



# This Week in State Tax (TWIST)

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## New York: ALJ finds that Universal Service Fund recovery included in sales tax base

The New York Division of Tax Appeals (DTA) held that T-Mobile Northeast LLC's (T-Mobile) recovery of Federal Universal Service Fund (FUSF) fees from customers, when tied to bundled mobile telecommunications services, was subject to sales and use tax.

T-Mobile offered service plans that included commercial mobile radio service (CMRS), instant text messaging (SMS/MMS), and internet access, sold for a single fixed periodic charge. The facts show that T-Mobile did provide the price for each of these individual services in its billing system and books. In addition to these bundled plans, T-Mobile also offered the ability to add-on interstate and international calling minutes for which it separately stated a FUSF fee on customer invoices to offset its mandatory contributions to the FUSF under federal law. Following an audit, the New York Division of Taxation (Division) assessed T-Mobile for sales and use tax due on the portion of T-Mobile's charges attributable to the recovered FUSF Fees.

On appeal, T-Mobile argued that the FUSF fees were not "charges for mobile telecommunications services" under Tax Law § 1111(l)(1) and, therefore, not subject to sales tax. T-Mobile contended that the statutory definition of such charges was derived from the Mobile Telecommunications Sourcing Act (MTSA), which does not include FUSF obligations in its scope, thus excluding FUSF fees from the definition. The DTA rejected this argument, however, agreeing with the Division of Taxation that the separately stated FUSF fees on T-Mobile's customer invoices are a component of the "whole service" provided by T-Mobile. The DTA determined that T-Mobile's charges at issue were taxable under § 1105(b)(2).

In contrast, in the [Matter of Time Warner Cable](#) (Time Warner), the New York Tax Appeals Tribunal (Tribunal) found that the service provider's FUSF fees were not taxable because they were tied to nontaxable interstate and international wireline VoIP services under § 1105(b)(1). Here, the DTA differentiated T-Mobile's services from that of the provider in *Matter of Time Warner Cable* and instead relied upon the Tribunal's analysis in *Matter of Helio, LLC*. In *Helio*, the Tribunal affirmed without discussion that FUSF fees included on an invoice with bundled mobile telecommunications service plans were taxable in their entirety under § 1105(b)(2) and may not be unbundled. As such, the DTA sustained the assessment, concluding that T-Mobile's FUSF fees were taxable even though they were separately stated. Please contact [Audra Mitchell](#) with questions regarding [in Matter of T-Mobile Northeast LLC](#).

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