

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
	:	
of	:	
	:	
TIME WARNER CABLE INFORMATION	:	DETERMINATION
SERVICES (NY), LLC	:	DTA NO. 830442
for Revision of a Determination or for Refund of Sales	:	
and Use Tax under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 2014 through February 28,	:	
2017.	:	
	:	

Petitioner, Time Warner Cable Information Services (NY), LLC, filed a petition for revision of a determination or for refund of sales and use tax under articles 28 and 29 of the Tax Law for the period March 1, 2014 through February 28, 2017.

A hearing was held in Brooklyn, New York, on March 21, 2023, before Jessica DiFiore, Administrative Law Judge, with all briefs to be filed by July 5, 2023, which date began the six-month period for the issuance of this determination. Petitioner appeared by Eversheds Sutherland, LLP (Eric S. Tresh, Esq., Maria Todorova, Esq., and Chelsea E. Marmor, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Lori Antolick, Esq., of counsel). This matter was reassigned to Alejandro Taylor, Administrative Law Judge, pursuant to the authority of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15 [f]).

After reviewing the entire record in this matter, Alejandro Taylor, Administrative Law Judge, renders the following determination.

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, Time Warner Cable Information Services (NY), LLC, is a limited liability company with operations in New York. Since May 2016, Charter Communications, Inc., has been the parent company of petitioner. Petitioner provides intrastate, interstate, and international voice over internet protocol (VoIP) telecommunication services to its customers in New York. Petitioner sold some of these services on an unlimited basis to its customers, whereby a customer paid a flat monthly fee for combined intrastate and interstate telephone service as part of a bundled plan.

2. As a telecommunications provider, petitioner is required to contribute to the Federal Universal Service Fund (FUSF). The amount that telecommunication service providers are required to contribute is determined by their revenues from interstate services, although service providers can choose to recover their FUSF contributions from their customers. As part of its interstate services reporting, petitioner is required to file Federal Communications Commission (FCC) Forms 499-A and 499-Q with the Universal Services Administrative Company (USAC), which petitioner did as part of a consolidated group of related entities during the audit period.

3. By correspondence dated April 3, 2017, the Division of Taxation (Division) informed petitioner that it had selected petitioner's sales and use tax returns for audit for the period beginning March 1, 2014 and ending February 28, 2017 (the audit period). Attached to the audit appointment letter was an information document request, which listed the documents the

Division requested of petitioner to submit for review in the course of its audit, and naming Patrick Moylan as the auditor.

4. On February 19, 2020, the Division issued a notice of determination, bearing assessment number L-051273649 (notice), asserting additional sales and use tax of \$7,298,079.94, plus interest. Therein, the Division asserted that petitioner owes additional sales tax on the charges petitioner billed its customers to recover its contributions to the FUSF.

5. On May 7, 2020, petitioner filed a timely request for a conciliation conference with the Bureau of Mediation and Conciliation Services (BCMS). On December 4, 2020, the conciliation conference was held and, pursuant thereto, the Division revised its determination of the amount of additional sales tax due to \$6,667,845.05, plus interest, to account for sales tax petitioner demonstrated that it had charged on New York State Universal Service Fund fees it collected from its customers. On February 12, 2021, BCMS issued a conciliation order (CMS No. 000320215) sustaining the Division's revised amount of sales tax due from petitioner. On May 7, 2021, petitioner filed a timely petition with the Division of Tax Appeals.

6. At the hearing, the Division presented the testimony of Patrick Moylan. Mr. Moylan has been a tax auditor with the Division since 2009. He holds a bachelor's degree in accounting from Syracuse University and had 14 years of accounting experience before joining the Division. Since being employed by the Division, he has performed at least 200 audits.

7. Mr. Moylan testified that he was assigned to audit petitioner as a follow up to a previous audit. During the early phase of the audit, Mr. Moylan made several requests for documents to conduct the audit. By a written agreement dated July 24, 2017, the parties agreed to elect August 2016 as a test period for the audit. The parties entered into successive

agreements to extend the time for completion of the audit, culminating in a final consent extending that period to March 20, 2020.

8. During the course of the audit, with the help of the Division's Technical Audit Assist (TAA) unit, Mr. Moylan prepared reports of data submitted by petitioner regarding transactions on which Universal Service Fund fees were collected. Using the findings of the audit of the test period, Mr. Moylan calculated the error rates for each of the different areas under audit, including the amount of sales tax due on the FUSF collected from petitioner's customers. Mr. Moylan determined that the error rate for the FUSF fee during the test period was 6.5344 percent of the sales tax collected from petitioner's customers. Mr. Moylan then applied this error rate to petitioner's sales tax returns and determined that \$7,298,079.94 in additional sales tax was due on the Universal Service Fund fees collected from petitioner's customers during the audit period.

