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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Pharmacy Corporation of America,

Appellant,

v.

State of Washington, Department of Revenue

Respondent.

Brief of Appellant

David A. Petteys, WSBA No. 33157
david@stollpetteys.com
Stoll Petteys PLLC
1455 NW Leary Way, Suite 400
Seattle, Washington 98107
Telephone: (206) 456-6697
Facsimile: (888) 494-3028

Attorney for Appellant
Pharmacy Corporation of America

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I. INTRODUCTION

This appeal involves the application of RCW 82.04.272, which imposes the B&O tax at a rate of 0.138 percent on engaging in the business of “warehousing and reselling drugs for human use pursuant to a prescription.”¹ The parties agree the only issue in dispute is whether Appellant Pharmacy Corporation of America’s (“PharMerica”) sales of prescription drugs pursuant to contracts to provide prescription drugs to long-term care facilities (collectively, the “Facilities”) qualify for the so-called “buyer requirement” of the statute, which limits the application of the prescription drug tax to the “reselling of the drugs to persons selling at retail or to ... health care providers.”

PharMerica filed an administrative refund claim with Respondent Department of Revenue (the “Department”), seeking the recovery of additional taxes it erroneously paid at the retailing tax rate of 0.471% on its gross income from prescription drugs sold pursuant to its pharmacy services agreements with the Facilities. Although the Department conceded that the lower tax rate was applicable to transactions where PharMerica received payment directly from the Facilities, it refused to grant PharMerica a refund with respect to transactions where payment is received from a source other

¹ Referred to hereinafter as the “prescription drug tax.”

than health care providers, such as a Medicare Part D prescription drug plan, reasoning that such transactions fail to satisfy the buyer requirement.

Notwithstanding the Department's assertions to the contrary, PharMerica is in all instances reselling the prescription drugs at issue to the Facilities for purposes of RCW 82.04.272(2)(b), irrespective of who ultimately remits payment to PharMerica. PharMerica is contractually obligated to provide the prescription drugs at issue to the Facilities, not their residents. Likewise, in all instances, the drugs are ordered, received, stored, and dispensed by the Facilities, not to their residents. Consequently, PharMerica's provision of prescription drugs to the Facilities qualifies for the prescription drug tax rate under RCW 82.04.272(1), irrespective of who ultimately pays the cost of the drugs. Since there are no genuine issues of fact material to the determination of the issues presented in this appeal, PharMerica respectfully requests that the Court reverse the trial court's order granting the Department's motion for summary judgment and order the entry of summary judgment in favor of PharMerica on its refund claim.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by entering the order dated August 17, 2018 granting the Respondent Department's Motion for Summary

Judgment and dismissing Appellant PharMerica's Notice of Appeal with prejudice.

2. The trial court erred by denying Appellant PharMerica's request for the entry of an order granting summary judgment in favor of PharMerica as to its claim for refund of the additional taxes it paid on transactions taxable under the prescription drug tax rate.

B. Issues Pertaining to Assignments of Error

1. PharMerica is engaged in business as a long-term care pharmacy, whereby it purchases prescription drugs from manufacturers and wholesalers and warehouses and resells the same pursuant to pharmacy services agreements between itself and various long-term care facilities. In all instances, the drugs are ordered, received, stored, and administered by the long-term care facilities to their residents, pursuant to prescriptions by licensed health care practitioners, and in no instance are the drugs ordered or received by the residents directly.

Is the gross income PharMerica derives from such transactions taxable under the B&O tax classification for warehousing and reselling prescription drugs under RCW 82.04.272(1) and (2)(b), irrespective of the identity of the party or parties who remit payment for such drugs?

2. Is PharMerica entitled to the entry of an order granting judgment in its favor as to its claim for the refund of the additional taxes it

paid on transactions taxable as warehousing and reselling prescription drugs under RCW 82.04.272(1) and (2)(b), when there is no genuine issue of material fact and PharMerica is entitled to judgment as a matter of law?

III. STATEMENT OF THE CASE

A. PharMerica's long-term care pharmacy business.

PharMerica provides comprehensive institutional pharmacy services to long-term care facilities and similar institutional healthcare providers, including hospitals, nursing homes, assisted living facilities, inpatient rehabilitation centers, intermediate care facilities, hospices, and other institutional healthcare providers. CP 288. During the period January 1, 2008 through June 30, 2012 (the "Period at Issue"), PharMerica provided prescription drugs and related pharmacy services to approximately 400 Facilities in Washington. CP 87-101. PharMerica purchases prescription drugs from manufacturers and wholesalers and stores them in pharmaceutical warehouses at various locations throughout the country, including two warehouses in Washington. CP 242-43. PharMerica repackages, dispenses, and delivers the drugs in bulk to the Facilities, whose staff are responsible for administering the drugs to the residents as prescribed. *See* CP 242-43 and 246.²

² PharMerica is also obligated to provide the Facilities with various institutional pharmacy services, including pharmacy consultations, medication management, inventory control,

1. PharMerica provides the prescription drugs at issue pursuant to contracts with long-term care facilities, not individual residents.

PharMerica's long-term care pharmacy business operates differently from traditional "retail" pharmacies. PharMerica enters into pharmacy services agreements with the Facilities that describe the terms and conditions under which PharMerica will provide prescription drugs and related pharmacy services to the Facilities. CP 245-46. Upon execution of the pharmacy services agreements, PharMerica coordinates with the licensed healthcare practitioners at each Facility to ascertain the Facility's requirements for meeting the needs for their residents. CP 243, 246-47. After the Facility submits the pharmacy orders, PharMerica dispenses and labels the prescriptions for individual residents, consolidates the orders to the Facility in totes, and delivers the consolidated orders to the Facilities via courier for storage and later administration to their residents. CP 246. In no instance does PharMerica receive any orders from, or dispense or deliver prescription drugs directly to, the individual patients. CP 245-47.

Under federal and state law, the Facilities must provide pharmacy drugs and services to residents and patients in their care. *See* 42 U.S.C. § 1396r(b)(4)(A)(iii) (requiring the provision of pharmaceutical services to

and similar services. *See* CP 108-14.

residents); 42 C.F.R. § 483.45 (providing that long-term care facilities “must provide routine and emergency drugs and biologicals to its residents, or obtain them under an agreement”); WAC 246-865-060 (requiring the “provision for timely delivery of drugs and biologicals from a pharmacy so a practitioner's orders for drug therapy can be implemented without undue delay”).

2. Under the pharmacy services agreements, PharMerica is obligated to provide the prescription drugs at issue to the Facilities, not to their individual residents.

All of the prescription drug sales at issue in this case were made pursuant to PharMerica’s pharmacy services agreements with its Facility customers. CP 243, 245-47. Under the agreements, PharMerica is obligated to “provide to the Facility the pharmacy-related services (‘Services’) and prescription drugs and other health care related products and medical devices (‘Products’).” CP 104; *see also* CP 147 (Determination No. 15-0078, finding that “Taxpayer’s [PharMerica’s] standard sales contract...was with facilities, and not individual patients”) (emphasis added). All of the prescription drugs associated with these sales were ordered, received, and stored by the Facilities and administered to their residents pursuant to prescriptions issued by licensed healthcare practitioners. CP 247.

