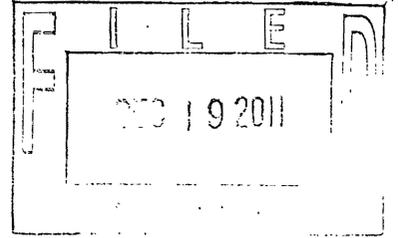


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1299



WHEELING HOSPITAL, INC,

Petitioner,

v.

**CRAIG A. GRIFFITH, WEST VIRGINIA
TAX COMMISSIONER,**

**Circuit Court of Ohio County
Civil Action No. 10-CAP-15**

Respondent.

PETITIONER WHEELING HOSPITAL, INC.'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court of Ohio County, West Virginia committed an error of law when it ignored the federal definition for “physicians’ services” that is incorporated by reference into the West Virginia Broad Based Tax, W. Va. Code § 11-27-1, *et seq.*, and thereby denied Wheeling Hospital, Inc. a refund for Broad Based Taxes that it overpaid for the years 2003 through 2006.

2. The Circuit Court of Ohio County, West Virginia committed an error of law when it impermissibly required Wheeling Hospital, Inc. to pay Broad Based Taxes for “physicians’ services” at a higher tax rate than that imposed on other health care providers in West Virginia providing “physicians’ services,” and thereby violated the uniformity requirement imposed by 42 U.S.C. §§ 1396b(w)(3)(B) and (C).

II. STATEMENT OF THE CASE

In order to fully grasp the clear errors of law committed by the Circuit Court below, all of which involve taxes impermissibly imposed by the State on health care services provided by Wheeling Hospital, it is essential to understand the health care services and taxes at issue. Three distinct types of health care services are at issue in this case: (i) inpatient hospital services; (ii) outpatient hospital services; and (iii) “physicians’ services.” Under West Virginia law, inpatient and outpatient hospital services are taxed at a higher rate than “physicians’ services.” “Physicians’ services,” in turn, consist of three components: (i) a physician’s work, (ii) a physician’s malpractice insurance, and (iii) the overhead necessary for a physician to perform his work (“Overhead”). By the term “Overhead,” federal and state law contemplate the facility, staff, equipment, drugs, supplies, and other overhead necessary when a physician is directly performing a service defined by the industry as “physicians’ services.” For example, in many

cases physicians choose to provide chemotherapy services at Wheeling Hospital for Medicare and Medicaid patients because Medicare and Medicaid drastically cut reimbursement for chemotherapy drugs to independent physicians. (A.R. 694-95). In such cases, the Hospital pays for the practice expense component – e.g., the drug that is being administered to a cancer patient. Consequently, because this Overhead was originally and incorrectly reported as an inpatient or outpatient service and taxed at a higher rate than that for “physicians’ services,” the Hospital will sustain a loss because the Hospital is not reimbursed by Medicaid at a level that covers the cost for such Overhead in the first place.¹

When a physician who is not employed by a hospital nevertheless performs work in that hospital, the physician is paid for the first two components of his services (e.g., the work and malpractice insurance components). Because the hospital provides the Overhead, the hospital, rather than the physician, is paid for that component of the “physicians’ services.” From 2003 through 2006, Wheeling Hospital incorrectly reported gross receipts from Overhead as inpatient or outpatient hospital services, rather than as “physicians’ services.” As a result, Wheeling Hospital incorrectly overpaid Broad Based Taxes on “physicians’ services” at the higher tax rate imposed on inpatient and outpatient services. When Wheeling Hospital discovered its error, it filed amended returns for 2003 through 2006 in order to conform to the overarching federal Medicaid and Medicare laws, and requested a refund of the overpaid taxes. The State has refused to issue Wheeling Hospital a refund.

¹ (A.R. 694) (“Well, in the last few years Medicare has decided to greatly reduce what they pay under the practice expense component, that piece for the drug that’s being given to the cancer patient. And so doctors, and I hear this at every hospital that I work at virtually, and this is including Wheeling, that doctors know that Medicare and Medicaid both pay way low rates for that practice component, so Medicare and Medicaid patients are almost universally seen at hospitals for their chemotherapy. That’s the practice expense component. And so the hospital pays for the costs of providing that practice expense component and gets reimbursed probably below that cost.”).

Since 2007, the West Virginia Tax Commissioner (whose rationale was adopted in full by the Circuit Court) has contended that this case is controlled by “who” provides a health care service or “where” that service was provided. The issue, however, is not “who” or “where,” but “what *type*” of health care service was provided – here, “physicians’ services.” At each stage of the refund process, the State flagrantly disregarded governing state and federal tax laws that require the Overhead component provided by the Hospital be taxed at the “physicians’ services” rate which is lower than that for inpatient and outpatient services. The denial of a refund in this case can only be justified by ignoring state and federal tax laws, but the Tax Department’s decision to ignore the clear language and intent of the Legislature is no justification at all.

In affirming the rulings of both the West Virginia Tax Department and the Office of Tax Appeals, the Circuit Court of Ohio County, West Virginia (“Circuit Court”) committed two errors of law. First, the Circuit Court ignored the federal definition of “physicians’ services,” even though it is expressly incorporated by reference into the West Virginia Broad Based Tax, W. Va. Code § 11-27-1, *et seq.* (“Broad Based Tax”). By incorporating the federal definition, the Legislature expressly revealed its intent that the federal definition control.

Second, the Circuit Court has empowered the Tax Commissioner to impose a different rate of tax on the exact same type of health care services *even though* federal, and therefore West Virginia, tax laws require that “physicians’ services” be taxed uniformly. When it enacted the Broad Based Tax in 1993, the Legislature intended that the Act would conform to federal statutes and regulations governing health care provider taxes. The ultimate goal, of course, was to ensure that West Virginia’s Medicaid program would enjoy the benefits of the federal Medicaid matching program. The Circuit Court, however, has eviscerated the federal uniformity

requirement – namely, that a health care service (here, “physicians’ services”) be taxed at the same rate *regardless* of the entity providing the service.

The Circuit Court has not only denied Wheeling Hospital a refund to which it is lawfully entitled, but it has also called the continued validity of the entire West Virginia Medicaid program into question. The errors of law committed by the Circuit Court below are clear, and if left uncorrected will place the State in a position where it stands to lose millions of dollars in federal Medicaid assistance, funding that some residents of this State depend on for health care that they cannot otherwise afford. The Circuit Court’s Order should be vacated, and Wheeling Hospital awarded the refund and statutory interest to which it is lawfully entitled.

