Division contends that Tax Law § 184 is not a tax on "Internet access" within the meaning of the ITFA. The Division argues that its taxation of these services was protected by the moratorium exemptions added to the ITFA as grandfather provisions permitting continued state taxation for a specified period. Lastly, the Division contends that petitioner's Fiber Broadband and ADSL services sold to the ISPs were not "telecommunications services" used to provide "Internet access" which would qualify them for the exemption from state taxation.

OPINION

Tax Law § 184 provides an additional franchise tax on the gross earnings of "[e]very corporation . . . principally engaged in the conduct of . . . local telephone business . . ." (Tax Law § 184 [1]). Excluded from the gross earnings under this section are "earnings . . . derived by such taxpayer from sales for ultimate consumption of telecommunications service to its customers . . . (ii) one hundred percent of separately charged inter-LATA, interstate or international telecommunications service" (***id***).

Petitioner excluded from its calculation of gross receipts its sales of ADSL and Fiber Broadband services to ISPs contending that providing these services to ISPs met the definition of interstate telecommunications service within the provisions of Tax Law § 184 and therefore were excluded from taxation. It is the exclusion of these receipts from the calculation of gross earnings under Tax Law § 184 that is at issue here.

When the Division issues a notice of deficiency, a presumption of correctness attaches (***see Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***Matter of Tavolacci v State Tax Commn.***, 77 AD2d 759 [3d Dept 1980]). Petitioner bears the burden of proof by showing through clear and convincing evidence that a deficiency assessment is improper or erroneous (***id.***, ***see also Matter of Meskouris Bros. v Chu***, 139 AD2d 813 [3d Dept 1988]; ***Matter of Surface Line Operators Fraternal Org. v Tully***, 85 AD2d 858 [3d Dept 1981]).

Here, petitioner cannot sustain its burden since the ADSL and Fiber Broadband services petitioner sold to its ISP customers were resold by those ISPs for ultimate consumption by their own customers (***see*** finding of fact 14). The exclusion applies by its own terms to sales of

telecommunications service for ultimate consumption, as opposed to sales for resale to the ISP's customers.

Petitioner asks this Tribunal to characterize its sales to its customers as "sales for ultimate consumption" qualifying for the exclusion insofar that its ISP customers were the ultimate consumers of the services sold. Toward this end, petitioner relies on a dictionary definition of "ultimate" as "last in a progression or series" or "basic, fundamental" (https://www.merriam-webster.com/dictionary/ultimate [last visited November 1, 2023]). "Consumption," meanwhile, is defined as "use of something" while "consume" means "to do away with" or "to utilize as a customer" (https://www.merriam-webster.com/dictionary/consumption [last visited November 1, 2023]). We find this argument unpersuasive when viewed together with the facts as found by the Administrative Law Judge (***see*** findings of fact 18 through 20) describing the manner in which petitioner's ISP customers purchase access to petitioner's ADSL and Fiber Broadband networks and provide Internet access to their own customers. Accordingly, we find that the Administrative Law Judge correctly found that petitioner's services do not qualify for the exclusion from gross earnings for receipts from telecommunications service provided by Tax Law § 184.

Resolving the question of whether petitioner's ADSL and Fiber Broadband services qualify for the exclusion from gross earnings under Tax Law § 184 does not end our inquiry. The Division has taken an exception to that portion of the determination of the Administrative Law Judge holding that the ITFA preempts state taxation of petitioner's ADSL and Fiber Broadband services.

The Supremacy Clause of the United States Constitution (US Const Art VI, Cl 2) mandates that state and local laws which conflict with federal law are "without effect" (***New***

York SMSA Ltd. Partnership v Town of Clarkstown, 612 F3d 97, 103 [2d Cir 2010]). "It is a familiar and well-established principle that the Supremacy Clause, US Const, Art VI, cl 2, invalidates state laws that 'interfere with, or are contrary to,' federal law" (***Hillsborough County, Florida v Automated Med. Labs., Inc.***, 471 US 707 [1985], quoting ***Gibbons v Ogden***, 22 US 1, 82 [1824]). The inquiry in a federal preemption analysis is whether Congress intended to preempt state law, and where there is no evidence to the contrary, it is presumed that the state law has not been preempted (***Matter of Morgan Guar. Trust Co. of N.Y. v Tax Appeals Trib. of N.Y. State Dept. of Taxation & Fin.***, 80 NY2d 44, 48 [1992]). An intent to preempt may take several forms. At issue here is a question of express preemption since "[u]nder the Supremacy Clause, federal law may supersede state law . . . [including] when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms" (***id.***, quoting ***Jones v Rath Packing Co.***, 430 US 519, 525 [1977]). Express preemption occurs when, for example, Congress specifically acts to prevent specified state action. "[T]he purpose of Congress is the ultimate touchstone" (***Matter of Morgan Guar. Trust Co. of N.Y.***, 80 NY2d at 48, quoting ***Retail Clerks v Schermerhorn***, 375 US 96, 103 [1963]) and Congress can express an intent to preempt state or local law explicitly, through the express language of a federal statute, or implicitly, through the scope, structure, and purpose of the federal law (***Bates v Abbott Labs.***, 727 F Supp 3d 194, 217 [ND NY, March 29, 2024]).