9. Pursuant to the audit, petitioner submitted sample invoices representing charges to its customers for its telecommunication services provided during the audit period. The charges detailed therein were for phone service bundles that included interstate and intrastate phone service. The invoices stated that for purposes of calculating sales tax, set percentages ranging between 25.97 and 26.3 of the charges for phone services were for interstate or international activity. As explained in a sample invoice, the purpose of the FUSF charge to petitioner's customers is to "recover the amount that telephone service providers must contribute to the Federal Universal Service Fund, which helps keep local phone rates affordable for all Americans."

10. At the hearing, petitioner offered the testimony of Jennifer Tatel, a former general counsel with the FCC. Ms. Tatel earned a bachelor's degree from the University of Illinois, a master's degree from Columbia University, and her juris doctor from George Washington

University. Before joining the law firm of Wilkinson Barker & Knauer in 2017, Ms. Tatel served in several roles at the FCC, including chief of industry analysis in the FCC's media bureau, as a legal advisor, and in the office of general counsel, where she spent most of her time at the FCC. While in the office of general counsel, Ms. Tatel served as assistant general counsel, chief of staff, deputy general counsel, and acting general counsel. Ms. Tatel is currently a member of the Federal Communications Bar Association. While serving in her roles at the FCC, Ms. Tatel's responsibilities included dealing with issues related to the FCC's adoption of the regulations concerning the FUSF and implementing its requirements.

11. Ms. Tatel explained the history of the FUSF and Congress' goal of making basic telephone service universally available. Toward that end, providers of interstate and international telephone services are required to contribute to the FUSF based on their revenues from such services. In determining that amount, service providers may elect a safe harbor percentage under FCC regulations for interstate and international services or they may conduct a traffic study to determine the relative intrastate versus interstate and international traffic in calculating their revenues from those services. Service providers then file quarterly estimates of their interstate and international service revenues with the FCC on form 499-Q for the upcoming quarter. The FCC sets a contribution factor based on all service providers' quarterly revenue estimates and the amount it expects is needed to operate the FUSF. The USAC then bills service providers based on the contribution factor and the estimated revenues reported to the FCC. In April of the following year, service providers are required to file form 499-A with the FCC, which represents their actual revenues for the year prior, and reconciles their contributions with the actual costs of operating the FUSF. According to Ms. Tatel, for purposes of a required contribution to the FUSF from a service provider, it does not matter whether any interstate or

international calls were made during the quarter, but rather only if revenues from interstate and international services were received. While service providers are not required to pass the FUSF fee along to their customers, in practice most do, including petitioner.

12. Petitioner also presented the testimony of its employee, Brandi Drake. Ms. Drake most recently has served as petitioner's senior director of transaction tax and has been employed by petitioner for about 15 years. She earned a bachelor's degree in business administration and a master of accountancy degree from the University of Georgia. She is a certified public accountant and is licensed in Georgia. She currently oversees audits for petitioner and in the past she also oversaw compliance with state and federal Universal Service Fund requirements. During the audit period, Ms. Drake also oversaw the filing of petitioner's sales tax returns and filings related to regulatory fees including the FUSF.

13. Ms. Drake testified that petitioner offers bundled plans for its telecommunications services. She explained that a bundled plan encompasses more than one service for a single charge, such as a bundle that includes interstate and intrastate phone service. Ms. Drake testified that, during the audit period, petitioner utilized a traffic study that analyzed the calls its customers made to determine the portion of calls that were interstate as opposed to intrastate in nature. Petitioner used that information to set the price for its telecommunication bundles. Using its accounting software, petitioner records revenue from its sales of intrastate and interstate sales separately in its general ledger. Although the revenue streams from each service are separately recorded in the general ledger, the customer is charged a single price for the bundled services. Along with the revenues from sales of the services provided, in the general ledger petitioner recorded as revenue the amounts collected from its customers for petitioner's required FUSF contributions. Ms. Drake reiterated that the price of bundled plans remained

static notwithstanding whether customers made purely intrastate or interstate calls. According to Ms. Drake, petitioner charged sales tax on the New York State Universal Service Fund fee passed along to its customers, but not on the FUSF because the FUSF is only associated with interstate and international phone service. Ms. Drake confirmed that the amounts that petitioner charged its customers for the FUSF fees makes up part of the price it charged its customers for interstate telecommunications services.

14. The parties submitted a stipulation of facts pursuant to the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) (*see* 20 NYCRR 3000.11), which have been summarized and substantially incorporated into the facts found here. Pursuant to the joint stipulation, the parties have agreed that the sole remaining issue in this case is whether the charges petitioner billed to its customers to recover its contributions to the FUSF are subject to sales tax.

