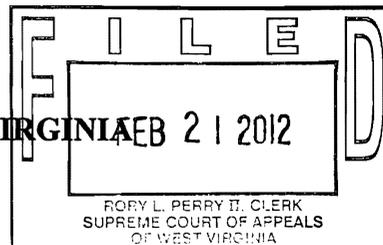


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 REPLY BRIEF

Niall A. Paul (WV Bar No. 5622) (Counsel of Record)
Timothy D. Houston (WV Bar No. 10858)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
Post Office Box 273
Charleston, West Virginia 25321-0273
(304) 340-3800 / (304) 340-3801 (*facsimile*)
npaul@spilmanlaw.com
thouston@spilmanlaw.com

Counsel for Petitioner Wheeling Hospital, Inc.

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I. SUMMARY OF THE ARGUMENT

The issue before the Court is not “who?” It is not even “when?,” “where?,” “why?,” or “how?” The issue, quite simply, is “what?” – “what” were the health care services provided by Petitioner Wheeling Hospital, Inc. (“Wheeling Hospital”). Specifically, were they “physicians’ services” (they were), “inpatient services” (they were not), or “outpatient services” (again, they were not). Under the West Virginia Broad Based Tax, W. Va. Code § 11-27-1, *et seq.* (“Broad Based Tax”), it is the *nature* of the service provided (the “what”) that controls the rate of tax imposed upon a health care provider for a specific health care service.

It does not matter “who” is performing a specific health care service – the “what” is dispositive of how that service is taxed under the Broad Based Tax. Despite confusing and distracting arguments, the Tax Commissioner’s Response Brief (“Resp. Br.”) acknowledges as much, actually citing case law supporting this point of law. *See* Resp. Br. 24 (“[O]ur concern is not *where* the services were provided, but, instead, our concern lies with the *nature* of the services actually provided.”) (citing *Children’s Hosp. v. State of Nebraska, Dept. of Health and Human Services*, 768 N.W.2d 442 (Neb. 2009) (emphasis in original)).

The intent in taxing the “what,” rather than the “who” or even the “where,” speaks to the Congressional quest to attain billing (and thus taxing) *uniformity* in the insurance and health care industries for the three components parts of “physicians’ services”: (i) the work of a physician; (ii) the physician’s malpractice insurance; and (iii) the overhead component, including the facility, staff, equipment, drugs, supplies, and other overhead required in order for a physician to perform his or her professional services (“Overhead”). *See* 42 C.F.R. § 414.22. This federal tax scheme was adopted by the West Virginia Legislature in the Broad Based Tax. Both the federal definition for “physicians’ service,” and the federal uniformity requirement that health care

related taxes be imposed on a “service” rather than the person or entity providing such service lead to one analysis and one legitimate conclusion.

Yet, the Tax Commissioner ignores the very points of law that he concedes are controlling. The Tax Commissioner’s efforts to “faithfully ensure the proper collection of Health Care Provider Taxes,” *see* Resp. Br. 15, have only succeeded in jeopardizing the entire West Virginia Medicaid system, gambling much-needed federal matching dollars, and endangering the availability of critical medical services that some West Virginians cannot otherwise afford but on which they still depend.

It is a long standing principle in this State that the plain language of a statute is to be applied as enacted – not modified, not rewritten, not even construed. Yet, the Tax Commissioner has muddled the otherwise clear language of the Broad Based Tax to create an air of ambiguity where none otherwise exists, requiring the need for judicial interpretation where none is otherwise needed. The Broad Based Tax *expressly* incorporates the federal definition for “physicians’ services,” a definition that is formulated through a number of provisions of federal law, including most completely and descriptively the federally enacted Current Procedural Terminology (“CPT”) Codes.

Without fail, it is for the Legislature to enact the laws in this State, the executive branch to enforce those laws *as written*, and the judiciary to ensure that this balance of powers is held in check. The actions of the Tax Commissioner must withstand judicial scrutiny to ensure that he has not exceeded the constitutional and statutory boundaries of his office, including the levying and collection of taxes on health care services. By refusing to grant Wheeling Hospital the requested refund, the Tax Commissioner has exceeded the constitutional and statutory authority of his office. The Tax Commissioner’s denial of the refund requested by Wheeling Hospital

cannot withstand judicial scrutiny under any reasonable standard, much less the plain language of the Broad Based Tax or federal law incorporated therein by the intent of the Legislature.