Once the Facility takes delivery of the prescription drugs or products, the Facilities are legally and contractually responsible for storing, distributing, and administering the drugs to the residents at the frequency and dosage indicated by the prescription. CP 104 (facilities must “[c]linically monitor its residents’ drug therapies at the Facility” and “coordinate and communicate with each patient and his physicians, pharmacists and other health care providers regarding the patient’s need and care.”).³

3. PharMerica is contractually entitled to receive payment for the prescription drugs from either the residents, third-party payors, and/or the Facilities.

Under the pharmacy services agreements, PharMerica is entitled to receive payment from either the Facility, a third-party payor such as a Medicare Part D prescription drug plan, and/or the resident to whom the drugs are prescribed. CP 195-96. Reimbursement for Facility-ordered prescription drugs and services may be made by Medicare, Medicaid, private insurance, other third-party payors, private payors, or ultimately, the Facilities themselves. CP 226.

³ Most of the prescription drugs at issue are prescribed to specific patients when ordered by the Facilities. However, the Facilities also maintain a stock of certain frequently administered medications – referred to as “house drugs” – that are not patient-specific when ordered by the Facility but are later dispensed to residents as needed (typically in emergency situations). *See* CP 152.

On admission of a resident or within twenty-four hours of any status change, the Facility must provide PharMerica with detailed information about necessary reimbursement procedures with private and government third-party payors, and government programs such as Medicaid and Medicare. *See* CP 197-98, 200-1, and 225-26. This includes prescription drug information for each Facility resident or patient and the hierarchy of how to bill for reimbursement of the PharMerica prescription orders. CP 197-98. PharMerica works with the Facility to determine the prescription needs, scope of prescription drug coverage, and financial responsibility for each of the Facility's residents. CP 197-98, 200-1. In many instances, the hierarchy of coverage will not be clear or will change due to the circumstances of the resident or patient and the complexities of hierarchy of coverage. CP 226-27.

As a practical matter, PharMerica – either directly or indirectly – receives reimbursement for the majority of the cost of the drugs from the resident's one or more prescription drug benefit plans, but the resident may also be required to remit a copayment. CP 60. Likewise, many residents of the Facilities are eligible for primary and secondary coverage under more than one prescription drug plan, such as a Medicare Part D prescription drug plan and Medicaid, in which case Medicaid may cover the resident's

copayments or a portion of the cost of the drugs not covered by Medicare. CP 60-61 and 226-27.

Consequently, PharMerica is often required to submit or re-submit reimbursement claims to multiple payors over the course of a resident's care at a Facility, and in many instances the identity of the party or parties ultimately responsible for reimbursing PharMerica cannot be accurately determined until well after the prescription drugs have been delivered to the Facility and administered to the resident. CP 227.

As required by the pharmacy services agreements, the Facilities are obligated to provide updated and accurate information to PharMerica regarding their patients' prescription drug coverage and financial responsibility. CP 195-96, 225. If PharMerica does not receive reimbursement due to a Facility's failure to provide timely or accurate claims reimbursement information, the Facility may ultimately be liable for reimbursing PharMerica for the unreimbursed costs of the drugs. CP 225-26; CP 310-11.

During the examination of PharMerica's refund claim, the Audit Division bifurcated the transactions at issue into two general categories:

- (1) sales where the Facilities reimbursed PharMerica for the cost of the drugs, which includes (a) drugs prescribed to residents covered by Medicare Part A or Medicaid, where

the Facilities receive a fixed daily per diem amount to cover the aggregate cost of the resident's care, including prescription drugs, and (b) so-called "house drugs," which are a supplemental supply of drugs that the Facilities keep on hand for emergency and nonemergency use and are not resident-specific; and

(2) sales where PharMerica received reimbursement for the cost of the drugs either (a) from the residents themselves (so called "private pay" or "self-pay" residents who are financially responsible for the cost of their own care) or (b) from a third party such as a Medicare Part D prescription drug plan or a private health insurer ("third-party payors").

See CP 34, 104, 148, and 152. However, as noted above, it is common for PharMerica to receive payment from multiple parties for the same order of prescription drugs, i.e., when the resident is required to remit a copayment or when there is primary and secondary coverage. CP 60-61 and 226-27.⁴

⁴ *See generally*, Dual Eligible Beneficiaries Under Medicare and Medicaid, U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services at 2-3, ICN 006977 (May 2018) (copy attached as Appendix A-5).

B. Procedural History

On August 1, 2012, PharMerica requested a refund of B&O tax from the Department for the reclassification of its sales of prescription drugs from the retailing tax rate of 0.471% under RCW 82.04.250 to the prescription drug tax rate of 0.138% under RCW 82.04.272, in the amount of \$281,740. CP 132. On or about March 11, 2014, the Department's Audit Division issued PharMerica a credit of \$23,308, representing the amount of overpaid tax on PharMerica's sales of so-called house drugs and sales of drugs upon which the Facilities were reimbursed by Medicaid, which the Audit Division reclassified from the retailing rate to the prescription drug rate. CP 127-28, 140-41. The Department denied PharMerica's refund request with respect to the remainder of the transactions at issue. CP 136-42.

On March 16, 2014, PharMerica filed an Appeal Petition with the Department's Appeals Division, and on March 26, 2015, the Appeals Division issued Determination No. 15-0078, which largely sustained the Audit Division's denial of PharMerica's refund claim but remanded the matter to the Audit Division for possible adjustment for certain direct sales to the Facilities. CP 145-55. On remand, the Audit Division increased the amount of the allowable refund by \$90,524, for a total credit of \$113,832. The amount of PharMerica's refund claim, net of the credits allowed by the

Department, for tax paid under the retailing rate on sales properly taxable under the prescription drug rate, is \$167,908, excluding interest.⁵

On December 9, 2015, PharMerica filed a Request for Executive Level Reconsideration with the Appeals Division, and on June 9, 2016, the Appeals Division issued Determination No. 15-0078R denying the petition for reconsideration. CP 175-83. PharMerica timely filed a Complaint for Excise Tax Refund and Notice of Appeal under RCW 82.32.180. CP 1. On May 22, 2018, the Department filed a motion for summary judgment, seeking the dismissal of PharMerica's refund claim in its entirety. CP 12. On August 17, 2018, the trial court issued an order granting the Department's motion for summary judgment and dismissing PharMerica's refund suit. CP 338-40.⁶ PharMerica timely filed a notice of appeal of the trial court's order granting the Department's motion for summary judgment. CP 342-45.

⁵ PharMerica does not assign error to the trial court's denial of the portion of its refund claim based on the deduction for compensation from public entities for health or social welfare services under RCW 82.04.4297.

⁶ The trial court did not provide any substantive rationale in support of the order granting the Department's motion for summary judgment, either in the order itself or at the conclusion of oral argument. CP 342-45; RP 41. Copies of the order and an excerpt from the transcript of the hearing are attached as Appendix A-1 and A-2, respectively.

IV. ARGUMENT

A. Standard of Review

The Court of Appeals reviews summary judgment orders de novo, performing the same inquiry as the trial court. *Aventis Pharm., Inc. v. Dep't of Revenue*, 5 Wn. App. 2d 637, 641-42, ___ P.3d ___ (Div. 2, 2018). “Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Id.* (citing *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005)).