15. Pursuant to 20 NYCRR 3000.15 (d) (6), petitioner proposed 62 findings of fact. In accordance with the State Administrative Procedure Act (SAPA) § 307 (1), petitioner's proposed findings of fact 1 through 4, 6, 7, 10, 18, 34, 36, 38, 42, and 44 through 62 are included in the joint stipulation or are based on the record and have been consolidated, condensed, and substantially incorporated into the findings of fact above as so modified. Proposed findings of fact 5, 8, 9, 11, 17, 19, 20, 21, 23, 24, 26 through 30, 32, 33, 35, 37, 39 through 41, and 43 have been modified to more accurately reflect the record and/or are accepted in part and rejected in part as conclusory, irrelevant and/or not supported by the record and to the extent accepted they have been consolidated, condensed, renumbered and substantially incorporated herein, as modified. Proposed findings of fact 12 through 16, 22, and 25 describe a federal statute and associated regulations and/or propose conclusions of law based thereon that need not be ruled on

for purposes of SAPA. Proposed finding of fact 31 is rejected as not supported by the record insofar as there is no evidence in the record of customers of petitioner that did not purchase bundled intrastate and interstate services.

CONCLUSIONS OF LAW

A. Section 1105 (b) (1) (B) of the Tax Law imposes sales tax on “the receipts from the sale . . . of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service.” Section 1101 (b) (3) defines the term “receipt” as “the amount of the sale price of any property and the charge for any service taxable under this article . . . without any deduction for expenses”

B. The sole issue presented is whether the FUSF fees recovered from petitioner’s customers are subject to sales tax. Petitioner argues that the recovered FUSF fees are exempt from sales tax as those fees comprise revenue from the sales of interstate and international telephone services. In essence, petitioner argues that the FUSF recovery fee is a component part of the receipt from the sale of tax-exempt interstate and international telephone service under Tax Law § 1105 (b) (1) (B). The Division counterargues that the FUSF fees recovered from petitioner’s customers are part of the receipt from sales of bundled telephony and telephone service that include intrastate and interstate telephone services, and thus such recovered fees should be regarded as part of the taxable receipt of the sale of telephony and telephone service in New York.

C. It is well-settled that statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (*Wegmans Food Mkts., Inc. v Tax Appeals Trib.*, 33 NY3d 587, 592 [2019]; *see also Matter of International Bar Assn. v Tax Appeals Trib.*, 210

AD2d 819 [3d Dept 1994], *lv denied* 85 NY2d 806 [1995]). In order to qualify for the exemption, petitioner bears the burden of clearly proving its entitlement to the exemption sought (*see* Tax Law § 1132 [c] [1]; *Matter of XO Communications Servs., LLC*, Tax Appeals Tribunal, May 9, 2018, *affd* 182 AD3d 71 [3d Dept 2020], *lv denied* 36 NY3d 903 [2020]; *see also Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 195 [1975], *lv denied* 37 NY2d 708 [1975]).

D. When construing a statute, the primary focus is on the intent of the Legislature in enacting the statute (McKinney’s Cons Laws of NY, Book 1, Statutes § 92; *see also Matter of Helio, LLC*, Tax Appeals Tribunal, July 2, 2015, citing *Matter of American Communications Tech. v State of N.Y. Tax Appeals Trib.*, 185 AD2d 79 [1993], *lv granted* 82 NY2d 653 [1993], *affd* 83 NY2d 773 [1994]). If 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 (McKinney’s Cons Laws of NY, Book 1, Statutes § 76; *see also New York State Assn. of Counties v Axelrod*, 213 AD2d 18, 24 [3d Dept 1995], *lv dismissed* 87 NY2d 918 [1996]).

E. Under the Tax Law, a receipt includes the sales price for a taxable service without deduction for expenses (*see* Tax Law § 1101 [b] [3]). The Division’s regulations explain that “all expenses . . . incurred by a vendor in making a sale, regardless of their taxable status and regardless of whether they are billed to a customer[,] are not deductible from the receipts” (20 NYCRR 526.5 [e]). The concept of a receipt as necessarily including its associated expenses, without regard to their taxable status, is well-established under New York law (*see Matter of Penfold v State Tax Commn.*, 114 AD2d 696 [3d Dept 1985]; *Matter of Building Contrs. Assoc. v Tully*, 87 AD2d 909 [3d Dept 1982]). In order to determine a service’s taxability, the correct analysis 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.*, Tax Appeals Tribunal, January 19, 1995; *Matter of Southern Pacific Communications Co.*, Tax Appeals Tribunal, May 14, 1991).