A. The Relationship Between the West Virginia Medicaid Program and Federal Laws and Regulations.

Wheeling Hospital, Inc. (“Wheeling Hospital” or “the Hospital”) is a licensed, nonprofit West Virginia hospital subject to the Broad Based Tax. (A.R. 89). The Broad Based Tax is imposed annually on gross receipts of health care providers,² and all proceeds from the Tax are dedicated to a fund that is used by the State to make disproportionate share payments to hospitals located in West Virginia. (A.R. 11-12, 1311). Amounts paid by the State qualify for federal matching funds under the Social Security Act’s Medicaid program. *See* 42 U.S.C. § 1396, *et*

² “Gross receipts,” as that term is used in the Broad Based Tax, is defined the same for each taxable service falling within the scope of the act:

[T]he amount received or receivable, whether in cash or in kind, from patients, third-party payors and others for physicians’ services furnished by the provider, including retroactive adjustments under reimbursement agreements with third-party payors, without any deduction for any expenses of any kind: *Provided*, That accrual basis providers shall be allowed to reduce gross receipts by their contractual allowances, to the extent such allowances are included therein, and by bad debts, to the extent the amount of such bad debts was previously included in the gross receipts upon which the tax imposed by this section was paid.

W. Va. Code § 11-27-16(c)(1) (emphasis in original).

*seq.*³ To fully understand the issues before the Court, a brief discussion of the West Virginia Medicaid program, the West Virginia Broad Based Tax, and corresponding federal laws and regulations is warranted.

In order to generate additional federal matching funds, a number of states enacted Medicaid-dedicated health care taxes. (A.R. 12). In response, Congress enacted Public Law 102-234 to define taxes that a state *can* impose without losing federal matching funds. *See* 42 U.S.C. § 1396b(w). The Centers for Medicare and Medicaid Services (“CMS”) subsequently promulgated regulations (“Broad Based Tax Regulations”) to further Section 1396b(w), including a “loss-of-federal-matching-funds” penalty for non-compliant states. 42 C.F.R. § 433, *et seq.* Under the CMS’ regulations, if a state imposes a tax that is not fully compliant with the federal Broad Based Tax Regulations, that state will lose federal matching funds. 42 C.F.R. § 433.57. (A.R. 12, 1134).

The Regulations list the classes of health care items and services that may be properly taxed by states, as well as specific types of service providers that may be taxed. 42 C.F.R. § 433.56. Among the items and services listed are “inpatient hospital services,” “outpatient hospital services,” and “physicians’ services.” 42 C.F.R. §§ 433.56(a)(1), (a)(2), (a)(5). Hospitals are not listed as a type of health care item or service that may be subject to a health care related tax; nor, for that matter, are hospitals identified as a type of service provider that can be taxed because of its status. *See* 42 U.S.C. § 1396b(w)(7)(A); 42 C.F.R. § 433.56. (A.R. 1140-47). The significance of this cannot be understated – both Congress and the CMS recognized that a hospital, as an entity, can furnish a variety of different health care services, including “physicians’ services.”

³ Title 19 of the Social Security Act articulates the requirements for federal funding of a participating state’s Medicaid insurance program. *See* 42 U.S.C. §§ 1396-1396w-1

When it enacted the Broad Based Tax, the West Virginia Legislature followed the federal tax scheme and imposed a separate tax on gross receipts generated from “inpatient services,” “outpatient services,” and “physicians’ services.” See W. Va. Code §§ 11-27-9 (inpatient hospital services), 11-27-15 (outpatient hospital services), and 11-27-16 (physicians’ services).

As a matter of federal law, any taxes imposed on these three services must be broad based and uniformly applied in order to avoid a reduction of a state’s Medicaid match from federal participation dollars. 42 U.S.C. § 1396b(w)(3)(B). As a result, if a state chooses to tax a service (i.e., “physicians’ services”), all providers of the service must be subject to the tax, 42 U.S.C. § 1396b(w)(3), meaning that services *must* be taxed at the same rate *regardless* of the person or entity providing the service. 42 U.S.C. § 1396b(w)(3)(C)(III). (A.R. 13-14, 1140-47).

B. In Enacting the Broad Based Tax, the West Virginia Legislature Expressly Adopted the Federal Definition For “Physicians’ Services.”

When the West Virginia Legislature enacted the Broad Based Tax in 1993, its articulated intent was to comply with Public Law 102-234 – the very law enacted by Congress to unify state-level health care taxes imposed on various services, including “physicians’ services.” The Legislature recognized that “[e]nactment by the United States Congress in 1991 of Public Law 102-234, amending Section 1903 of the Social Security Act, places limitations and restrictions on the flexibility states have to raise state share for its medical assistance program. The tax enacted in this article is intended to conform to the requirements of Public Law 102-234,” including the requirement that types of services, rather than types of providers, be taxed uniformly. W. Va. Code §§ 11-27-1(f), (g) (emphasis added).

As a result, hospitals subject to the Broad Based Tax are not taxable as entities *per se*, but are instead taxed for specific taxable services they provide. (A.R. 13-15, 1140-47). “Physicians’ services” are a separately listed class of services in both the federal Broad Based Tax

Regulations, 42 C.F.R. § 433.56(a)(5), and the West Virginia Broad Based Tax. W. Va. Code § 11-27-16. Importantly, Section 11-27-16(c)(3) defines “physicians’ services” as “services that are physicians’ services for purposes of Section 1903(w) of the Social Security Act.” “Physicians’ services” is defined as those “furnished by a physician . . . whether in the office, the patient’s home, **a hospital**, or a nursing facility, or elsewhere” 42 U.S.C § 1396d (emphasis added). This definition is repeated in the Broad Based Tax Regulations, which state, in pertinent part, that “[p]hysicians’ services, whether furnished in . . . **a hospital** . . . or elsewhere[] means services furnished by a physician . . . [w]ithin the scope of practice of medicine or osteopathy as defined by State law; and [b]y or under the personal supervision of an individual licensed under State law to practice medicine or osteopathy. *See* 42 C.F.R. § 440.50(a).⁴ (A.R. 15, 974-75).

C. “Current Procedural Terminology” Codes Promulgated by the CMS and Adopted by the West Virginia Department of Health and Human Resources Identify “Physicians’ Services.”

In order to maintain a coding system for purposes of processing Medicare and Medicaid claims for reimbursement, the Secretary of Health and Human Services was charged with establishing standards and requirements for the electronic transmission of health information. *See* 42 U.S.C. §§ 1320d-2(a)(1), 1320d-2(a)(2)(A), 1320d-2(c)(1). The Secretary, through the CMS, adopted the Current Procedural Terminology (“CPT”) coding system. The CPT coding system is a numbering coding system maintained by the American Medical Association (“AMA”), and consists of descriptive terms and identifying codes that are used to identify medical services and procedures furnished by physicians and other health care professionals.

⁴ The Legislature also adopted the definitions for “inpatient hospital services” and “outpatient hospital services” articulated by the Broad Based Tax Regulations. *See* W. Va. Code §§ 11-27-9 (inpatient hospital services), 11-27-15 (outpatient hospital services); *see also* 42 C.F.R. §§ 440.10 (defining inpatient hospital services), 440.20 (defining outpatient hospital services).

(A.R. 92). Importantly, CPT codes *only* exist for professional health care services and related items. (A.R. 92).

The CMS prepares and publishes a “Physicians’ Fee Schedule” annually in the *Federal Register*. (A.R. 6-7, 94). The Fee Schedule is used to determine the amount of Medicare reimbursement that will be paid for each service provided by a physician, listed by CPT code, and necessarily both narrows the scope of and provides a bright line for defining “physicians’ services.” “Physicians’ services” consist of three components:

- (i) the work of a physician;
- (ii) the physician’s malpractice insurance costs; and
- (iii) the practice expense component (overhead), which is made up of the facility, staff, equipment, drugs, supplies, and other overhead required in order for a physician to perform his or her professional services [“Overhead” or “Overhead component”].

42 C.F.R. § 414.22; (A.R. 7, 966, 978). When “physicians’ services are provided in a hospital rather than in a physician’s office, the practice expense component (e.g., Overhead) is reduced because the hospital bears some or all of the costs of practice expenses required for the performance of the physician.” (A.R. 7, 95, 967-68). For that matter, “[w]hen the physician service is provided in a facility owned by a hospital, the hospital bills and receives payment for a portion of the practice expense component of the physician fee.” (A.R. 7, 95, 967-68). However, “[w]hen the physician service is provided in a facility owned by a hospital and the physician is not employed by the hospital, the physician bills and receives payment for the work and malpractice components of the physician fee.” In that event, the hospital, not the physician, is paid for the Overhead component. *See* 42 C.F.R. § 414.22. (A.R. 7, 95, 967-68).

Just as the CMS adopted the CPT, so too did the West Virginia Department of Health and Human Resources. W. Va. Code § 33-15B-3(a)(3). Both agencies, as well as the health care and insurance industries, require hospitals to use the physicians' services CPT codes included in the "Physicians' Fee Schedule" when charging for and identifying the Overhead component of "physicians' services." 45 C.F.R. § 162.1002(a)(5), W. Va. Code § 33-15B-3(a)(2). (A.R. 976-77).

D. As Early as 2000, the West Virginia Tax Department Knew and Understood the Definition of "Physicians' Services."

In order to fully grasp the shortcomings in the position advanced by the Tax Department (later adopted in full by the Circuit Court), an understanding of the Tax Department's historic treatment of "physicians' services" under the Broad Based Tax is vital. On November 4, 1999, Debra Anderson, then a partner at KPMG, requested that the Tax Department issue an opinion regarding the applicability of the Broad Based Tax to various services provided by a hospital, including "physicians' services." (A.R. 89). The Tax Department issued an opinion letter on January 5, 2000. (A.R. 89, 126-128).

Again, on October 25, 2006, Ms. Anderson requested confirmation of how to apply the Broad Based Tax to services provided by a hospital, including "physicians' services." (A.R. 89, 129-132). The Tax Department responded on November 6, 2006, opining that:⁵

For purposes of the Health Care Provider Tax [the Broad Based Tax], physicians' services are taxable at the "physicians' services" rate to the extent they are not billed as a part of another taxable service. For example, if an individual is admitted to a hospital on an inpatient basis and testing is performed by a physician and billed as part of the inpatient charge, that service (including any drugs or medical supplies provided in conjunction with the service) would be subject to the West Virginia Health Care Provider Tax under the inpatient hospital services classification. If not billed as

⁵ The January 5, 2000 and October 25, 2006 letters from the Tax Department contained nearly identical language regarding the definition of "physicians' services." (A.R. 126-28, 133-37).

part of the inpatient charge, the service would be subject to the Health Care Provider Tax under the physicians' services classification.

However, please note that if the insurance/medical profession views a service as a physician's service, and can be readily identified as such, the West Virginia Tax Department allows that portion of a bill to be separated from the rest of the bill and paid at the physician's service rate, despite such service being listed as a portion of a larger overall bill for medical services.

Services performed by an independent physician are taxable under the physicians' services classification to the extent that they are billed separately as physicians' services.

Health care services provided by a physician through outpatient clinics which provide health care services under the direct supervision and responsibility of a physician, are health care services taxable under the physicians' services classification to the extent that they are billed separately as physicians' services. This disposition would apply without regard to whether the clinic is located in a hospital or separate from a hospital. Examples of such clinics might include: oncology clinics, occupational lung disease clinics, sports medicine centers, sleep disorders center, cardiology clinics, kidney transplant centers, drug abuse clinics, obstetrical and reproductive medicine clinics, and family physician clinics. Again, this would include any drugs or other medical supplies provided in conjunction with the medical service.

The West Virginia Tax Department also permits the separation and payment of physician's services from the larger bill for such outpatient clinic services, when the service is recognized by the insurance/medical profession as such a service, and when the service can be readily identified as a physician's service.

(A.R. 133-37). While the Hospital recognizes that the letters written by the Tax Department in 2000 and 2006 do not legally bind the State or otherwise modify a legislative enactment, the opinion offered by the Tax Department demonstrates an understanding of both (i) the definition of "physicians' services," and (ii) the coding system employed in the insurance and medical industries (including CMS) to identify "physicians' services."

E. The Hospital's Request For a Refund and Amended Tax Returns.

From 2003 through 2006, Wheeling Hospital used the CPT coding system to charge, bill, and seek reimbursement for its health care services. (A.R. 9-10, 969-70, 1291). During that time period, however, the Hospital incorrectly reported gross receipts from the Overhead component of "physicians' services" as inpatient or outpatient hospital services. As a result, gross receipts that should have been taxed at the lower rate of tax imposed on "physicians' services" were instead taxed at the higher rate of tax imposed on inpatient and outpatient services.⁶ In late 2006 and 2007, Wheeling Hospital discovered its error and filed a series of amended Broad Based Tax returns with the Tax Department seeking a refund for the Broad Based Taxes that it overpaid. In each amended return, the Hospital correctly identified certain services as "physicians' services" under W. Va. Code § 11-27-16 to conform with federal law. (A.R. 2-4, 963-65).

The overpayments of Broad Based Taxes claimed by the Hospital were a result of the difference between the tax rate imposed on inpatient and outpatient hospital services, and that imposed on "physicians' services." (A.R. 2-4, 963-65). From 2003 through 2006, inpatient and outpatient hospital services were taxed at a rate of 2.5%; the tax rate for "physicians' services," however, declined from 1.6% in the first nine months of the Hospital's 2003 fiscal year to 0.8% in the last three months of its 2006 fiscal year. (A.R. 4, 1288). The Hospital's correction in its amended returns stems from the fact that when a physician directly performs a service in a hospital, the revenue is related to "Overhead" and is defined by the health care and insurance industries as "physicians' services." (A.R. 4, 7, 966).

⁶ Because of the disparity between what was taxed at a higher rate (and consequently overpaid) and what should have, as a matter of federal and thus West Virginia law, been taxed at the lower "physicians' rate," Wheeling Hospital's ability to recover the cost of providing certain Overhead is further endangered. Indeed, the Overhead incident to chemotherapy, for example, is not reimbursed at a level by Medicare Medicaid that covers the cost for such Overhead in the first place.

Specifically, on October 27, 2006, the Hospital filed an amended return for fiscal year 2003, requesting a refund of \$484,188; on December 14, 2006, the Hospital filed amended returns for 2004 and 2005, requesting refunds of \$687,101 and \$800,986, respectively. (A.R. 89, 1313). On January 16, 2007, the Tax Department denied the refunds for the years 2004 and 2005 pending receipt of additional information. On March 15, 2007, the Hospital filed an amended return for fiscal year 2006, requesting a refund of \$779,945. (A.R. 89).

F. The Tax Department's Field Audit and the Denial of the Hospital's Broad Based Tax Refund.

Later in 2007, auditors from the Tax Department performed a field audit of the Hospital's amended Broad Based Tax returns for fiscal years 2003 through 2006. (A.R. 89-90, 963-64, 1313). During the field audit, the Hospital provided the Tax Department with calculations for reductions to the refund claims to which it would agree for fiscal years 2003, 2004, and 2005. (A.R. 89-90, 963-64, 1313).

On December 24, 2007, the Tax Department granted in part and denied in part the Hospital's request for a Broad Based Tax refund. The Hospital received refunds for 2003, 2004, 2005, and 2006 in amounts of \$66,882, \$152,088, \$150,811, and \$70,759, respectively.⁷ (A.R. 90). On March 4, 2008, the Hospital filed a timely appeal with the West Virginia Office of Tax Appeals ("Office of Tax Appeals") for the remainder of the refunds claimed by the Hospital in its amended returns for 2003 through 2006; that is, \$360,281, \$499,173, \$617,297, and \$709,186, respectively. (A.R. 90).

The refund amounts denied by the Tax Department all relate to the Hospital's amendment of its original returns to correctly identify inpatient and outpatient hospital services as

⁷ As a result of the amended returns filed by Wheeling Hospital, the Tax Commissioner refunded some of the taxes overpaid by Wheeling Hospital. The overpaid taxes at issue herein pertain to the Overhead component of "physicians' services."

“physicians’ services” as defined by federal law. (A.R. 90, 963-64). In denying the requested refund, the Tax Department contended that because the service was performed *in* the Hospital, revenue based on Overhead should be classified as inpatient and outpatient hospital services and taxed at a higher rate than “physicians’ services.” (A.R. 964).

G. The Proceeding Before the West Virginia Office of Tax Appeals.

On March 4, 2008, Wheeling Hospital filed a petition for refund with the West Virginia Office of Tax Appeals. The Hospital requested an order compelling the Tax Department to refund the remainder of the Broad Based Tax refunds claimed by the Hospital for 2003 through 2006.⁸ On June 11, 2008, the Honorable Robert W. Kiefer, Jr., Administrative Law Judge, held a hearing on the Hospital’s petitions for refund in the Office of Tax Appeals. (A.R. 675-727).⁹

On April 22, 2010, the Office of Tax Appeals issued its administrative decision sustaining the denial of refunds for each of the years requested. (A.R. 933-57). Judge Kiefer used the “common, ordinary and accepted meaning” of the term “physicians’ services” rather than the federal definition that the Legislature incorporated by reference into the Broad Based Tax Act. (A.R. 943-44, 956-57, 980-86). Rather than give effect to the Legislature’s clear intent, the Office of Tax Appeals instead employed canons of statutory construction when no

⁸ In connection with the Hospital’s petitions for refund, the parties entered into 299 Stipulations of Fact on May 22, 2008 regarding the relevant and material facts. The stipulated facts, as well as more than 50 exhibits, were jointly submitted to the Office of Tax Appeals. (A.R. 87-123) (joint stipulations), (A.R. 124-664) (exhibits). Certain facts were left in dispute. (A.R. 780-81).

⁹ After the issues before the Office of Tax Appeals were joined but before a decision issued, counsel for the Tax Commissioner submitted correspondence dated May 15, 2009 to Judge Kiefer. Counsel for the Respondent requested that the Office of Tax Appeals take judicial notice that then-Governor Manchin had approved Senate Bill 724 on May 12, 2009, which effectively amended the definition of “physicians’ services” for purposes of the Broad Based Tax. (A.R. 891-93). As a result of the statutory amendment, Judge Kiefer requested supplemental briefing on the retroactive effect of Senate Bill 724. (A.R. 898-932). When the Office of Tax Appeals issued its administration decision on April 22, 2010, it held that Senate Bill 724 did not retroactively apply to the definition of “physicians’ services.” Similarly, the Circuit Court below did not apply Senate Bill 724 in rendering its decision. (A.R. 1323). Accordingly, the retroactive application of Senate Bill 724 is not before the Court in this appeal. (A.R. 1323); *see* “Notice of Appeal” (Sept. 16, 2011).

statutory construction was necessary, much less warranted, because of the clear language employed the Legislature.

H. Appeal to the Circuit Court of Ohio County.

On June 25, 2010, Wheeling Hospital timely appealed the administrative decision of the Office of Tax Appeals to the Circuit Court of Ohio County, West Virginia. (A.R. 2-61). In its briefing, the Tax Department conceded that “[t]here is no dispute that physicians’ services can be provided in a hospital. . . . [O]ur concern is not with *where* the services were provided, but instead, our concern lies with the *nature* of the services actually provided.” (A.R. 1036) (emphasis added).

This proposition *supports* the rationale advanced by the Hospital, because it is the nature of a service, *not* the provider of that service, which controls the definition of “physicians’ services” and the resulting tax implications. Amazingly, the Tax Department *then* contended that “anything done or furnished by a hospital . . . cannot be a physician service.” (A.R. 1038). The Respondent cites no authority to support the contention that “who” provides a health care service or “where” that service is provided is in any way controlling of “what” that service is.

By Order entered August 17, 2011, Judge Gaughan adopted the proposed order submitted by the Department and affirmed the Office of Tax Appeals, albeit on alternative grounds.¹⁰ (A.R. 1311). The Circuit Court correctly noted that the Hospital, as the taxpayer, bears the burden of proof to establish that its identification of certain services as “physicians’ services” is proper. (A.R. 130). Yet, the Circuit Court failed to recognize (much less apply) the established tenet that “[l]aws imposing a . . . tax are strictly construed and . . . construed in favor of the

¹⁰ The proposed order submitted by the Tax Department at the Circuit Court level did an about-face from the administrative decision in an attempt to cure the blatant errors of law contained therein. The proposed order submitted by the Tax Department, however, is equally flawed. (A.R. 1285-1308)

taxpayer and against the state.” *Coordinating Council for Indep. Living, Inc. v. Palmer*, 209 W. Va. 274, 281, 546 S.E.2d 454, 461 (2001).

The errors of law committed by the Circuit Court are readily apparent. The Circuit Court found that since the Hospital originally reported the disputed services on its Broad Based Health Care Tax Returns as inpatient and outpatient services, “the statutes in question are plain and unambiguous.” (A.R. 1323). The logical flaw in the Circuit Court’s finding would, in effect, prohibit the amendment of a tax return, because the “conclusiveness” of the original filing to the exclusion of any other classification would pose an insurmountable bar to *any* correction in an amended return.¹¹ The Circuit Court further found that:

anything done or furnished by a hospital, and not its employed physicians, is not the practice of medicine and cannot be a physician service. . . . [T]he Hospital staff that assists the physician when he performs a procedure are employees of the Hospital, who are under the physician’s direction but not under his supervision. **Therefore, the Hospital’s provision of staff, facility, supplies and equipment is not a physician service.**

(A.R. 1324-25) (emphasis added). Although the Circuit Court paid lip-service to the federal definition of “physicians’ services,” (A.R. 1324), it reached the wrong result because it ignored the federal definition altogether. Rather than applying the definition for “physicians’ services” vis-à-vis the CPT codes promulgated by the CMS for “physicians’ services,” the Circuit Court relied on the definition for the practice of medicine in the West Virginia Code.¹² (A.R. 1324-25).

¹¹ The Circuit Court’s suggestion that the original return filed by the Hospital bars a taxpayer from filing, or even prevailing on an amended return, is ludicrous. The filing of an amended tax return is expressly permitted: “[c]orporations may amend their Business Franchise Tax and/or Corporation Net Income Tax Return” See 2010 West Virginia Corporation Net Income/Business Franchise Tax Instructions & Forms, West Virginia State Tax Department, <http://www.wva.state.wv.us/wvtax/corporateNetBusinessFranchiseTaxForms.aspx> (lasted visited Dec. 14, 2011).

¹² The Circuit Court further attempted to justify its error by citing *Corpus Juris Secundum* and a law review article from 1997, secondary sources that are persuasive at best but no substitute for controlling federal and state laws and regulations. (A.R. 1324).

The Circuit Court's error is further compounded by its conclusion that CPT codes "describe[] inpatient and outpatient services associated with a physician service or procedure" when used by a hospital, but "do[] not transform those services into 'physicians' services.'" (A.R. 1326). Yet, the "Physician's Fee Schedule" promulgated by the CMS has three components for each professional service rendered by a physician. When a hospital, rather than a physician, provides the third component (Overhead) necessary for a physician to perform his or her professional services, that hospital, rather than the physician, receives payment for Overhead expenses. Because a hospital is required, as a matter of federal and state law, to use the "physician's services" CPT codes from the federal "Physicians' Fee Schedule" when charging for Overhead, it retains that character (i.e., a "physician's service") for purposes of the Broad Based Tax. The Circuit Court committed a clear error of law when it found to the contrary. Its Order should be reversed, and Wheeling Hospital awarded the refund and statutory interest to which it is lawfully entitled.

III. SUMMARY OF THE ARGUMENT

When the West Virginia Legislature enacted the Broad Based Tax in 1993, the purpose and intent of the Legislature was clear. So, too, was the interrelationship between state law and the federal limitations and requirements imposed on State Medicaid programs that entitle a state to receive federal participation dollars under a "matching program:"

Medicaid provides access to basic medical care for our citizens who are not physically, mentally or economically able to provide for their own care. Inadequate compensation of health care providers rendering medicaid services is a barrier to indigent persons obtaining access to health care services. Without adequate compensation for the provision of medicaid services, this state cannot attract or retain a sufficient number of health care providers necessary to serve our indigent population. While participation by a state in the medicaid program created by Title XIX of the Social Security Act is voluntary, the reality is that states, and particularly

this state, have no choice but to participate. The alternative is to deprive indigent citizens and particularly the children of indigent families of basic medical services. The federal government sets the criteria for eligibility to obtain medicaid services. The federal government also requires that certain services be provided as part of a state's medicaid program. [T]he [Federal] Social Security Act[] places limitations and restrictions on the flexibility states have to raise state share for its medical assistance program. The tax enacted in this article is intended to conform with the requirements of Public Law 102-234.

W. Va. Code § 11-27-1(a)-(g) (1993).

The Broad Based Tax was not intended to authorize the Tax Commissioner to arbitrarily shake down health care providers. Nor was it intended to empower the Tax Commissioner to ignore federal law that the Legislature not only *acknowledged* in its enabling legislation, but *expressly incorporated by reference* into the West Virginia Code. Nowhere in the West Virginia Constitution or Code is a circuit court, much less the executive branch, empowered to unilaterally rewrite or modify an act of the Legislature.¹³ Yet, even in the face of bedrock principles of the separation of powers that vest all lawmaking authority in the Legislature,¹⁴ the

¹³ In effect, the Tax Commissioner is essentially gambling federal participation money upon an interpretation of the West Virginia Code that cannot be justified in the face of the plain language of the statute. "Gamble," however, may not even be a strong enough word to describe the cavalier manner by which the Tax Commissioner and Circuit Court are putting much needed federal monies on the line. If the Tax Commissioner's application of the Broad Based Tax to Wheeling Hospital goes unnoticed by the federal government, Wheeling Hospital will be forced to pay a higher rate of tax than other health care providers providing "physicians' services" in direct violation of state and federal tax laws. Conversely, if the federal government realizes the Tax Commissioner's startling disregard of the federal uniformity requirement that is an express condition precedent to the receipt of federal participation dollars, West Virginia stands to lose millions of dollars in federal Medicaid matching funds. In light of the nearly \$3 million Medicaid gap that the Attorney General of West Virginia has created as the result of his improper appropriation of settlement funds due and owing to the federal government, the West Virginia Medicaid program may be looking at a gap that neither the Tax Commissioner, the Circuit Court, nor the State of West Virginia as a whole can fill, much less endure.

¹⁴ Time and again, this Court has recognized that "[t]he imposition of taxes is a legislative function. Courts are not permitted to concern themselves with the need for or wisdom of taxes properly imposed, but are obligated to recognize that proper taxes are essential to the maintenance of government." *Neal v. City of Huntington*, 151 W. Va. 1051, 1056, 158 S.E.2d 223, 226 (1967).

combined efforts of the Tax Commissioner and Circuit Court below have succeeded in doing just that.

For purposes of the West Virginia Broad Based Tax, “physicians’ services” are defined by CPT codes, a product of federal law and required by the health care and insurance industries to identify, bill, and pay for physicians’ services. The three recognized components of “physicians’ services,” including Overhead, retain their character as “physicians’ services” irrespective of who provides the service – whether an actual physician or a hospital. Indeed, the federal classifications upon which states may impose health care related taxes authorize taxes to be imposed with respect to a *service*, *not* the person or entity providing that service.

For that matter, hospitals in West Virginia can provide “physicians’ services,” particularly the Overhead component arising from work performed by a physician. In order to circumvent this basic tenet of federal health care law, the Circuit Court ignored the governing federal definition of “physicians’ services” and incorrectly applied the definition for the practice of medicine appearing in an unrelated provision of the West Virginia Code. But, whether or not an entity can engage in the practice of medicine has no bearing on whether or not an entity can provide the Overhead component for purposes of the Broad Based Tax. The issue is not whether a health care provider can practice medicine, but whether a hospital can provide Overhead that is charged using “physicians’ services” CPT codes incident to services provided by a physician. It is the CPT codes, not some arbitrary definition appearing elsewhere in the Code, that defines a “physicians’ services” under federal law, and such services retain that character for purposes of West Virginia’s health care provider taxes.

Wheeling Hospital, much like any other hospital in this State, can and did provide the Overhead component of “physicians’ services” (which were properly charged using federal CPT

codes). Gross receipts that were paid for Overhead should have been reported and taxed under W. Va. Code § 11-27-16 as “physicians’ services,” not as inpatient or outpatient hospital services. The Circuit Court committed an error of law in concluding otherwise.

The implications of the Circuit Court’s Order are by no means limited to this litigation. By imposing a different rate of tax on Wheeling Hospital for “physicians’ services” than that imposed on other health care providers, the Circuit Court has eviscerated the federal uniformity requirement for states to draw federal participation dollars for state Medicaid programs. *See* 42 U.S.C. §§ 1396b(w)(3)(B), (C).

Since the increased rate of tax on Wheeling Hospital is impermissible under state and federal law, federal law mandates that the amount of the impermissible taxes not be matched with federal participation dollars. What is more, the State stands to lose the amount of federal participation dollars that *would have been* drawn had the amount of taxes collected been permissible. *See* 42 U.S.C. § 1396b(w)(1)(A).

The Tax Department has not only robbed Wheeling Hospital of a tax refund that it is entitled to as a matter of federal and state law, but it did so by putting the State’s Medicaid program, and the interests of West Virginians who depend on Medicaid for health care, in the line of fire. In the wake of what will likely be a \$3 million gap in the state Medicaid program arising from the actions of the Attorney General of West Virginia, the Tax Department did not even blink when it misconstrued state and federal law and put millions of dollars in federal Medicaid participation dollars on the line. The Circuit Court below did nothing more than “rubber stamp” the Tax Department’s actions even in the face of the substantial risk posed to residents of West Virginia who not only depend on, but *need* the state Medicaid program (funded

in large part by federal participation dollars) for health care for themselves and their families.¹⁵ To get there, though, the Circuit Court cast aside clear statutory language, misapplied state and federal laws and regulations, and committed errors of law that demand correction.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure, Petitioner respectfully requests oral argument under Revised Rules 20(a)(1), 20(a)(2), and 20(a)(3). None of the criteria articulated in Revised Rule 18(a) that would obviate the need for oral argument is present. The matter before the Court implicates issues of first impression – specifically, how “physicians’ services,” as that term is used in the Broad Based Tax, is defined, and whether a hospital can provide “physicians’ services” for purposes of taxes imposed under the Tax. Issues of fundamental public importance are implicated: the validity of the Broad Based Taxes imposed on the Hospital control whether the State can receive federal participation dollars for its Medicaid program. Oral argument under Revised Rule 20, as well as a precedential disposition of the issues presently before the Court, is necessary.

V. ARGUMENT

A. Standard of Review.

“Interpreting a statute . . . presents a purely legal question subject to *de novo* review.” Syl. pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011). Of course, “[t]he primary object in construing a statute is to ascertain and give effect to the intent of

¹⁵ To put things in perspective, according to the two-year average from the United States Census Bureau, **16.4%** of West Virginians are below the poverty line, while **13.6%** of West Virginians do not have health insurance. See *Percentage of People in Poverty by State Using Two and Three Year Averages: 2007-2008 and 2009-2010*, United States Census Bureau, <http://www.census.gov/hhes/www/poverty/data/incpovhlth/2010/state.xls> (Sept. 13, 2011); *Number and Percentage of People Without Health Insurance Coverage by State Using Two and Three Year Averages: 2007-2008 and 2009-2010*, United States Census Bureau, <http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2010/tables.html> (Sept. 13, 2011).

the Legislature.” Syl. pt. 1, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). If “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent,” as do the Broad Based Tax and federal legislation incorporated therein by reference, such statute “will **not** be interpreted by the courts but will be given full force and effect.” Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) (emphasis added).

If “a bona fide dispute arises as to the amount and extent [of] tax liability or to the manner of collecting tax liability, such disputes properly reach the courts. The function of the courts in relation to taxes is not to levy or assess the taxes but to review legislation and executive-administrative action and to determine their correctness.” *Columbia Gas Transmission Corp. v. E. I. du Pont de Nemours and Co.*, 159 W. Va. 1, 13, 217 S.E.2d 919, 926 (1975).

Upon a challenge to the actions of the Tax Commissioner, “[i]f the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent. **No deference is due the agency’s interpretation at this stage.**” Syl. pt. 4 (in part), *W. Va. Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996) (emphasis added). As this Court has recognized time and again, “[l]aws imposing a . . . tax are strictly construed[.] . . . [W]hen there is doubt as to the meaning of such laws[,] they are construed in favor of the taxpayer and against the state.” *Coordinating Council*, 209 W. Va. at 281, 546 S.E.2d at 461.

B. The Circuit Court Committed an Error of Law When It Ignored the Federal Definition For “Physicians’ Services” Incorporated by Reference Into the Broad Based Tax.

The Circuit Court goes to great lengths to justify the denial of the refund requested by Wheeling Hospital, but cannot escape the glaring error of law it committed with respect to the definition of “physicians’ services.” (A.R.1324-27). Under governing federal law incorporated into the Broad Based Tax, the State may permissibly impose a tax on a delineated health care service, rather than the person or entity performing the service. Included in those services are “physicians’ services,” a term that the West Virginia Legislature intended to (and did) define by reference to the Social Security Act.

Indeed, the tax imposed by W. Va. Code § 11-27-16 is not imposed on “physicians.” It is imposed on every “person” rendering physicians’ services:

[f]or the privilege of **engaging or continuing within this state in the business of providing physicians’ services**, there is hereby levied and shall be collected from every **person rendering such service** an annual broad-based health care related tax.

W. Va. Code § 11-27-16 (1993). “Person,” as used in Section 11-27-16, is defined as “any individual, partnership, association, company, **corporation** or other entity engaging in a privilege taxed under this article.” W. Va. Code § 11-27-3(b)(7) (1993) (emphasis added). “Physicians’ services,” of course, was defined as “those services that are physicians’ services for purposes of Section 1903(w) of the Social Security Act.” W. Va. Code § 11-27-16(c)(3) (1993). Interposing the definition of “person” into Section 11-27-16 as it read in 1993, the statute includes “every [*corporation*] rendering such [*physician’s*] service.”

Perhaps most importantly, when the West Virginia Legislature enacted the Broad Based Tax act, it stated that:

[e]nactment by the United States Congress in 1991 of Public Law 102-234, amending Section 1903 of the Social Security Act, places limitations and restrictions on the flexibility states have to raise state share for its medical assistance program. **The tax enacted in this article is intended to conform to the requirements of Public Law 102-234.**

W. Va. Code §§ 11-27-1(f), (g) (emphasis added).

If, in 1993, when the Broad Based Tax was enacted, federal law did not permit a hospital to perform “physicians’ services” (as found by the Circuit Court below), the Broad Based Tax would have been self-defeating because W. Va. Code § 11-27-16 permitted a corporation (i.e., a hospital) to perform physicians’ services. That said, the Legislature’s intent that the Broad Based Tax “conform to the requirements of Public Law 102-234” would have been meaningless, as would the tax on and definition of “physicians’ services” contained in W. Va. Code § 11-27-16(c)(3), and the definition of “person” contained in Section 11-27-3(b)(7). Yet, “[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there,” *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 299, 624 S.E.2d 729, 736 (2005), because “the Legislature must be presumed to have acted with full knowledge of the provisions of all prior statutes dealing with the same subject matter.” *Vest v. Cobb*, 138 W. Va. 660, 687, 76 S.E.2d 885, 899 (1953).¹⁶

“Neither [a circuit court] nor the Tax Commissioner can insert language by interpretation into a tax statute that widens or narrows the statute’s application; the power of the purse lies solely with the Legislature, and so too does the power to alter the tax statutes.” *Fountain Place Cinema*, 227 W. Va. at ___, 707 S.E.2d at 864. The Tax Commissioner, the Office of Tax Appeals and, ultimately, the Circuit Court have done just that.

¹⁶ The *Vest* court further noted that “a statute should be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph or provision thereof” *Vest*, 138 W. Va. at 684-85, 76 S.E.2d at 898.

Despite this Court's instruction that "a related statute cannot be utilized to create doubt in an otherwise clear statute," *Subcarrier Commc'ns*, 218 W. Va. at 298, 624 S.E.2d at 735, the Circuit Court scoured the Code to equivocate an otherwise unequivocal definition. Rather than applying the plain language of the Broad Based Tax and governing federal law, the Circuit Court interjected the definition for the practice of medicine found in another provision of the West Virginia Code. Because "[i]t is not the prerogative of [courts] to arbitrarily disregard the plain meaning of clearly written statutes," whether through interpretation or construction when neither are called for, the Circuit Court committed an error of law in disregarding the definition of "physicians' services." *McVey v. Pritt*, 218 W. Va. 537, 540, 625 S.E.2d 299, 302 (2005).

Rather, "[s]tatutes or sections which expressly refer to each other[] are in *pari materia*. To the effect that a statute may refer to another statute and incorporate it, or a part thereof, by reference, and that such reference is complete in itself so as not to violate the constitution," they are to be read together. *Vest*, 138 W. Va. at 685, 76 S.E.2d at 899. In other words, "[a] statute may refer to another statute, in which case both statutes are to be read and construed in *pari materia*." Syl. pt. 11, *id.* See *Michigan Prot. and Advocacy Serv., Inc. v. Caruso*, 581 F. Supp. 2d 847, 851 (W.D. Mich. 2008) ("[S]tatutes that incorporate existing federal statutes by reference are valid and constitutional."); see also *State v. Bowman*, 1982 WL 2285, *7 (Ohio App. Jan. 7, 1982) (Parrino, J., concurring in part and dissenting in part) ("A state statute may validly incorporate by reference a federally-enacted law, rule, or regulation in existence at the time the statute became effective.").

For purposes of the Broad Based Tax, "physicians' service" is defined by federal law and constitute "physicians' services" under the Broad Based Tax Regulations, which in turn rely on the CPT code sets to identify "physicians' services" and provide for their reimbursement. When

a hospital provides the Overhead component of “physicians’ services,” the hospital, and not the physician, receives payment for that Overhead and is required to use the “physicians’ services” CPT codes included on the “Physicians’ Fee Schedule.” Because the Overhead component provided by a hospital is charged using “physicians’ services” CPT codes and is defined as a “physicians’ service” under federal law, it retains that character for purposes of the Broad Based Tax. Accordingly, the Hospital’s receipts for the Overhead component should have been reported and taxed under W. Va. Code § 11-27-16 (physicians’ services), and not as inpatient hospital services (W. Va. Code § 11-27-9) or outpatient hospital services (W. Va. Code § 11-27-15).

C. The Circuit Court Committed an Error of Law When It Violated the Federal Uniformity Requirement Imposed on the Broad Based Tax.

The Circuit Court further erred in refusing to recognize that all persons and entities that provide “physicians’ services,” or any component thereof, *must* be treated alike under West Virginia’s Broad Based Tax. In requiring Wheeling Hospital to pay health care provider taxes at a higher rate on services that should, for purposes of Medicaid and Medicare, be taxed as “physicians’ services” at a much lower rate of tax, the Circuit Court violated the federal uniformity requirement. (A.R. 13-14, 1140-47).

Provided that a state health care provider tax satisfies certain federal requirements, a state may impose that tax. The revenue generated by such a state tax can, in turn, be used to draw federal participation dollars for that state’s Medicaid program. In 1993, the West Virginia Legislature imposed a tax on “physicians’ services.” W. Va. Code § 11-27-16. Importantly, when Congress and the CMS intended to allow taxation of a *provider* type (rather than a type of service), those provider types were specifically identified: (i) intermediate care facilities for the mentally retarded (42 C.F.R. § 433.56(a)(4)); and (ii) ambulatory surgical center services (42

C.F.R. § 433.56(a)(9)). Congress and the CMS clearly understood the distinction between a service that could be provided by more than one provider type (i.e., “physicians’ services”) and a class of services provided *only* by one provider type. “Hospitals” were not listed as a class of provider that could provide only one type of service. (A.R. 1140-47).

Under applicable federal law, any taxes imposed on listed services, including “physicians’ services,” must be both broad based and uniformly applied in order to avoid a federal reduction of the State’s Medicaid match. The CMS deems a health care provider tax “broad based” if it “is imposed on at least all health care items or services in the class or providers or such items or services.” 42 C.F.R. § 433.68(c). The “uniformity requirement” mandates that:

the tax is imposed on provider revenue or receipts with respect to a class of items or services (or providers of those health care items or services), the tax is imposed at a uniform rate for all services (or providers of those items or services) in the class on all the gross revenues or receipts, or on net operating revenues relating to the provision of all items or services in the State

42 C.F.R. § 433.68(d).

Inasmuch as the West Virginia Legislature enacted the Broad Based Tax in order to “**conform to the requirements of Public Law 102-234**,” W. Va. Code § 11-27-1(g) (emphasis added), the uniformity requirement articulated in the federal Broad Based Tax Regulations is equally applicable to the Broad Based Tax because the Broad Based Tax Regulations were promulgated in furtherance of Public Law 102-234. (A.R. 1143-44). To the extent the Legislature chooses to tax a type of service (as it has with “physicians’ services”), *all providers* of that service must be taxed at the same rate. For that matter, the tax must be imposed on types of services rather than on types of providers *except* in the case of the two types of service providers specifically identified by Congress. *See* 42 C.F.R. §§ 433.56(a)(4), (a)(9); *see also* W. Va. Code

§ 11-27-4 (imposition of tax on ambulatory surgical center); W. Va. Code § 11-27-10 (imposition of tax on intermediate care facility for individuals with mental disability). Hospitals, therefore, are *not* taxable as a class of provider, but subject to a single rate of taxation on gross receipts for providing each of the taxable services, including “physicians’ services,” as is every other person or entity furnishing “physicians’ services” in West Virginia.

D. The Impermissible Tax Imposed On Wheeling Hospital Could Have Disastrous Consequences For the West Virginia Medicaid Program.

The ripple effect from the Circuit Court’s errors of law is far reaching and implicates West Virginians dependent on the State’s Medicaid program for health care. Because the increased rate of tax imposed on Wheeling Hospital deviates from the federal uniformity requirement, the amount of impermissible health care provider related taxes collected cannot be used to draw federal participation dollars for the State’s Medicaid program. West Virginia stands to lose the amount of federal participation dollars that *would have been* drawn had the amount of the impermissible tax collected been a permissible health care related tax. *See* 42 U.S.C. § 1396b(w)(1)(A). (A.R. 12, 973-74).

The damage that the imposition of an impermissible health care provider tax can have on a state’s Medicaid program is catastrophic, and best demonstrated by a simple example. Suppose a hospital derives \$1 million of gross receipts from providing the Overhead component of a physician’s services rendered in a hospital. If this \$1 million is taxed at a rate of 1.6% (the rate of tax on gross receipts derived from “physicians’ services” in effect on July 1, 2003), the tax generated is \$16,000. However, if this \$1 million is taxed at the higher rate of 2.5% as contended by the Tax Commissioner, the revenue generated would be \$25,000, a difference of \$9,000. Today, the difference is even more extreme – the rate of tax on gross receipts from the provision of physicians’ services is 0%, while the rate of tax on gross receipts from furnishing

inpatient and outpatient hospital services remains 2.5%. By continuing to tax the \$1 million at the rate of 2.5%, the State is improperly collecting \$25,000.

But, the State should be collecting *no tax* on the gross receipt of \$1 million that the Hospital derives from furnishing the Overhead component physicians' services when a physician's service is rendered *in the Hospital*. In this example, the entire \$25,000 is an impermissible health care related tax under 42 U.S.C. § 1396b(w). The federal penalty for the State's collection of an impermissible health care provider tax is that the amount of federal participation dollars is reduced by the amount of impermissible health care provider taxes collected by the State. Thus, if the federal-state match is three-to-one, the State loses **\$100,000** from its Medicaid program (\$25,000 of impermissible tax + \$75,000 of federal participation dollars).

Here, the Tax Commissioner has unlawfully refused to refund Wheeling Hospital **\$2,185,937** for the years 2003, 2004, 2005, and 2006, collectively. (A.R. 90). The Circuit Court's error in denying the Hospital a refund could have disastrous consequences for the State's Medicaid program. Accordingly, the Circuit Court's Order should be vacated, and Wheeling Hospital awarded the requested refund as well as statutory interest.

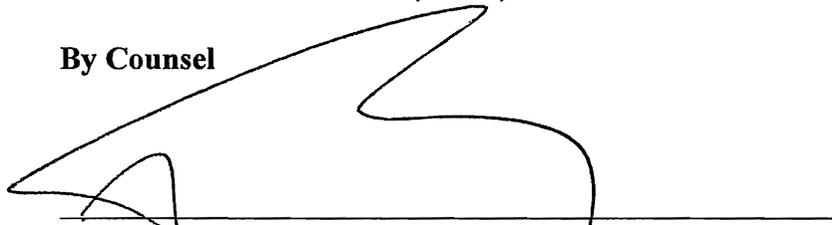
VI. CONCLUSION

The errors of law committed by the Circuit Court are readily apparent and cannot go uncorrected. The Circuit Court has ignored federal law incorporated by reference into the Broad Based Tax that the Legislature saw fit to include, ignored the federal uniformity requirement, and single-handedly placed the State's Medicaid program in jeopardy. For the reasons stated herein, and for such other and further reasons appearing to this Honorable Court, Petitioner Wheeling Hospital respectfully requests that the Circuit Court's Order be vacated; that Wheeling Hospital, Inc. be awarded the refund and statutory interest to which it is lawfully entitled; and that this Honorable Court grant such other and further relief as it deems just and proper.

Submitted December 19, 2011.

WHEELING HOSPITAL, INC., Petitioner

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Counsel for the Petitioner

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WHEELING HOSPITAL, INC.,
Petitioner Below**

Petitioner,

v.

Docket No.11-1299

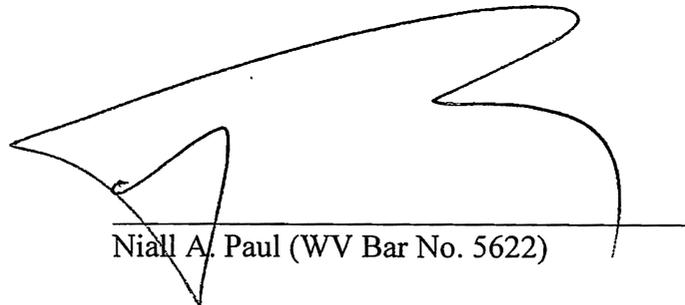
**CRAIG A. GRIFFITH, WEST VIRGINIA
STATE TAX COMMISSIONER,
Respondent Below,**

Respondent.

CERTIFICATE OF SERVICE

I, Niall A. Paul, hereby certify that on this 19th day of December, 2011, the foregoing
“**Petitioner Wheeling Hospital, Inc.’s Brief**” were served upon counsel of record by hand
delivering a true and correct copy addressed, as follows:

Katherine A. Schultz
State Capitol Complex
Building 1, Room W-435
Charleston, WV 25305



Niall A. Paul (WV Bar No. 5622)