B. Principles of Statutory Construction

Questions of statutory interpretation are likewise subject to de novo review. *Aventis*, 5 Wn. App. 2d at 642 (citing *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014)). The fundamental objective of statutory interpretation is to “ascertain and carry out the legislature’s intent.” *Jametsky*, 179 Wn.2d at 762. In doing so, this Court “give[s] effect to the plain meaning of the statute as derived from the context of the entire act,” together with any related statutes that reveal the legislative intent of the provision at issue. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). In so doing, however, the Court should avoid interpreting the statute in a manner that produces “unlikely, absurd, or

strained results.” *Home Depot USA, Inc. v. Dep't of Revenue*, 151 Wn. App. 909, 916, 215 P.3d 222 (Div. 2, 2009).

“If a statute’s meaning is plain on its face, a court gives effect to that meaning as an expression of legislative intent.” *Aventis*, 5 Wn. App. 2d at 642. If a statute “uses plain language and defines essential terms, the statute is not ambiguous.” *Regence Blueshield v. Office of Ins. Comm'r*, 131 Wn. App. 639, 646, 128 P.3d 640 (2006). A statute will be deemed ambiguous if “susceptible to two or more reasonable interpretations,” but not merely because an alternative interpretation is “conceivable.” *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009). “Any doubts as to the meaning of a statute under which a tax is sought to be imposed will be construed against the taxing power.” *Aventis*, 5 Wn. App. 2d at 642 (interpreting RCW 82.04.272).

C. Statutory Requirements for the Prescription Drug Tax Rate

1. RCW 82.04.272

Washington’s B&O tax is imposed upon “the act or privilege of engaging in business activities,” which is “measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.” RCW 82.04.220(1). RCW 82.04.272(1) imposes the B&O tax at a rate of 0.138 percent on persons engaging “in the business of warehousing and reselling drugs for human use pursuant to a

prescription.” The term “warehousing and reselling drugs for human use pursuant to a prescription” is defined as follows:

the buying of drugs for human use pursuant to a prescription, from a manufacturer or another wholesaler, and reselling of the drugs to persons selling at retail or to hospitals, clinics, health care providers, or other providers of health care services, by a wholesaler or retailer who is registered with the federal drug enforcement administration and licensed by the pharmacy quality assurance commission.

RCW 82.04.272(2)(b) (emphasis added).

2. ETA 3180

In an effort to clarify the application of the prescription drug tax rate and the meaning of the “reselling to ...” requirement for the warehousing and reselling prescription drugs tax classification, the Department issued Excise Tax Advisory (ETA) 3180.2013 (2013) (copy attached as Appendix A-3), which provides as in relevant part as follows:

To qualify for the preferential B&O tax rate, the seller must satisfy all of the Seller Requirements AND the qualifying sale must be made to a buyer meeting at least one of the Buyer Requirements:

Seller Requirements

To qualify for the preferential B&O tax rate, the seller must satisfy the following requirements:

- Purchase prescription drugs from a manufacturer or wholesaler;

- Warehouse and resell the prescription drugs;
- Be registered with the Federal Drug Enforcement Administration; and
- Be licensed by the Pharmacy Quality Assurance Commission (as either a wholesaler or retailer).

Buyer Requirements

A seller qualifies for the preferential B&O tax rate if the seller satisfies all the requirements above and resells the prescription drugs directly to a buyer who is:

- A retailer with a pharmacy facility license or non-residential pharmacy license issued by the Department of Health under RCW 18.64.043 or RCW 18.64.370, respectively; or
- A hospital, clinic, health care provider, or other provider of health care services.

ETA 3180.

D. PharMerica qualifies for the prescription drug tax rate for “warehousing and reselling drugs for human use pursuant to a prescription.”

1. Under the plain language of the statute, PharMerica is engaged in the business of “reselling of the drugs ... to health care providers.”

The starting point for determining the applicability of RCW 82.04.272 is the incidence of the tax. Washington’s B&O tax is a tax on engaging in business activities, not individual transactions. *Compare* RCW 82.04.220(1) (levying “a tax for the act or privilege of engaging in business

activities”) *with* RCW 82.08.020(1) (imposing the retail sales tax “on *each* retail sale in this state”) (emphasis added). RCW 82.04.272(1) imposes tax on “the business of warehousing and reselling drugs for human use pursuant to a prescription.” Thus, relevant business activity for purposes of this dispute is PharMerica’s reselling of prescription drugs pursuant to the Pharmacy Services Agreements that it enters into with its long-term care facility customers.

The pharmacy services agreements obligate PharMerica to “provide to the Facility the pharmacy-related services ... and prescription drugs and other health care related products ... described in the Schedule(s) attached in accordance with the terms and conditions of this Agreement.” CP 104 (emphasis added). As noted above, PharMerica does not receive orders from or dispense prescription drugs to individual patients. CP 247. Instead, it buys prescription drugs from manufacturers and wholesalers and repackages, dispenses, and delivers those drugs to the Facilities for administration to their residents by the Facility’s nursing staff. CP 246-47, 148. The cost of the prescription drugs is specified in the pharmacy services agreements and is determined either by negotiations between PharMerica and the Facilities or by the reimbursement rates established by governmental third-party payers, such as Medicare and Medicaid. *See, e.g.*, CP 106, 148.

The parties' course of performance mirrors these contractual provisions: all of the prescription drugs at issue were sold pursuant to the pharmacy services agreements executed by PharMerica and the Facilities. *See* CP 104. Conversely, in no instance were any of the prescription drugs at issue ordered by or delivered directly to the residents themselves, regardless of the identity of the party who was ultimately responsible for payment. CP 247. This was true both for Facility residents who were eligible to have their prescription drug costs reimbursed by a "third-party payor" like Medicare, Medicaid, or a private healthcare insurance company, as well as "private pay residents" who were not eligible for a prescription drug benefit plan accepted by PharMerica and assumed responsibility for payment themselves. CP 247. Once the prescriptions are given to the Facilities by the prescribing practitioner, the residents themselves have no direct connection to the sales of the prescription drugs at issue until the drugs are administered by the Facility's nursing staff. *See* CP 148.

The foregoing facts demonstrate that all of PharMerica's sales of prescription drugs pursuant to the pharmacy services agreements satisfy the definition of "warehousing and reselling drugs for human use pursuant to a prescription" under RCW 82.04.272(2) because in all instances, PharMerica is "reselling" prescription drugs and the Facilities are the "buyers" under the common and ordinary meanings of those terms, including under the

authorities cited by the Department. *See* CP 39. The Department, however, erroneously applies those definitions to the facts and circumstances of this case.

The word “buyer” is synonymous with “purchaser,” which is commonly understood to mean “one who acquires property for a consideration (as of money).” *Webster’s Third New International Dictionary* at 306 and 1805. For purposes of the B&O tax, the term “sale” is defined as “any transfer of the ownership of, title to, or possession of property for a valuable consideration.” RCW 82.04.040(1).

In all instances, the Facilities order the prescription drugs at issue, and PharMerica delivers and transfers possession of those drugs to the Facilities for administration to its residents, in exchange for the promise of receiving payment under the terms, conditions, and prices set forth in the pharmacy services agreements. As the Department acknowledges, “delivery and administration of the drug would meet one requirement for a sale.” *See* CP 40. And the element of consideration is satisfied by the Facility’s promise that PharMerica will receive payment for the drugs, either from the facility’s residents, or a third-party payor such as Medicare, Medicaid, or other third-party party prescription drug benefit plan. Accordingly, the Facilities are the “buyer” with respect to all of PharMerica’s sales of

prescription drugs, irrespective of the identity of the party or parties who ultimately remits payment.