F. Here, petitioner is selling bundled telecommunication services that include intrastate and interstate telephony and telephone service components. There is no disagreement between the parties regarding whether sales of interstate and international telephony and telephone service are exempt from sales tax under Tax Law § 1105 (b) (1) (B). The statute is unambiguous in its exemption of interstate and international telephony and telephone service. Petitioner does not allege that the Division improperly included in taxable receipts that portion of petitioner's revenues stemming from interstate and international telephony and telephone service as determined by the traffic study. However, the FUSF fees here at issue are an integral component of the bundled services it sells, insofar as petitioner has passed that cost to its customers and included it as a cost of the services provided, as evidenced on its invoices for its services. As such, the recovered FUSF fees constitute an expense and, thus, a component of the taxable receipts from the sales of telephony and telephone service in New York State.

Examination of the relation between the FUSF fee as imposed on petitioner and how petitioner allocates this fee to its customers confirms this interpretation. Petitioner charges the FUSF fee to its customers without regard to the number of calls or minutes of usage of interstate or international services. However, petitioner's required contribution to the FUSF is based on the ratio of its customers' intrastate versus interstate/international telephone usage *in aggregate* as determined by a study of total network traffic. The amount of the FUSF fee charged to petitioner's customers is not determined by the actual number of interstate or international calls made or interstate or international minutes used by any individual customer in a given billing

period. Rather, the percentage of out-of-state telephony determined pursuant to petitioner's traffic study is applied to the cost of the bundled plan to calculate the FUSF fee the customer will pay. The customer pays the fee regardless of the customer's actual usage of interstate and international telephony, which is why the FUSF charge is properly deemed an expense. Even if a customer were to make no out-of-state calls for the billable period, the customer is still charged a standardized percentage of the bundled plan's cost for the FUSF fee, as observed on petitioner's invoices submitted at the hearing. The recovered FUSF fee is merely a part of the whole service purchased and is not exempt as sales of interstate or international telephony or telephone services (*cf. Matter of Penfold v State Tax Commn*, 14 AD2d at 697 [where an otherwise nontaxable service was taxable as an integral component of the taxable receipt]). As such, the Division properly imposed sales tax on petitioner's charges to its customers to recover its FUSF contributions.

G. Petitioner's argument that the Division did not act in accordance with its own policy as expressed in a technical services bulletin (TSB) is misplaced. TSB-M-17(3)C, (6)S describes the Division's revised policy regarding allocation between taxable intrastate and nontaxable interstate and international telephone services in bundled sales. First, that TSB was not issued until September 5, 2017, and by its own terms took effect on March 1, 2017, a date that falls after the end of the audit period here at issue. Second, the Division clearly exempted from petitioner's taxable sales an amount proportional to the percentage of telephone calls determined to be interstate/international in nature pursuant to petitioner's traffic study. Third, there is no mention in the TSB of an exemption from sales tax of any fees connected to the FUSF. The only reference to the FUSF in the TSB is in relation to telecommunication service providers

commonly using traffic studies to demonstrate the proportion of their revenues from interstate and international services.

H. Petitioner correctly noted that the Tax Appeals Tribunal decision in *Matter of Helio, LLC* is distinguishable in one important regard from the case at hand. Tax Law § 1105 (b) (1) (B) is applicable to landline telephony and telephone service, and includes an exemption for receipts from interstate and international telephony and telephone service, whereas Tax Law § 1105 (b) (2) is only applicable to mobile telecommunications services and does not contain a similar exemption for wireless interstate and international telephony and telephone services. Mobile telecommunication services were the services at issue in *Helio*, unlike services offered here by petitioner, which were intrastate, interstate and international landline services.

I. To the extent that petitioner urges adoption of the analysis employed in the determination of the administrative law judge in *Matter of XO New York, Inc.* (Division of Tax Appeals, December 28, 2006), in order to find that FUSF fees are not includable in taxable receipts, such an invitation is declined. Division of Tax Appeals determinations are not precedential (*see* Tax Law 2010 [5]; *see also Matter of Helio, LLC*). Furthermore, the services at issue in that case are clearly distinguishable from the bundled services at issue in the present matter. In *XO New York, Inc.*, customers did not pay the FUSF fee if they only made intrastate calls. The record here demonstrates that notwithstanding actual use of interstate and international services as part of their bundled plans, petitioner's customers always bore the cost of the FUSF fee.

J. The petition of Time Warner Cable Information Services (NY), LLC is denied and the notice of determination, dated February 19, 2020, as modified by the Division on December 4, 2020 (*see* finding of fact 5), is sustained.

DATED: Albany, New York
January 04, 2024

/s/ Alejandro Taylor
ADMINISTRATIVE LAW JUDGE