When the Broad Based Tax was enacted, the West Virginia Legislature could have elected to forego the federal uniformity requirement imposed on the taxation of “physicians’ services.” It did not. As a result, the Tax Commissioner was bound, as a matter of state and federal law, to apply the Broad Based Tax in a uniform manner on all providers of “physicians’ services.” He did not. Although the Tax Commissioner’s Response Brief focuses on the tax dollars at stake, the true issue before the Court is not the financial consequences of this appeal, but the need to ensure that the Broad Based Tax is applied in a uniform manner on *all* providers of “physicians’ services” as the Legislature intended. The Tax Commissioner has cast aside the federal uniformity requirement and the clear definition of “physicians’ services,” essentially forcing Wheeling Hospital to pursue this appeal to protect its constitutional rights. The Circuit Court’s Order should be reversed and vacated, and Wheeling Hospital granted the refund and interest to which it is lawfully entitled.

II. ARGUMENT

A. Wheeling Hospital Is Entitled To A Refund When the Reclassified Gross Receipts Are Applied To The Plain Language Of The West Virginia Broad Based Tax.

In light of the cloud of confusion created by the Tax Commissioner in his Response Brief, a brief synopsis of the factual landscape before the Court is warranted. For the Fiscal Years 2003 through 2006, Wheeling Hospital used CPT Codes to bill and seek reimbursement for the health care services that it provided. (A.R. 9-10, 969-70, 1291). During those years, inpatient and outpatient hospital services were taxed at a rate of 2.5%. (A.R. 4, 1288). The tax rate for “physicians’ services” declined from 1.6% for the first nine months of Fiscal Year 2003 to 0.8% in the last three months of Fiscal Year 2006. (A.R. 4, 1288).

Wheeling Hospital filed amended Broad Based Tax returns for Fiscal Years 2003 through 2006, requesting a total of \$2,752,200.00 in refunds. (A.R. 89) Wheeling Hospital filed these amended returns because it learned that it incorrectly reported as inpatient or outpatient hospital services gross receipts from the “Overhead” component of “physicians’ services.”¹

During these Fiscal Years, the West Virginia Broad Based Tax defined inpatient, outpatient and physicians’ services by reference to federal statutes and regulatory provisions. *See* W. Va. Code §§ 11-27-9(c)(3), -15(c)(3), and -16(c)(3) (1993). These provisions are required to be applied consistent with federal law. W. Va. Code § 11-27-1. Section 11-27-16 imposes a tax on every person or entity that provides “physicians’ services.”

B. The Definition Of “Physicians’ Services” Is Clear And Unambiguous.

The only taxable services at issue here are “inpatient hospital services,” “outpatient hospital services” and “physicians’ services.” The only definition in dispute is “physicians’ services.” These three services are properly taxable pursuant to federal law, *see* 42 C.F.R. §§ 433.56(a)(1), (a)(2) and (a)(5), and are likewise taxed under the Broad Based Tax. *See* W. Va. Code §§ 11-27-9, -15 and -16.

West Virginia Code § 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.” Section 1903(w), in turn, defines “physicians’ services” as those “furnished by a physician . . . whether

¹ In his brief, as well as the *amicus curiae* brief filed by the West Virginia Department of Health and Human Resources, Bureau for Medical Services, the State invokes the amount of tax dollars at stake in this appeal and similar proceedings currently pending before the West Virginia Office of Tax Appeals. The amount of tax dollars in play, however, in no way validates the Tax Commissioner’s refusal to grant Wheeling Hospital the refund (and interest) to which it is rightfully entitled as a matter of state and federal law. If anything, the amount of tax dollars at issue shows that the Tax Commissioner has committed a costly error that if allowed to stand will only be compounded by the loss of federal matching dollars from the West Virginia Medicaid program.

in the office, the patient's home, a hospital, or a nursing facility, or elsewhere" 42 U.S.C. § 1396d.²

"Physicians' services" are then more precisely defined by CPT Codes, a numeric coding system consisting of descriptive terms to identify the medical services and procedures provided by health care professionals. 42 U.S.C. §§ 1320d-2(a)(1), 1320d-2(a)(2)(A), 1320d-2(c)(1) (A.R. 92). The Federal Center for Medicare and Medicaid Services ("CMS"), the federal agency charged with oversight of state Medicaid programs, promulgated and adopted the CPT Codes. CMS also annually publishes a "Physicians' Fee Schedule" which is used to determine the appropriate Medicare reimbursement amount for health care 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, *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").