2. The Department’s interpretation of the statute erroneously assumes that the “buyer” of the prescription drugs must necessarily be the party who remits payment.

The Department claims PharMerica’s position is “unreasonable and without merit because it does not satisfy the key element of providing valuable consideration in exchange for the drug.” CP 40. In support for this proposition, the Department relies on *Inland Empire Dairy Assn v. Dep’t of Revenue*, 14 Wn. App. 592, 594, 544 P.2d 52 (1975) and *Gandy v. State*, 57 Wn.2d 690, 694, 359 P.2d 302 (1961) for the unremarkable proposition that “[t]he requirement of a valuable consideration for B&O tax purposes is necessary and ‘is at least as important as the transfer.’” *See* CP 40 (quoting *Gandy, supra*, 57 Wn.2d at 694).

However, the Department’s reliance on *Inland Dairy* and *Gandy* is misplaced – there is no dispute as to whether PharMerica received consideration in exchange for sales – were that the case, there would be no taxable sale in the first instance. *See Inland Dairy*, 14 Wn. App. at 594. Furthermore, the Department fails to cite any authority in support of its contention that the consideration must be paid directly by the party to whom possession is transferred in order to constitute a taxable sale for B&O tax purposes, nor does the Department explain why the identity of the party or

parties who ultimately remit payment is somehow dispositive as to whether PharMerica satisfies ETA 3180's "buyer requirement."

This Court recently had the opportunity to interpret the statute in *Aventis*, where it held that the prescription drug tax rate did not apply to wholesalers who sell to other wholesalers. 5 Wn. App. 2d at 640. In *Aventis*, the taxpayers were engaged in the business of purchasing, warehousing, and reselling prescription drugs to other wholesalers, who in turn sold to retail pharmacies or health care providers. *Id.* Although the taxpayers in *Aventis* satisfied the reseller requirement under RCW 82.04.272(2)(b), this Court held that because its buyers were other drug wholesalers, they failed to meet the buyer requirement. *Id.* at 640-41.

Aventis is distinguishable from the instant case in that it involved the question of whether the taxpayers' buyers satisfied the buyer requirement, whereas in this case, there is no dispute over whether the Facilities are "health care providers" for purposes of the buyer requirement – the Department concedes that PharMerica is eligible for the prescription drug tax rate when it receives payment from the Facilities directly. *See* CP 34. Instead, the dispute in this case centers on whether the Facilities meet the definition of buyer with respect to transactions that are otherwise identical, except for the fact that PharMerica happens to receive payment from a source other than the Facilities. Although this is a question *Aventis* did not

address, the decision does clarify that where the Court concludes an application or meaning is doubtful or uncertain, it should be strictly construed in favor of PharMerica, not the Department. *See Aventis*, 5 Wn. App. 2d at 640 n.1, discussed in Section D.4., below.

In *Aaro Med. Supplies, Inc. v. Revenue*, this Court interpreted the meaning of the word “buyer” in the context of a seller’s obligation to collect and remit sales tax, holding that the Medicare beneficiary-patients, not the federal government, were the “buyers” of the taxpayer’s durable medical products for purposes under RCW 82.08.050, notwithstanding the fact that the federal government paid for the products by assignment. *Aaro Med. Supplies, Inc. v. Revenue*, 132 Wn. App. 709, 711, 132 P.3d 1143 (2006), *rev. den’d*, 159 Wn.2d 1013 (2007).

In *Aaro*, the facts strongly supported the conclusion that the Medicare beneficiaries, not the federal government, were the “buyers” of the durable medical products: the Medicare beneficiaries identified and ordered the durable medical products from the vendor; they also took possession and became the owners of, and incurred the primary obligation to pay for, the products. *Id.* at 720. The Court observed that the Washington Supreme Court had previously held that under RCW 82.08.050, the “buyer” is the person who is “*legally obligated to pay the seller in any transaction.*” *Aaro*, 132 Wn. App. at 718 (quoting *Murray v. State*, 62 Wn.2d 619, 624,

384 P.2d 337 (1963). The Court also recognized that “under a strict interpretation of Washington’s sales tax statute, the federal government is arguably a ‘joint buyer’ with the beneficiary, but the Court was ultimately “not persuaded that such interpretation should control here.” *Aaro*, 132 Wn. App. at 717. Instead, the Court agreed with the view expressed by the Ohio Supreme Court, noting that “regardless of who ultimately pays for the medical products, the Medicare beneficiary is the one who identifies the product, orders it from the vendor, incurs the primary obligation to pay for it, takes possession of it, becomes the owner of it, and uses it. *Id.* at 720 (citing *Akron Home Medical Services, Inc., v. Lindley*, 25 Ohio St. 3d 107, 495 N.E.2d 417 (1986)). On that basis, the Court held that “the Medicare beneficiaries, not the federal government, were the ‘buyers’ under RCW 82.08.050,” even when the federal government paid for the products by assignment. *Aaro*, 132 Wash. App. at 720.

The Court should adopt a like approach to the issue presented in this case and reject the Department’s overly narrow and irrational construction of the statute, particularly its misplaced reliance on the party and parties from whom payment was ultimately received as a litmus test or proxy for determining eligibility for the prescription drug tax rate under RCW 82.04.272(1) and (2)(b). Like the vendors and Medicare beneficiaries in *Aaro*, almost every aspect of the contractual relationship between

PharMerica and the Facilities, as well as their course of performance thereunder, compels the conclusion that the Facilities are, as a matter of law, the buyers for purpose of this case. Since there is no dispute as to whether the Facilities' meet the definition of health care providers, the Court should reject the Department's construction of the statute and instead hold that PharMerica is, as a matter of law, reselling the prescription drugs to the Facilities, not the residents or any third-party payors.

3. The Department's construction of the statute fails to advance the Legislature's intent and produces an unlikely, absurd, and strained result.

In support of its motion for summary judgment, the Department attempted to summarize the relatively sparse legislative history of RCW 82.04.272, noting that “[t]he purpose of this preferential classification was to help in-state sellers of prescription drugs compete with out-of-state drug warehouse companies.” CP 037 (citing House Bill Report, ESHB 2933 (1998)). However, the Department fails to demonstrate how its interpretation of the statute even remotely advances the Legislature's desire to level the playing field for in-state resellers of prescription drugs such as PharMerica. The instant case makes this point abundantly clear. The Department's theory is that PharMerica qualifies for the prescription drug rate only with respect to its so-called direct sales, that is, sales where the Facility directly reimburses PharMerica for the cost of the prescription drugs. Yet, in all

other instances, the Department contends that PharMerica is deemed ineligible for the prescription drug tax rate, based solely on an arbitrary and irrational bright-line rule that turns on the identity of the party who ultimately remits payment. Since the substantial majority of PharMerica's revenue from prescription drug sales to the Facilities is received from Medicare Part D plans and other third-party payors, under the Department's interpretation, only a relatively small percentage of its sales would qualify for the prescription drug rate. *See* CP 215.

The Court determines legislative intent from the statute's plain language and ordinary meaning and, in doing so, it "must avoid unlikely, absurd, or strained results." *Nelson Alaska Seafoods, Inc. v. Dep't of Revenue*, 143 Wn. App. 455, 461, 177 P.3d 1161, 1164 (2008) (citing *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005)). Yet the application of the Department's unreasonably narrow and overly literal construction leads to the sort of unlikely, absurd or strained result that this Court cautioned against in *Nelson, supra*.

