

ITFA Is Alive and Well: New York Advisory Opinion Reaffirms Sales Tax Exemption for Internet Access Services

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In its latest Advisory Opinion, [TSB-A-24\(4\)S](#) (June 26, 2024), the New York State Department of Taxation and Finance (the Department) reaffirmed the broad protections offered by the Internet Tax Freedom Act (ITFA) against state and local taxation of internet access. The Petitioner, a New York-based business, sought clarity on whether its subscription to a secure hosted exchange service, which facilitates critical email functions without requiring internal IT infrastructure, would be subject to New York State sales tax.

KEY FACTS AND BACKGROUND

The Petitioner subscribes to a secure hosted exchange service from a provider located in Florida. This service offers comprehensive email management, including mobile device synchronization and Microsoft Exchange functionalities. The service includes (1) unlimited mailbox storage, (2) premium email security protection, (3) anti-virus protection, and (4) live phone support. The service relies on the Petitioner maintaining its own internet connection, with software licensing obligations dictated by agreements with third-party vendors.

THE DEPARTMENT'S RULING

After acknowledging that email service qualifies as taxable telephony or telegraphy service under New York Tax Law § 1105(b)(1), the Department concluded unequivocally that “[e]lectronic mail services are included in the ITFA definition of Internet access, regardless of whether such services are provided independently or packaged with Internet access” and are, therefore, **not** subject to New York State sales tax. This decision hinges on the protections established by ITFA, which precludes state and local governments from imposing taxes on Internet Access.

ITFA: A CRITICAL SAFEGUARD AGAINST STATE TAXATION

ITFA, enacted in 1998 and made permanent in 2016, has consistently served as a bulwark against state efforts to impose tax on Internet Access and multiple or discriminatory taxes on electronic commerce. See ITFA § 1101(a). Under ITFA’s Internet Access prong, services that enable users to

access content, information, email, or other services offered over the internet are shielded from state and local sales taxes.[1] The Advisory Opinion underscores this federal protection, categorizing the Petitioner's email services as an Internet access service, which is exempt from New York State sales tax under ITFA.

REINFORCING ITFA'S PREEMPTIVE POWER: RECENT CASES

This is not an isolated application of ITFA. ITFA has recently been at the center of significant legal challenges, reinforcing its importance in protecting digital services from state taxation. For example, in *Petition of Verizon New York Inc.*, DTA No. 829240 (N.Y. Div. Tax App. May 4, 2023), an administrative law judge (ALJ) ruled that the gross receipts tax on transportation and transmission corporations could not be applied to revenues from asymmetric digital subscriber line and fiber broadband services because these services are federally preempted under ITFA as Internet Access. In rejecting the Department's narrow interpretation of internet access services, which only included services provided to end-user consumers, the ALJ emphasized that US Congress intended ITFA's prohibition on taxing Internet Access to be broad, using the definition from ITFA rather than state tax law.

ITFA'S ONGOING RELEVANCE

New York's Advisory Opinion highlights the continued importance of ITFA in today's digital economy. As businesses increasingly depend on internet-based services, ITFA helps keep these services free from state and local taxes.

For businesses and tax professionals, it's essential to stay up to date on how ITFA applies. This Advisory Opinion serves as an important affirmation that services facilitating internet access remain outside the reach of New York sales tax, thanks to ITFA's broad protections.

[1] Effective November 1, 2007, Congress expanded ITFA's definition of Internet Access to include: "a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access." ITFA § 1105(5)(E).

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National Law Review, Volume XIV, Number 276

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