The ITFA was enacted by Congress in 1998 and broadly prohibits taxes on Internet access (***see*** Pub L 105-277, Div C, Title XI § 1101 [Oct 21, 1998] [enacted as a statutory note to 47 USC § 151], amended by Pub L 107-75, Pub L 108-435, Pub L 110-108, Pub L 113-164, Pub L 113-235, Pub L 114-53, Pub L 114-113, and Pub L 114-125). The ITFA, as originally

enacted, represented Congress's attempt to protect Internet access and electronic commerce from potentially burdensome state and local taxation.

The ITFA operated by putting in place a moratorium temporarily preventing state and local governments from imposing new taxes on Internet access. The ITFA defines "tax" to mean "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred" (ITFA § 1105 [8] [A] [i]), but also does not include a tax "levied upon or measured by net income, capital stock, net worth, or property value" (ITFA § 1105 [10] [B]).

As enacted in 1998, the ITFA provided the following definition of "Internet access service":

> "The term 'Internet access' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. *Such term does not include telecommunications services*" (ITFA former § 1104 [5]; Internet Tax Freedom Act of 1998, Pub L 105-277 [emphasis added]).

This definition of Internet access reflected the prevalence of "narrowband" telephone dial-up and modem methodology of the late nineties. Telecommunications services, such as DSL, sold as transport to ISPs were initially excluded from this definition and thus were still taxable and not subject to the moratorium (***see*** US Govt Accountability Office, GAO-06-273, Internet Access Tax Moratorium: Revenue Impacts Will Vary by State at 1 [2006]). As DSL and other technologies for delivering Internet access expanded, Congress took note of the need to protect these drivers of internet growth from state taxation.

Congress extended the ITFA in 2001 (***see*** Internet Tax Nondiscrimination Act of 2001, Pub L 107-75) and again extended and expanded the ITFA when it passed the Internet Tax Nondiscrimination Act of 2004 (ITNA 2004) which had an effective date of November 1, 2003

(Pub L 108-435). After the 2004 amendments contained in the ITNA and through the taxable period in question, the ITFA broadly provided that:

> "Internet access means a service that enables users to connect to the Internet to access content, information, or other services. *The term 'Internet access' does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access*" (ITFA former § 1105 [5], Internet Tax Non-Discrimination Act of 2004, Pub L 108-435 [emphasis added]).

With this change, it became clear that telecommunications services such as DSL, a major concern of Congress, were now defined as within "Internet access" and thus were barred from state taxation.

After all amendments and before the taxable period at issue here, the ITFA defined "Internet access" as:

> "[t]he term Internet access (A) means a service that enables users to connect to the Internet to access content, information or other services offered over the Internet; (B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold—(i) to provide such service; or (ii) to otherwise enable users to access content, information or other services offered over the Internet" (ITFA § 1105 [5] [A]-[B]; Internet Tax Freedom Act Amendments Act of 2007, Pub L 110-108, § 4).

It cannot be disputed that the ITFA was a specific Congressional act of express preemption of the authority of state and local authorities to tax Internet access predicated on Congress' specific intent to foster the growth and expansion of the Internet. Voluminous Congressional testimony was dedicated to the question of how best to effect the growth of the internet. The act itself is titled the Internet Tax Freedom Act, a clear reference to the law's moratorium on state tax of Internet access.