By drawing an arbitrary distinction based on the identity of the party who ultimately remits payment for the prescription drugs, the Department's interpretation conflicts with the plain language of the statute and frustrates the Legislature's intention to reduce the tax burden on in-state resellers of prescription drugs by mitigating the unfair competitive advantage enjoyed

by out-of-state resellers, who were often able to avoid paying any B&O tax on Washington sales due to their lack of an in-state presence and their eligibility for the direct seller's exemption. *See* CP 046-47; House Bill Report, ESHB 2933 (1998) (attached hereto as Appendix A-4).

If the legislature's aim "was to help in-state wholesalers of prescription drugs compete with out-of-state drug warehouse companies," CP 37, it is difficult to see how the Department's interpretation of the statute even remotely achieves that end. Since the vast majority of revenue received by long-term care pharmacies is derived from Medicare Part D prescription drug benefit plans and other third-party payors, the Department's interpretation of the statute effectively forecloses the entire long-term care pharmacy industry's ability to enjoy the benefits of the prescription drug tax rate on all but a small fraction of their sales. Neither the plain text of the statute nor its legislative history suggests that the Legislature intended to limit the prescription drug tax rate in this manner.

Accordingly, the Court should reject the Department's narrow and strained construction of the statute and instead hold that PharMerica is eligible for the prescription drug tax rate under the plain language of RCW 82.04.272 on all of its sales of prescription drugs to the Facilities pursuant to the pharmacy services agreements, irrespective of whether the cost of those drugs is paid for by the Facility, its residents, or a third-party payor.

4. If the Court concludes that the prescription drug tax statute is ambiguous, it must be strictly construed, with any doubt as to its applicability resolved in favor of PharMerica and against the Department.

In *Aventis Pharm., Inc. v. Dep't of Revenue*, the Department asserted that this Court “should interpret the prescription drug tax strictly against the taxpayer, as a preferential rate is equivalent to an exemption or deduction.” *Id.* at 642 n.1. However, the Court properly rejected the Department’s invitation to do, observing that in *Agrilink Foods, Inc. v. Dep't of Revenue*, the Washington Supreme Court held that, “in the context of a preferential tax rate for a specific industry, ‘[i]f any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.’” *Aventis*, 5 Wn. App. 2d at 642 n.1 (quoting *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 393, 103 P.3d 1226, 1227 (2005)). In light of this, the Court concluded that “[b]ecause the prescription drug tax statute involves a preferential rate and not an exemption or deduction, we construe it against DOR.” *Aventis*, 5 Wn. App. 2d at 642 n.1 (emphasis added).

For the reasons explained above, PharMerica qualifies for the prescription drug tax rate under both the plain language of the statute and as interpreted by the Department under ETA 3180. However, in the event that the Court were to conclude that the meaning of “warehousing and

reselling drugs for human use pursuant to a prescription” is ambiguous or doubtful as applied to PharMerica, then consistent with *Aventis*, the Court should strictly construe the statute and resolve any doubt or ambiguity in favor of PharMerica and against the construction advanced by the Department. *See Aventis, supra*, 5 Wn. App. 2d at 642 n.1.

E. The Court should reverse the trial court’s order granting summary judgment to the Department and order the entry of judgment in favor of PharMerica.

Summary judgment may be granted in favor of the nonmoving party if it is clear that that party is entitled to the entry of judgment. *See, e.g., Impehoven v. Dep’t of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (reversing the trial court’s grant of summary judgment in favor of the taxpayer and ordering the entry of summary judgment in favor of the Department as the nonmoving party).

For the reasons explained above, PharMerica is clearly entitled to a judgment as a matter of law on its claim for the refund of the taxes it overpaid under the retailing tax rate on gross receipts that were properly subject to the prescription drug tax rate. Accordingly, since there are no genuine issues of material fact in dispute, the Court should reverse the judgment below and order the entry of summary judgment in favor of PharMerica.

V. CONCLUSION

For the reasons discussed above, PharMerica respectfully requests that the Court of Appeals reverse the trial court's order granting summary judgment in favor of the Department and order the entry of summary judgment in favor of PharMerica, granting its claim for the refund of the entire amount of the overpaid B&O tax it paid at the higher retailing B&O tax rate on gross income derived from warehousing and reselling prescription drugs, in the amount of \$167,908, plus refund interest calculated in the manner prescribed by RCW 82.32.060.

DATED: January 2, 2019.

STOLL PETTEYS PLLC



By: _____

David A. Petteys, WSBA No. 33157
1455 NW Leary Way, Suite 400
Seattle, Washington 98107
Telephone: (206) 456-6697
Facsimile: (888) 494-3028
david@stollpetteys.com

Attorneys for Appellant Pharmacy
Corporation of America

VI. APPENDIX

- A-1: Order Granting Department's Motion for Summary Judgment
- A-2: Excerpt from Verbatim Report of Proceedings
- A-3: Excise Tax Advisory (ETA) 3180.2013 (2013)
- A-4: House Bill Report, ESHB 2933 (1998)
- A-5: Dual Eligible Beneficiaries Under Medicare and Medicaid, U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (May 2018)

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 2, 2019, I caused a true and correct copy of the foregoing Brief of Appellant to be served on the following individual(s) via electronic mail and U.S. Mail:

Andrew Krawczyk, WSBA No. 42982
Assistant Attorney General
7141 Cleanwater Lane SW
Olympia, WA 98504-0123
Andrewk1@dor.wa.gov
JulieJ@atg.wa.gov
REVOLyEF@atg.wa.gov

SIGNED this 2nd day of January, 2019, at Seattle, Washington.

 /s/ Jeannie Osgood
Jeannie Osgood, WSBA # 27551

APPENDIX A-1

16-2-02724-34
ORGSJ 42
Order Granting Summary Judgment
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Linda Myhre Enlow
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No Hearing Set
 Hearing is Set
Date: August 17, 2018
Time: 9:00 a.m.
Judge Dixon/Civil

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

PHARMACY CORPORATION OF
AMERICA, a California corporation,

Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant.

NO. 16-2-02724-34

~~PROPOSED~~ ORDER GRANTING
DEPARTMENT'S MOTION FOR
SUMMARY JUDGMENT

THIS MATTER coming on for hearing on the Defendant State of Washington Department of Revenue's motion for summary judgment, Plaintiff appearing by David Petteys, Stoll Petteys PLLC, and Defendant State of Washington Department of Revenue appearing by ROBERT W. FERGUSON, Attorney General for the State of Washington, and Andrew Krawczyk, Assistant Attorney General. The following documents and evidence were called to the attention of the Court:

1. Department of Revenue's Motion for Summary Judgment filed May 22, 2018;
2. Memorandum in Support of Defendant Department's Motion for Summary Judgment filed on July 20, 2018 with Attachment 1;
3. Declaration of Andrew Krawczyk In Support of Summary Judgment dated July 20, 2018 with Exhibits A-C;

1 4. Declaration of John Scheller In Support of Department's Motion for Summary
2 Judgment dated July 20, 2018 with Exhibits A-I;

3 5. PharMerica's Opposition to the Department of Revenue's Motion for Summary
4 Judgment filed on August 7, 2011;

5 6. Declaration of David A. Petteys in Support of PharMerica's Opposition to the
6 Department's Motion for Summary Judgment with exhibits A-1 and A-2;

7 7. Declaration of Karlyn Tropeano in Support of PharMerica's Opposition to the
8 Department's Motion for Summary Judgment with exhibit 1.

9 8. Declaration of Ben Riley in Support of PharMerica's Opposition to the
10 Department's Motion for Summary Judgment with exhibits A and B;

11 9. Declaration of David Rose in Support of PharMerica's Opposition to the
12 Department's Motion for Summary Judgment with exhibits A and B;

13 10. Notice of Errata and Correction Regarding Declaration of Ben Riley; and,

14 11. Defendant Department of Revenue's Reply In Support of Motion for Summary
15 Judgment.

16 12. _____
17 _____

18 The Court having considered the documents filed by the parties in support and opposition
19 to the parties' cross motions for summary judgment, including the documents identified above
20 and the records and files herein, and having heard argument of counsel and being fully advised in
21 the premises:

22 IT IS HEREBY ORDERED that:

- 23 1. Department of Revenue's Motion for Summary Judgment is GRANTED;
- 24 2. Plaintiff's Notice of Appeal is hereby DISMISSED with prejudice;
- 25 3. Each side shall bear their own attorney's fees and costs; and
- 26 4. This Order shall constitute the Judgment of the Court.

IT IS SO ORDERED

On this 17 day of August, 2018



The Honorable Judge James J. Dixon

Presented by:

ROBERT W. FERGUSON
Attorney General



ANDREW KRAWCZYK, WSBA No. 42982
Assistant Attorney General
Attorneys for Defendant
State of Washington Department of Revenue, OID No. 91027

Approved as to form/
Notice of presentation waived:

STOLL PETTEYS PLLC



DAVID PETTEYS, WSBA No. 33157
Attorneys for Plaintiff Pharmacy
Corporation of America

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APPENDIX A-2

1 don't know that -- I don't think either party has
2 argued what the legislative intent was here. And
3 since that's the case, I won't bother speculating.
4 But that's all I have, Your Honor. I'm happy to
5 entertain any questions. Thank you.

6 THE COURT: Thank you. I don't.

7 It's now 11:59. There are people here in the
8 courtroom that don't work for me, and so the court
9 wants the parties to know that I have spent some time
10 reviewing the pleadings and conducting some
11 additional research, in addition to the cases cited
12 by the parties. So the court is not going to place
13 its ruling on the record, because I only have
14 26 seconds to do that, out of fairness to other
15 people here in the courtroom.

16 So if the parties will leave with the clerk, if
17 they have them, proposed orders, the court will sign
18 a proposed order later this afternoon. There's one
19 more issue I want to look at based upon an argument
20 made by the petitioner here. There is a case I want
21 to look at here. But I'll make a decision this
22 afternoon, file the order, and get a copy to both
23 parties.

24 Thank you. The court is in recess.

25 MR. PETTEYS: Thank you, Your Honor.

APPENDIX A-3



Excise Tax Advisory

Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230.

ETA 3180.2013

Issue Date: September 25, 2013

Warehousing/Reselling Prescription Drug B&O Tax Preference

Background

The purpose of this excise tax advisory (ETA) is to clarify the requirements to qualify for preferential tax treatment under RCW 82.04.272.

RCW 82.04.272 provides a preferential B&O tax rate to persons “engaging in the business of warehousing and reselling drugs for human use pursuant to a prescription.” This statute defines “warehousing and reselling drugs for human use pursuant to a prescription” to be:

The buying of drugs for human use pursuant to a prescription from a manufacturer or another wholesaler, and reselling of the drugs to persons selling at retail or to hospitals, clinics, health care providers, or other providers of health care services, by a wholesaler or retailer who is registered with the federal drug enforcement administration and licensed by the Pharmacy Quality Assurance Commission.

Seller and Buyer Requirements

To qualify for the preferential B&O tax rate, the seller must satisfy all of the Seller Requirements AND the qualifying sale must be made to a buyer meeting at least one of the Buyer Requirements:

Seller Requirements

To qualify for the preferential B&O tax rate, the seller must satisfy the following requirements:

- Purchase prescription drugs from a manufacturer or wholesaler¹;
- Warehouse and resell the prescription drugs²;
- Be registered with the Federal Drug Enforcement Administration; and

¹ Direct sales of drugs by the manufacturer do not qualify for the preferential Warehousing/Reselling Prescription Drug B&O tax rate, because the drugs sold were not previously purchased from a manufacturer or wholesaler.

² There is no requirement that the warehousing activity occur within Washington.

To request this document in an alternate format, visit <http://dor.wa.gov> and click on “contact us” or call 1-800-647-7706. Teletype (TTY) users may use the Washington Relay Service by calling 711.

General tax information is available on our website at dor.wa.gov.

Questions? Complete the online form at dor.wa.gov/communications or call 800-647-7706. If you want a binding ruling from the Department, complete the form at dor.wa.gov/rulings.

- Be licensed by the Pharmacy Quality Assurance Commission (as either a wholesaler or retailer).
-

Buyer Requirements

A seller qualifies for the preferential B&O tax rate if the seller satisfies all the requirements above and resells the prescription drugs directly to a buyer who is:

- A retailer with a pharmacy facility license or non-residential pharmacy license issued by the Department of Health under RCW 18.64.043 or RCW 18.64.370, respectively; or
 - A hospital, clinic, health care provider, or other provider of health care services.
-

APPENDIX A-4

HOUSE BILL REPORT

HB 2933

As Reported By House Committee On:

Finance

Title: An act relating to the business and occupation taxation of warehousing and reselling of pharmaceutical drugs subject to regulation by the federal drug enforcement administration and the state board of pharmacy.

Brief Description: Prescribing the taxation of businesses warehousing and selling pharmaceutical drugs.

Sponsors: Representatives Radcliff, Cooper, Cooke, Morris, Doumit, Dyer, L. Thomas, Zellinsky, Grant and Thompson.

Brief History:

Committee Activity:

Finance: 2/4/98, 2/9/98 [DPS].

HOUSE COMMITTEE ON FINANCE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Carrell, Vice Chairman; Mulliken, Vice Chairman; Dunshee, Ranking Minority Member; Boldt; Conway; Mason; Morris; Pennington; Schoesler; Thompson and Van Luven.

Staff: Rick Peterson (786-7150).

Background: The business and occupation tax (B&O) is levied for the privilege of doing business in Washington. The tax is levied on 100 percent of the gross receipts of all business activities (except utility activities) conducted within the state.

Although there are several different rates, beginning July 1, 1998, the principal rates will be as follows:

Manufacturing/wholesaling	0.484	percent
Retailing	0.471	percent
Services	1.5	percent

Wholesalers that sell goods to retailers pay wholesaling B&O (0.484 percent) on the sales price of the goods sold.

Washington does not assess B&O tax on sales of goods which originate in Washington if the receipt of the goods occurs outside Washington. Washington does not apply B&O tax on sales of goods which originate outside the state unless the goods are received by the purchaser in this state and the out-of-state seller is legally considered to be doing business in Washington.

Out-of-state wholesalers may use direct seller's representatives or take orders by telephone or mail and avoid B&O tax.

Summary of Substitute Bill: Wholesalers of prescription drugs are provided a tax reduction. The tax rate is reduced from 0.484 percent of gross income to 0.138 percent of gross income.

Substitute Bill Compared to Original Bill: The substitute bill applies a tax rate of 0.138 percent of gross income while the original bill tax applied a tax of 0.484 percent of 4 percent of gross income (equivalent to a tax rate of 0.0194 percent of gross income).

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect on July 1, 1998.

Testimony For: Competition from out-of-state firms and mail order companies is hurting Washington distributors of pharmaceutical products. These competitors use their out-of-state location to avoid the B&O tax. The B&O tax averages roughly 25 percent of the profit of Washington firms. The proposed tax treatment applies only to pharmaceutical drugs that are regulated by the Federal Drug Enforcement Administration and Washington State Board of Pharmacy. It would make Washington companies competitive with out-of-state sellers.

Testimony Against: None.

Testified: Representative Radcliff, sponsor; and Hubie McMorrow, Washington Wholesale Druggists' Association (pro).

APPENDIX A-5



DUAL ELIGIBLE BENEFICIARIES UNDER MEDICARE AND MEDICAID

Target Audience: Medicare Fee-For-Service Providers and Medicaid Programs

The Hyperlink Table, at the end of this document, provides the complete URL for each hyperlink.

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Medicare and Medicaid Programs	2
Medicare Program.....	2
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Dual Eligible Beneficiaries	3
Medicare Savings Programs	4
Prohibited Billing of QMBs and Medicare Assignment	7
Resources	7

Learn about these topics on dual eligible beneficiaries under Medicare and Medicaid:

- Medicare and Medicaid Programs
- Dual eligible beneficiaries
- Prohibited billing of Qualified Medicare Beneficiary (QMB) individuals and Medicare assignment
- Resources

When “you” is used in this publication, we are referring to Medicare and Medicaid health care providers.

Medicare and Medicaid Programs

Medicare Program

Medicare is health insurance for people 65 or older, certain people under 65 with disabilities, and people of any age with End-Stage Renal Disease.

Medicare consists of four different parts:

- **Part A** – Hospital insurance (inpatient hospital care, inpatient care in a Skilled Nursing Facility, hospice care, and some home health services)
- **Part B** – Medical insurance (physician services, outpatient care, durable medical equipment, home health services, and many preventive services)
- **Part C** – Medicare Advantage (MA) (Medicare-approved private insurance companies provide all Part A and Part B services and may provide prescription drug coverage and other supplemental benefits)
- **Part D** – The Prescription Drug Benefit (Medicare-approved private companies provide outpatient prescription drug coverage)

The Extra Help Program helps pay for monthly premiums, annual deductibles, and copayments for Medicare Beneficiaries who have or want Part D coverage and meet certain income and resource limits.

Medicare beneficiaries can get their Medicare coverage one of these ways:

- Receive Part A and Part B services through the **Original Medicare Program**. To get Part D coverage, they must join a stand-alone Prescription Drug Plan.
- Receive Part A and Part B services from an **MA Plan** if they reside in its service area. Most MA plans include Part D coverage.

Medicaid Program

Medicaid is a medical health insurance program funded by Federal and State governments that pays costs for certain individuals and families with low incomes and, in some cases, limited resources.

The Federal government sets statutes, regulations, and policies. Each State operates within those broad national guidelines and:

- Establishes its own eligibility standards
- Determines the type, amount, duration, and scope of services
- Sets the rate of payment for services
- Administers its own program

Dual Eligible Beneficiaries

“Dual eligible beneficiaries” generally describes beneficiaries eligible for both Medicare and Medicaid. The term includes beneficiaries enrolled in Medicare Part A and/or Part B and receiving full Medicaid benefits and/or assistance with Medicare premiums or cost sharing through one of these Medicare Savings Program (MSP) categories:

- **Qualified Medicare Beneficiary (QMB) Program:** Helps pay premiums, deductibles, coinsurance, and copayments for Part A, Part B, or both programs
- **Specified Low-Income Medicare Beneficiary (SLMB) Program:** Helps pay Part B premiums
- **Qualifying Individual (QI) Program:** Helps pay Part B premiums
- **Qualified Disabled Working Individual (QDWI) Program:** Pays the Part A premium for certain disabled and working beneficiaries

Medicare pays covered medical services first for dual eligible beneficiaries because Medicaid is generally the payer of last resort. Medicaid may cover medical costs that Medicare may not cover or partially covers (such as nursing home care, personal care, and home- and community-based services).

Medicare and Medicaid dual eligible benefits vary by State. Some States offer Medicaid through Medicaid managed care plans, while other States provide Fee-For-Service Medicaid coverage. Some States provide certain dual eligible beneficiary plans that include all Medicare and Medicaid benefits.

Federal law defines income and resource standards for full Medicaid and the MSPs, but States have discretion to effectively raise those limits above the Federal floor. On an annual basis, the Centers for Medicare & Medicaid Services (CMS) releases [dual eligible standards](#). The Medicare Savings Programs section on the next page provides additional information.

Medicare Savings Programs

[MSPs](#) consider an individual's income and resources and other criteria. States can raise Federal income and resources criteria under Section [1902\(r\)\(2\)](#) of the Social Security Act (the Act) for most of the MSP groups (though not QDWIs), as long as they ensure that a QMB's income and resources are raised at least as much as they are raised for SLMBs or QIs. Tables 1 through 7 summarize the benefits and basic qualifications for each program.

Table 1. Full Medicaid (only)

Benefits & Qualifications	Description
Benefits	<ul style="list-style-type: none"> • Full Medicaid coverage either through mandatory coverage groups (for example, Supplemental Security Income [SSI] recipients) or optional coverage groups such as the “special income level” group for institutionalized individuals or home- and community-based waiver participants and medically needy individuals • Medicaid may pay Part A (if any) and Part B premiums and cost-sharing for Medicare services furnished by Medicare providers to the extent consistent with the Medicaid State Plan
Qualifications	<ul style="list-style-type: none"> • States determine income and resources criteria • No required enrollment in Medicare Parts A and B • State Medicaid eligibility may factor in the individual's institutional status or clinical need in some cases

Table 2. QMB Only

Benefits & Qualifications	Description
Benefits	<ul style="list-style-type: none"> • Medicaid pays Part A (if any) and Part B premiums • Medicaid may pay deductibles, coinsurance, and copayments for Medicare services furnished by Medicare providers consistent with the Medicaid State Plan (even if the Medicaid State Plan payment is unavailable for these charges, the QMB is not liable for them)
Qualifications	<ul style="list-style-type: none"> • Income may be up to 100% of the Federal Poverty Level (FPL) • Resources must be no more than 3 times the SSI resource limit, adjusted annually according to Consumer Price Index (CPI) increases • To qualify as a QMB Only, the beneficiary must be enrolled in Part A (or if uninsured for Part A, have filed for premium Part A on a conditional basis). For more information on this process, refer to Section HI 00801.140 of the Social Security Administration Program Operations Manual System.

Table 3. QMB Plus

Benefits & Qualifications	Description
Benefits	<ul style="list-style-type: none"> • Full Medicaid coverage • Medicaid pays Part A (if any) and Part B premiums, and may pay deductibles, coinsurance, and copayments consistent with the Medicaid State Plan (even if the Medicaid State Plan payment is unavailable for these charges, the QMB is not liable for them)
Qualifications	<ul style="list-style-type: none"> • Income may be up to 100% of the FPL • States determine resources criteria • To qualify as a QMB Plus, the individual must be enrolled in Part A (or if uninsured for Part A, have filed for premium Part A on a conditional basis). For more information on this process, refer to Section HI 00801.140 of the Social Security Administration Program Operations Manual System. • To qualify for full Medicaid benefits, an individual must meet financial and other criteria

Table 4. SLMB Only

Benefits & Qualifications	Description
Benefits	<ul style="list-style-type: none"> • Medicaid pays Part B premiums
Qualifications	<ul style="list-style-type: none"> • Income must be more than 100% but less than 120% of the FPL • Resources must be no more than 3 times the SSI resource limit, adjusted annually according to CPI increases • To qualify as an SLMB Only, individuals must be enrolled in Part A. Part A coverage is not a factor for full Medicaid eligibility.

Table 5. SLMB Plus

Benefits & Qualifications	Description
Benefits	<ul style="list-style-type: none"> • Full Medicaid coverage • Medicaid pays Part B premiums
Qualifications	<ul style="list-style-type: none"> • Income must be more than 100% but less than 120% of the FPL • States determine resources criteria • To qualify as a SLMB Plus, individuals must be enrolled in Part A. Part A coverage is not a factor for full Medicaid eligibility. • To qualify for full Medicaid benefits, an individual must meet financial and other criteria

Table 6. QI

Benefits & Qualifications	Description
Benefits	<ul style="list-style-type: none"> • Medicaid pays Part B premiums
Qualifications	<ul style="list-style-type: none"> • Income must be at least 120% but less than 135% of the FPL • Resources must be no more than 3 times the SSI resource limit, adjusted annually according to CPI increases • To qualify as a QI, individuals must be enrolled in Part A. Part A coverage is not a factor for full Medicaid eligibility. • Beneficiaries under this program are not otherwise eligible for full Medicaid coverage through the State

Table 7. QDWI

Benefits & Qualifications	Description
Benefits	<ul style="list-style-type: none"> • Medicaid pays Part A premiums
Qualifications	<ul style="list-style-type: none"> • Income must be no more than 200% of the FPL • Resources must be no more than 2 times the SSI resource limit • The individual with a qualifying disability lost free Part A coverage upon returning to work and now must enroll in and purchase Part A coverage

Prohibited Billing of QMBs and Medicare Assignment

Be aware that certain billing prohibitions apply to dual eligible beneficiaries you serve. Federal law (Sections [1902\(n\)\(3\)\(B\)](#) and [1866\(a\)\(1\)\(A\)](#) of the Act, as modified by Section 4714 of the Balanced Budget Act of 1997) prohibits all Medicare providers from billing QMBs for all Medicare deductibles, coinsurance, or copayments. All Medicare and Medicaid payments you receive for furnishing services to a QMB are considered payment in full. You are subject to sanctions if you bill a QMB for amounts above the total of all Medicare and Medicaid payments (even when Medicaid pays nothing). For more information on prohibited billing of QMBs, visit [Prohibition on Billing Dually Eligible Individuals Enrolled in the Qualified Medicare Beneficiary \(QMB\) Program](#) and Section [1902](#) of the Act.

Also under Section [1848\(g\)\(3\)\(A\)](#) of the Act, all Medicare providers must accept assignment for Part B services furnished to dual eligible beneficiaries. Assignment means the Medicare-allowed amount (Physician Fee Schedule amount) constitutes payment in full for all Part B-covered services provided to beneficiaries.

Medicare Remittance Advice notices clearly indicate if a beneficiary is a QMB and show that the beneficiary's responsibility for deductible, copayment, and coinsurance cost-sharing is zero. Providers may bill subsequent payers for any cost-sharing amounts. If you collected any money from a QMB for cost-sharing, then you must refund it. If you sent a bill for these charges to a QMB, or turned such a bill over to collections, then you must recall it.

Resources

Table 8 lists some dual eligible beneficiary resources.

Table 8. Dual Eligible Beneficiary Resources

For More Information About...	Resource
Medicare and Medicaid Basics	CMS.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/MLN-Publications-Items/ICN909330.html
Medicare General Information, Eligibility, and Entitlement: Chapter 2—Hospital Insurance and Supplementary Medical Insurance	CMS.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/ge101c02.pdf
Medicare Claims Processing Manual, Chapter 1—General Billing Requirements, Section 200 – Qualified Medicare Beneficiary (QMB) Program	CMS.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c01.pdf
Medicare Savings Programs	Medicare.gov/your-medicare-costs/help-paying-costs/medicare-savings-program/medicare-savings-programs.html
Qualified Medicare Beneficiary (QMB) Program	CMS.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/QMB.html

Table 8. Dual Eligible Beneficiary Resources (cont.)

For More Information About...	Resource
Social Security Administration's Role in Medicare Savings Programs (MSP) Applications	Secure.SSA.gov/poms.nsf/lnx/0600815024
Reinstating the Qualified Medicare Beneficiary Indicator	CMS.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/MM10433.pdf CMS.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/MM9911.pdf
Medicare Advantage and Other Medicare Health Plans – General Information	CMS.gov/Medicare/Health-Plans/HealthPlansGenInfo
Medicare Managed Care Manual	CMS.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS019326.html
Medicare Managed Care Manual: Chapter 16b—Special Needs Plans, Section 20.2 – Dual Eligible SNPs	CMS.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/mc86c16b.pdf
Prescription Drug Coverage—General Information	CMS.gov/Medicare/Prescription-Drug-Coverage/PrescriptionDrugCovGenIn
Medicare Prescription Drug Benefit Manual	CMS.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS050485.html
Extra Help Program	SSA.gov/benefits/medicare/prescriptionhelp SSA.gov/pubs/EN-05-10508.pdf
Medicaid	Medicaid.gov
Medicare-Medicaid Coordination Office	CMS.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office
Medicare Learning Network® (MLN) Catalog	CMS.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/MLNCatalog.pdf
Medicare Information for Beneficiaries	Medicare.gov
Medicare Administrative Contractor Contacts	Go.CMS.gov/MAC-website-list

Table 9. Hyperlink Table

Embedded Hyperlink	Complete URL
1848(g)(3)(A)	https://www.ssa.gov/OP_Home/ssact/title18/1848.htm#act-1848-g-3
1866(a)(1)(A)	https://www.ssa.gov/OP_Home/ssact/title18/1866.htm
1902	https://www.ssa.gov/OP_Home/ssact/title19/1902.htm
1902(n)(3)(B)	https://www.ssa.gov/OP_Home/ssact/title19/1902.htm#act-1902-n-3
1902(r)(2)	https://www.ssa.gov/OP_Home/ssact/title19/1902.htm#act-1902-r-2
Dual Eligible Standards	https://www.medicaid.gov/medicaid/eligibility/medicaid-enrollees
MSPs	https://www.medicare.gov/your-medicare-costs/help-paying-costs/medicare-savings-program/medicare-savings-programs.html
Prohibition on Billing Dually Eligible Individuals Enrolled in the Qualified Medicare Beneficiary (QMB) Program	https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/SE1128.pdf
Social Security Administration Program Operations Manual System	https://secure.ssa.gov/apps10/poms.nsf/lnx/0600801140

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