42 C.F.R. § 414.22 (emphasis added).

As recognized by the governing CPT Codes, a "physician's services" are by no means controlled by "who" performs those services or "when" or "where" those services are provided. When a physician's services are rendered in a hospital, the hospital will bill and receive payment for the Overhead component of a "physician's services." See 42 C.F.R. § 414.22 (A.R. 7, 95,

² The corresponding federal regulation parrots the federal definition 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." 42 C.F.R. § 440.50(a).

967-68). Accordingly, a hospital will report gross receipts generated from such “Overhead” as “physicians’ services.”

C. The Comprehensive Definition Of “Physicians’ Services” Must Be Applied.

A statute must be applied as written before it can be constructed or interpreted. “When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the court” Syl pt. 1 (in part), *J. D. Moore, Inc. v. Hardesty*, 147 W. Va. 611, 129 S.E.2d 722 (1963). Instead, “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent . . . will be given full force and effect.” Syl. pt. 3 (in part), *Cunningham v. Hill*, 226 W. Va. 180, 698 S.E.2d 944 (2010). For that matter, “[a] statute should be read and applied as to make it accord with the spirit, purposes, and objects of the general system of law which it is intended to form a part” *Cunningham*, 226 W. Va. at 185, 698 S.E.2d at 949.

In enacting the Broad Based Tax, the Legislature unequivocally expressed its intent that the Broad Based Tax mirror federal law. *See* W. Va. Code § 11-27-1(g) (“The tax enacted in this article is intended to conform to the requirements of Public Law 102-234.”) (emphasis added). “Physicians’ services” are defined by federal law and, more importantly, the definitional reference to Section 1903(w) of the Social Security Act is unqualified. *See* W. Va. Code § 11-27-16(c)(3) (1993). In other words, the definition of “physicians’ services” includes the *entire* definition of “physicians’ services” applicable to Section 1903(w) of the Social Security Act, including the CPT Codes that delineate the three component parts of “physicians’ services” and, more specifically, “Overhead” costs.

D. The Tax Commissioner Impermissibly And Incorrectly Attempts to Construe The Definition Of “Physicians’ Services.”

The Tax Commissioner acknowledges that the W. Va. Code § 11-27-16(c)(3) defines “physicians’ services” by reference to Section 1903(w) of the Social Security Act and incorporates the federal definition by reference. (Resp. Br. 22). The Tax Commissioner incorrectly maintains that *the* definition for “physicians’ services” is *only* contained in 42 C.F.R. § 440.50(a), effectively arguing that the sum is the equivalent of a single part. (Resp. Br. 21-22).

In so doing, the Tax Commissioner ignores the body of federal law defining “physicians’ services,” instead employing statutory construction (a practice reserved *only* to resolve statutory ambiguity). While the totality of the definition is contained in different sections, all of these sections come together to form a single, comprehensive definition of “physicians’ services.” *See* Syl. pt. 3 (in part), *Barr v. NCB Management Services, Inc.*, 227 W. Va. 507, 711 S.E.2d 577 (2011) (“the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated.”).³

This issue needs no “construction,” only the application of the clear letter of state and federal law.⁴ No court, much less a member of the executive branch, should unilaterally interpose a dictionary definition to replace a statutory definition provided by the clear language

³ Public Law 102-234 and the Broad Based Tax are inextricably related to the exact same subject matter – health care provider taxes. *See* W. Va. Code § 11-27-1. Where, as here, “[s]tatutes . . . relate to the same subject matter[,] they should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syl. pt. 3, *Smith v. State Workmen’s Compensation Com’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). For that matter, “a court must whenever possible read statutes dealing with the same subject matter in *pari materia* so that the statutes are harmonious and congruent, giving meaning to each word of the statutes, and avoiding readings which would result in a conflict in the mandates of different statutory provisions.” *Mangus v. Ashley*, 199 W. Va. 651, 487 S.E.2d 309 (1997).

⁴ The inherent contradiction in the Tax Commissioner’s argument is readily apparent – he contends that hospitals can *never* provide physician services but, in the same breath, **acknowledges** that Wheeling Hospital **can provide physicians’ services**. The former argument, however, required the Tax Commissioner and Circuit Court to rewrite the clear language of Congress and the Legislature.

of a legislative body. The Tax Commissioner, and ultimately the Circuit Court below, have cast aside a bedrock canon of statutory construction – that the plain language of a statute be applied *as written*.

The Tax Commissioner’s construction of the Broad Based Tax fails to appreciate the statutory definition of “physicians’ services,” as well as the Congressional policy of uniformity in taxing health care *services* rather than health care *providers*. “[S]tatutory construction,” of course, “is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.” *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988). Suggesting that only *one* of *several* provisions of federal law defines “physicians’ services” misses the mark. By focusing on *one* section of the Code of Federal Regulations (which, consequently, constitutes only *one* facet of “physicians’ services”), the Tax Commissioner ignores the full scope of a “physician’s services.” The definition of “physicians’ services,” however, is not limited to one section, one provision, or even a single word. For that reason, one provision of a statute should *never* be read to the exclusion of other component parts of the same statutory scheme. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997).

When one puts on blinders and ignores the remaining federal and state laws that define “physician’s services,” it is easy to make the attenuated arguments contained in the Tax Commissioner’s Response Brief. The Tax Commissioner’s position reeks of desperation, a desperation to justify a mistake, a desperation to stop a refund that is due and owing. That desperation has boiled over into arguments designed to distract this Court from a very serious consequence of the Tax Commissioner’s actions – a demand by the federal government for reimbursement of federal Medicaid matching funds resulting from the improper taxation by the

State. The problem is, the Tax Commissioner's argument seeks to ignore the issues raised in Wheeling Hospital's Brief and create new issues entirely. But the Tax Commissioner cannot put on blinders, nor can he treat the Broad Based Tax or federal laws as a salad bar, picking and choosing different sections to abide by whenever it suits him. The Tax Commissioner must accept and apply the laws and their definitions as written, in their entirety.

All "physicians' services," including the "Overhead" component provided by Wheeling Hospital and other hospitals sitting in West Virginia, are to be taxed at the same rate as a matter of state and federal law *irrespective of the person or entity providing that service*. The Circuit Court erred as a matter of law in concluding otherwise.

E. The Tax Commissioner And Circuit Court Below Have Placed The West Virginia Medicaid Program In Jeopardy.

The present appeal is the culmination of a series of events that never had to occur and could have been avoided years ago. The Tax Commissioner's Response Brief fails to address a critical aspect of the Broad Based Tax. When the Broad Based Tax was enacted, the State could have obtained a waiver from the federal government permitting the type of inconsistent taxation of "physicians' services" that is occurring in this case. *See* 42 CFR § 433.72. It did not. Instead, the Legislature imposed a tax on "physicians' services" uniformly, thereby instructing that each component of a "physician's service" be taxed at the same rate regardless of the person or entity providing that service. Not once did the State of West Virginia attempt to obtain a waiver in order to deviate from the otherwise uniform taxation of "physicians' services" required by federal law and adopted into the Broad Based Tax. Over time, the Legislature eliminated the tax on "physicians' services" altogether. The State's decision not to obtain a waiver cannot be overstated: the Legislature did not intend to provide physicians the competitive benefit of immunity from taxation on the exact same services performed by hospitals and other health care

providers that are taxed at a significantly higher level. The Legislature intended to (and did) eliminate the tax on “physicians’ services” for all health care providers alike, including Wheeling Hospital.

The Tax Commissioner bases his entire Response Brief on the financial consequences of the issues before the Court, never really taking head-on the issues giving rise to those potential consequences. For that matter, the only reason that Wheeling Hospital is even addressing the tax dollars at play is because the Tax Commissioner has not only introduced the issue, but presented only one side in doing so – namely, that were the refund due and owing actually paid, the State would face a more than \$2 million budget hole in the State Medicaid program. The amount of the refund owed, however, has no bearing on the legal merits of this appeal, which turn on the definition of “physicians’ services” under state and federal law and the attendant application of the Broad Based Tax to providers of such services. The Tax Commissioner waives the more than \$2 million tax dollars at stake as a banner to support arguments that the plain letter of the law cannot, but that banner represents nothing more than his failure to apply the Broad Based Tax in the manner intended by the Legislature.

In his Response Brief, the Tax Commissioner represents that affirming the Circuit Court’s Order “will not have disastrous consequences for the West Virginia Medicaid program.” (Resp. Br. ii). This, by all accounts, is inaccurate. The appeal before the Court is a “Catch 22” in the strictest sense. For this Court to rule for the Tax Commissioner, it will have to hold that the State of West Virginia taxes “physicians’ services” at different rates depending on *who* provides those services, in direct contravention of federal law that grants matching funds on the condition of the uniform application of taxes on health care services. Importantly, federal law does *not* say that the states cannot tax in the manner proposed by the Tax Commissioner – rather,

Congress merely refuses to provide Medicaid matching funds to states that impose different tax rates depending on the provider of a delineated health care service. Accordingly, in the absence of the requested refund, West Virginia stands to lose the entire amount of federal participation dollars that were improperly drawn from the federal government because those taxes that were collected from Wheeling Hospital, as well as fourteen other hospitals operating in West Virginia, were impermissible health care related taxes.

In that same vein, CMS, the federal agency responsible for oversight of state Medicaid programs, may decide that only the portion of the tax related to “physicians’ services” is invalid. In that case, the potential recovery by CMS of federal matching dollars is roughly \$75 million per year. If CMS determines that the *entire* tax is invalid for federal matching purposes, the potential recovery, and attendant liability of the State of West Virginia, is over **\$500 million per year**. These dollars are real — the tax dollars have already been spent on the West Virginia Medicaid program, so the federal match is already tainted and subject to recovery.

While the Tax Commissioner urges this Court to uphold the clear error of law committed below, arguing that “this Court could create a substantial shortfall in the Medicaid budget” vis-à-vis a reversal, *see* Resp. Br. 17, he is only urging this Court to place hundreds of millions of dollars in federal matching funds at stake based on an application of federal law that cannot, and will not, withstand federal scrutiny.

The factual predicate for this appeal was avoidable, and this appeal is a last resort to obtain a refund to which Wheeling Hospital is entitled as a matter of state and federal law. The Tax Commissioner, as well as the Circuit Court below, has not only erred as a matter of law, but has “gone all in” with virtually each and every single dollar invested in the State Medicaid program on what is nothing short of a reckless gamble. The Tax Commissioner, however, is not

just gambling federal matching dollars – he is gambling the health, the well-being, and ultimately the lives of West Virginians, young and old alike, who cannot afford medical coverage absent the State Medicaid program, all based on a statutory interpretation that cannot, and will not, withstand federal scrutiny. Reversal of the Circuit Court’s Order is warranted.

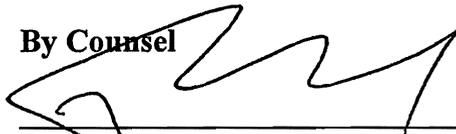
III. CONCLUSION

For the reasons stated herein, as well as in Petitioner Wheeling Hospital, Inc.’s Brief, Wheeling Hospital respectfully requests that this Honorable Court vacate the Circuit Court’s Order; 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 February 21, 2012.

WHEELING HOSPITAL, INC., Petitioner

By Counsel



Niall A. Paul (WV Bar No. 5622) (Counsel of Record)
Timothy D. Houston (WV Bar No. 10858)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
Post Office Box 273
Charleston, West Virginia 25321-0273
(304) 340-3800 / (304) 340-3801 (*facsimile*)
npaul@spilmanlaw.com
thouston@spilmanlaw.com

Counsel for Petitioner Wheeling Hospital, Inc.

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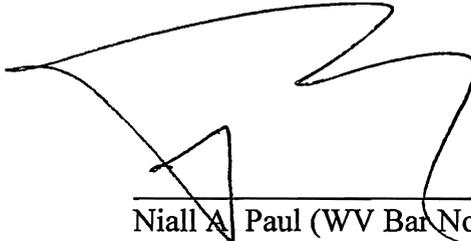
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Respondent.

CERTIFICATE OF SERVICE

I, Niall A. Paul, hereby certify that on this 21st day of February, 2012, the foregoing “Petitioner Wheeling Hospital, Inc.’s Reply 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)