In considering the impact of the proposed amendments to the ITFA under ITNA 2004, the Senate Committee on Commerce, Science, and Transportation issued a report (S Rep 108-155, September 29, 2003), and reported that:

> "The Committee intends for the tax exemption for telecommunications services to apply whenever the ultimate use of those telecommunications services is to provide Internet access. Thus, if a telecommunications carrier sells wholesale telecommunications services to an Internet service provider that intends to use those telecommunications services to provide Internet access, then the exemption would apply.
>
> The modified definition of Internet access would clarify that all transmission components of Internet access, regardless of the regulatory treatment of the underlying platform, are covered under the ITFA's Internet tax moratorium only when the transmission component is used to provide Internet access . . . . By modifying the definition of Internet access, the Committee seeks to clarify that, under the ITFA, neither Internet access nor the transmission component of Internet access is subject to taxation."

The telecommunications services provision was extended again in 2007 through 2008 (***see*** Pub L 110-108, § 3), the first of the tax years here at issue. The question before us is whether New York's taxation of petitioner's ADSL and Fiber Broadband services is exempt from the moratorium on state taxation of Internet access. As the Administrative Law Judge correctly noted, the plain language of the ITFA casts a broad net over services "purchased, used, or sold," that "enables users to connect to the Internet" (***see*** ITFA § 1105 [5] [A]; [B]). As discussed above, the law was expanded to include telecommunications services such as those provided by petitioner to ISPs who used those services to connect their customers to the Internet. The clear expression in the preemption language of the ITFA reflected the intent of Congress to foster the growth and expansion of the Internet and electronic commerce free from any new state taxation, and to eventually phase out grandfathered state taxes on Internet access and related telecommunication services. In light of the definitions of the terms "Internet access" and "telecommunications" contained in the ITFA after the 2004 amendments, "the plain terms of [the

statute] strike directly at the subject tax" (***Air Transp. Assn. of Am. v New York State Dept. of Taxation & Fin.***, 91 AD2d 169, 170 [3d Dept 1983], ***affd*** 59 NY2d 917 [1983], ***cert denied*** 464 US 960 [1983]).

The Division's argument regarding the construction of "telecommunications services" is inapposite where the statutory terms necessarily have different meanings given the context in which they arose and were modified (***compare*** L 1995, Ch 2, § 27 [amending Tax Law § 184 to narrow the scope of the tax on local telephone companies and provide a complete exclusion for earnings from interstate and international telecommunications services] ***with*** Pub L 110-108 [modifying the ITFA's definition of "Internet access" to include related unregulated telecommunications services]; ***see also*** HR Rep 110-372 [House Judiciary Committee Report on the ITFAAA of 2007]). We are unconvinced that the meaning that Congress intended to give the term "telecommunications service" in the ITFA was akin to "ordinary telephone service offered to the public for a fee," notwithstanding the Division's argument, in light of the ITFA's overall subject area (Internet access and electronic commerce) and Congress's stated intent in protecting this market from state and local taxes, including taxes on the transmission component of Internet access.

Thus, preemption of taxation by New York was clearly intended and took effect no later than when "telecommunications services" were added to the ITFA through the ITNA of 2004, effective (retroactively) on November 1, 2003 (***see*** Pub L 108–435, §§ 2 [c], 6 [a], 118 Stat 2615, 2617, 2622 [2004], codified at 47 USC § 151 note).

We turn next to the Division's argument that Tax Law § 184, as applied to petitioner's telecommunications services, was exempted from the moratorium on state taxation during the tax

years at issue by one of the grandfather provisions of the ITFA § 1104. An overview of the enactment of these provisions is helpful here.

The ITFA as enacted on October 21, 1998, placed a three-year moratorium on the ability of states to impose new taxes on Internet access. The act grandfathered for this period the state and local taxes that were ". . . generally imposed and actually enforced prior to October 1, 1998" (Pub L 105-277; ITFA § 1101 [a] [1]). This initial Internet tax moratorium and its grandfather provision expired on October 21, 2001. The ITNA 2001 (Pub L 107-75) was enacted on November 28, 2001, provided for a two year extension of the prior moratorium through November 1, 2003, and continued the grandfathering protection for pre-existing Internet access taxes (***see generally*** Cong Res Serv, ***Internet Taxation: Issues and Legislation in the 108th Congress***, RL31929, at 2-5 [updated December 17, 2004], https//everycrsreport.com/reports/RL31929.html).

On December 3, 2004, the ITNA 2004 (Pub L 108-435) was signed into law extending the tax moratorium in the ITFA for four years retroactively from November 1, 2003, to November 1, 2007, and grandfathering through this same period internet access taxes publicly enforced before October 1, 1998.

This act as noted, added "telecommunication services" that were "purchased, used, or sold" by a provider Internet access" to the definition of "Internet access" under the ITFA. It also created a separate grandfather provision in order to grant a moratorium exemption to those states that were taxing those telecommunications services components prior to November 1, 2003, and had made a public proclamation of this fact (***see generally*** ITFA § 1104 [post-2004 amendments]). Thus, Internet access taxes publicly proclaimed and enforced before November 1, 2003, were grandfathered between November 1, 2003, and November 1, 2005 (***id.***)

Pursuant to the Internet Tax Freedom Act Amendments Act (ITFAAA) (Pub L 110-108) and other extensions in subsequent acts, the pre-October 1998 taxes grandfather period was finally extended to the year 2020, long after the tax years in question. The pre-November 2003 taxes grandfather period which was which originally extended through November 1, 2005 (***see*** Pub L 108–435, § 6 [b], 118 Stat 2622 [2004]) was again extended to November 1, 2007 in the ITFAA of 2007, Pub L 110–108, § 2 [c] [2], 121 Stat 1024, and again to June 30, 2008 in the Consolidated Appropriations Act, 2008, Pub L 110–161, Div D, Title VI, § 624, 121 Stat 2015. However, the pre-November 1, 2003 state tax had to meet the qualification for these grandfather provisions.

As codified during the tax years in question, a bifurcated set of grandfather provisions was in force with the first covering pre-October 1998 taxes (ITFA § 1104 [a]) and the second covering pre-November 2003 taxes following the enactment of the more broadly defined internet access which included telecommunications services (ITFA § 1104 [b]). The sections carry different definitions and requirements.

Pursuant to ITFA § 1104 (a), a state tax on Internet access will be exempt from the moratorium under the ITFA § 1101(a) if the tax was authorized by statute and either: 1) the state tax administrative agency has issued a "rule or other public proclamation" that the agency has applied that tax to Internet access; *or* 2) the state has generally collected that tax on Internet access. The ITFA § 1104 (b) requires that the state tax administrative agency issue a "public rule or other public proclamation" that the agency has applied such tax to Internet access services *and* that such taxes to have been generally collected on charges for Internet access. The Division contends its taxation of petitions ADSL and Fiber Broadband telecommunications

services were exempted from the moratorium on taxation in the ITFA by operation of one or both of these grandfather clauses.

In support of its argument that Tax Law § 184 is protected by the grandfather provisions of the ITFA, the Division cites to its August 1996 report to the Governor and Legislature stating that "although New York's law does not specifically list Internet connection services as examples of telephony or telegraphy, the law does tax telephony and telegraphy of whatever nature" (*Improving New York State's Telecommunication Taxes*, August 1996). However, the Division omits the immediately preceding sentence in that report: "[t]he advisory panel identified Internet connection service as one example of an area not clearly addressed by the Tax Law or regulation" in a section entitled "Uncertainty About Services Taxed as Telephone and Telegraph" (***id.***). We cannot find that this indefinite statement rises to the level of a "public rule" or "proclamation" that would put Internet access providers on notice that the Division had taken a definite position that it would apply Tax Law § 184 in the way it has here. Furthermore, it seems to communicate policy proposals rather than the adoption of a rule or policy with regard to taxation of Internet access. It is also noted that this report was a preliminary report, and the final report only addressed this issue in the context of Tax Law § 186-e (***see*** *Improving New York State's Telecommunication Taxes*, January 1997), the excise tax on telecommunication services (***see*** TSB-M-08[4.1]C [recognizing that the excise tax imposed by Tax Law § 186-e on the telecommunications purchased, used, or sold by ISPs to provide Internet access was preempted by federal law on and after November 1, 2005]). Tax Law § 184, by its own terms and as applicable here, is applied against the gross earnings of local telephone businesses, with exclusions for interstate and international telecommunication service, and not specifically applied to Internet access. As a matter of fact, Tax Law § 184 does not mention Internet access

in any regard. Therefore, we cannot find that the Division has "generally collected" this tax on Internet access within the meaning given this term under the ITFA pursuant to the 2004 amendments. Having found no exemption from the moratorium, we agree with the Administrative Law Judge that the tax imposed pursuant to Tax Law §§ 184 and 184-a is preempted by the ITFA for the tax years at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Verizon New York Inc. is denied;
2. The exception of the Division of Taxation is denied;
3. The determination of the Administrative Law Judge is affirmed; and
4. The petition of Verizon New York Inc. is granted; and
5. The notice of deficiency dated December 27, 2018 is canceled.

DATED: Albany, New York
July 21, 2025

/s/ Jonathan S. Kaiman
Jonathan S. Kaiman
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner