

**BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION**

**FRESENIUS MEDICAL CARE
LAKE FOREST, LLC**

VERSUS

**BEVERLY GARIEPY, IN HER CAPACITY
AS DIRECTOR OF DEPARTMENT OF
FINANCE; CITY OF NEW ORLEANS
DEPARTMENT OF FINANCE, BUREAU
OF REVENUE**

**B.T.A. DOCKET NOS. L00814
and L00823**

**FRESENIUS MEDICAL CARE
LAKE FOREST, LLC**

VERSUS

**NORMAN WHITE, IN HIS CAPACITY
AS DIRECTOR OF DEPARTMENT OF
FINANCE; CITY OF NEW ORLEANS
DEPARTMENT OF FINANCE, BUREAU
OF REVENUE**

**B.T.A. DOCKET NOS. L00838,
L00851,L00870, L00889, L00911,
L00922,L00930, L00944, L00955,
L00966,L00979, L00997, L01011,
L01024,L01044, L01058, L01092,
L01103, L01112, L01135, L01148,
L01172,L01183, L01184, L01235,
L01245,L01255, L01294, L01313,
L01347,L01382, L01422, L01434,
L01459,L01486, L01507, L01529,
L01549,L01572, L01594, L01615,
L01646,L01678, L01726, L01750**

**FRESENIUS MEDICAL CARE
CAPITAL CITY, LLC**

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**NORMAN FOSTER, IN HIS CAPACITY
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**B.T.A. DOCKET NOS. L00402,
L00413 AND L00434**

**FRESENIUS MEDICAL CARE
CAPITAL CITY, LLC**

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**B.T.A. DOCKET NOS. L00444,
L00455, L00469, L00497, L00519,
L00532, L00536, L00555, L00569,
L00596, L00625, L00645, L00657,
L00671, L00683, L00696, L00719,
L00734, L00759, L00771, L00784
and L00802**

**BEVERLY GARIEPY, IN HER CAPACITY
AS DIRECTOR OF DEPARTMENT OF
FINANCE; CITY OF NEW ORLEANS
DEPARTMENT OF FINANCE, BUREAU
OF REVENUE**

**JUDGMENT WITH WRITTEN REASONS
ON THE CITY'S MOTION FOR SUMMARY JUDGMENT**

On April 11, 2024, this matter came before the Board for hearing on the *Motion for Summary Judgment* filed by Norman White, in his capacity as Director of the Department of Finance; and the City of New Orleans, Department of Finance, Bureau of Revenue (collectively, the "City"). Presiding at the hearing was Local Tax Judge Cade R. Cole. Appearing before the Board were Jesse R. Adams, III and Andre B. Burvant, attorneys for Fresenius Medical Care Lake Forest, LLC and Fresenius Medical Care Capital City, LLC (collectively, "Fresenius"), and James M. Roquemore, attorney for the City. At the conclusion of the hearing, the Board took the matter under advisement. The Board now rules as follows for the reasons set forth in the attached Written Reasons:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the City's *Motion for Summary Judgment* BE AND IS HEREBY DENIED.

This is a non-final Judgment and does not constitute an appealable Judgment as contemplated by La. R.S. 47:1410 and La. R.S. 47:1434.

JUDGMENT RENDERED AND SIGNED THIS 2ND DAY OF MAY, 2024.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE

**BOARD OF TAX APPEALS
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**WRITTEN REASONS FOR JUDGMENT
ON THE CITY'S MOTION FOR SUMMARY JUDGMENT**

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Background

Fresenius operates multiple dialysis facilities in Orleans Parish. Fresenius provides dialysis services to patients who are diagnosed with stage 5 Chronic Kidney Disease, also known as End-Stage Renal Disease ("ESRD"). ESRD is an irreversible and permanent kidney failure that requires regular dialysis treatments (usually, two to three times a week) and prescription drug administration to maintain life. These

conditions result in significant medical cost. Some of Fresenius's patients are covered by Medicare and some of its patients are not.¹

As part of its operation, Fresenius purchases prescription drugs from AmerisourceBergen Drug Corporation ("ABC"). Fresenius did not purchase prescription drugs for Medicare patients separately from prescription drugs for non-Medicare patients. Medicare is not a party to the transactions between Fresenius and ABC. Medicare does not regulate or instruct Fresenius as to what vendors to order prescription drugs from. Medicare does not set or regulate the price that Fresenius pays to ABC. Instead, Medicare reimbursed Fresenius for the dialysis services and prescription drugs administered to Medicare ESRD patients. As part of Medicare's reimbursement process, Fresenius submits an itemized list of the specific drugs and units of drugs administered to its Medicare patients as a part of a bundled payment process.

Fresenius administered specific prescription drugs to its Medicare patients pursuant to Medicare's ESRD-specific Conditions for Coverage ("CfC's") and each Medicare patient's prescriptions, standing orders, as well as the corresponding requirements and guidance of Medicare. Fresenius also administered prescription drugs to non-Medicare patients. However, Fresenius maintains that those prescription drugs are not at issue in these consolidated matters. Nevertheless, Fresenius does not store prescription drugs for Medicare patients separately from prescription drugs for non-Medicare patients.

Fresenius maintains a standard supply of each prescription drug at its facilities (the "par" level). To ensure that the par level is maintained, each week the facility informs the Fresenius Medical Care procurement group of the amount of each

¹ Fresenius asserts that the vast majority of its patients are enrolled or become enrolled in Medicare.

drug that it has in inventory. Drugs are ordered and delivered based upon the difference between the actual inventory and the par level.

The Centers for Medicare and Medicaid Services (“CMS”), which is the federal bureau that manages the Medicare program, developed CfC’s to regulate the minimum health, safety, and patient care standards for the operation of ESRD dialysis facilities. Medicare Part B covers all services, items, supplies, and equipment necessary to perform dialysis as well as drugs that are medically necessary in the treatment of the patient for ESRD if they are furnished in approved ESRD facilities. The facilities at issue in this case are so certified and are non-hospital facilities regulated under Medicare Part B. Fresenius must maintain compliance with the CfC’s and the provisions of Medicare to continue to participate in the Medicare ESRD program.

The ESRD CfC’s require Fresenius to organize an interdisciplinary team to provide each patient with an individualized comprehensive assessment and corresponding Plan of Care that specifies what is necessary to address the patient’s needs. Each patient’s Plan of Care must include measurable and expected outcomes that meet current evidence-based professionally-accepted clinical practice standards as required by CMS. The standards include administering the necessary related prescription drugs to address anemia and to achieve/sustain clinically appropriate hemoglobin and hematocrit levels.

The attending physician prescribes a regular, systematic, course of dialysis, including the frequency and duration of treatment and necessary prescription drugs. The physician completes and signs an admission order and a standing order for each patient. All of the prescription drugs ordered and purchased by Fresenius from ABC were required to be ordered on behalf of, and with the authorization of a licensed physician. Furthermore, a physician must approve any modifications to an individual patient’s prescription drug dosages.

Each morning, before patients arrive, the nurses will review the schedule of patients to be treated that day and based upon the standing orders, will retrieve the necessary prescription drugs for administration from storage. As the patient is receiving dialysis treatment, the nurse will administer the prescribed drugs as called for in the standing orders at the chair where the patient is receiving their dialysis treatment.

At each chair, there is a computer terminal that monitors the treatment, and also allows the nurse to input the drugs administered to the patient into an electronic medical chart. The medical chart allows Fresenius to keep track of each drug administered, including the dosage and amount, for each patient at each treatment visit. The electronic data regarding the administration of prescription drugs is uploaded to each patient's electronic medical record, as well as tracked in Fresenius's recordkeeping system. The existence of these patient-specific records is a matter of uncontested fact, although the actual records themselves were not attached to Fresenius's Memorandum.

Discussion

The City seeks summary judgment on the grounds that Fresenius cannot prove that its purchases of prescription drugs administered to Medicare patients are non-taxable under any of the three following statutes:

La. R.S. 47:301(10)(u):

For purposes of sales and use taxes levied and imposed by local governmental subdivisions, school boards, and other political subdivisions whose boundaries are not coterminous with those of the state, "sale at retail" by a person shall not mean or include the sale of tangible personal property if such sale is made under the provisions of Medicare.

La. R.S. 47:315.3(A):

Any person who has paid sales and use taxes, levied by the state and any other taxing authorities in the state, upon the sale, lease, or rental of tangible personal property when such sale, lease, or rental is paid by or under the provisions of Medicare, shall be entitled to reimbursement of the amount of tax paid on such property[.]

La. R.S. 47:337.9(F):

Notwithstanding any provision of law to the contrary, prescription drugs purchased through or pursuant to a **Medicare Part B** and D plan shall be exempt from the sales and use taxes imposed by any local governmental subdivision, school board, or other political subdivision whose boundaries are not coterminous with the state. [emphasis added].

The City argues that the foregoing statutes can never apply to purchases of supplies or drugs by a medical care provider from a wholesaler. Thus, in the City's view, none of the three provisions above can apply to any purchase of prescription drugs by Fresenius from ABC. *Crowe v. Bio-Med. Application of Louisiana, LLC*, 2014-0917 (La. App. 1 Cir. 6/3/16), 208 So.3d 473, *adhered to on reh'g*, 2014-0917 (La. App. 1 Cir. 2/17/11), 241 So.3d 328, and *writ denied*, 2017-0502 (La. 5/12/17), 219 So.3d 1106 addressed similar issues.

La. R.S. 47:337.9(F) provides an exemption for sales of prescription drugs purchased through or pursuant to a Medicare Part B plan. In *Crowe*, the First Circuit held that La. R.S. 47:337.9(F) is clearly-worded and could not apply to:

[B]ulk drug sales between a dialysis clinic and pharmaceutical vendor (sales in which the provisions of Medicare play no part in determining which drugs are purchased, which vendor is used, what price is paid, or whether sales tax is charged) to supply the *entire* population of the clinic's ESRD dialysis patients, including both Medicare and non-Medicare patients. Given that these drugs undisputedly are purchased for administration to *all* patients of the Franklinton clinic and that the purchases are not made through any Medicare Part B or D plan and are not paid by Medicare, we likewise agree with the district court that Bio-Medical is not entitled to a sales tax exemption

Crowe, 2014-0917, p. 26, 208 So.3d at 490–91 [emphasis in original].

Under *Crowe*, La. R.S. 47:337.9(F) applies only to sales of prescription drugs to a Medicare patient. Transactions of that nature are covered by Medicare Part D. However, the exemption must be broader than that, or it can never apply to a sale of prescription drugs purchased through or pursuant to a Medicare Part B plan. Medicare Part B applies to medically necessary doctor services, delivered either on an in-patient or an out-patient basis, as well as other outpatient care. Medicare Part

B covers institutional dialysis services and supplies furnished in an approved ESRD facility. This coverage extends to all services, items, supplies, and equipment necessary to perform dialysis, as well as drugs medically necessary for the treatment of an ESRD patient, routine dialysis monitoring tests, routine diagnostic tests, and “Epoetin (EPO)” and its administration. 42 C.F.R. § 410.50. The only way that Medicare Part B can be implicated in any sale of prescription drugs is when the medical provider purchases them from a dealer.

In *Iasis Glenwood Regional Medical Center, L. P. v. City of Monroe, Taxation and Revenue Division*, B.T.A. Docket No. L00033 (La. Bd. Tax App. 12/1/20) 2020 WL 8473317 (*Iasis I*), the Board held that the medical provider claiming the exemption had to “reliably calculate the medical supplies and prescription drugs administered to Medicare or Medicaid patients. . . . Specific proof must tie the use of a particular prescription drug for which tax was paid to an actual Medicare patient.” *Id.* at *5. On Motion for New Trial, the Board explained further that the ideal evidence to connect the supplies and drugs to Medicare patients would be Medicare patient billing statements showing the actual items used on the Medicare patients. *Iasis Glenwood Regional Medical Center, L. P. v. City of Monroe, Taxation and Revenue Division*, B.T.A. Docket No. L00033 (La. Bd. Tax App. 4/7/22) 2022 WL 2168846, at * 6 (*Iasis II*). The Board’s ruling in *Iasis II* came after the taxpayer claimed to have “detailed reports available listing the drug name, the amount administered, the charging physician, and the charge amount, and most importantly the type of insurance covering the patient.” *Id.* The Board held that if the taxpayer had introduced said proof, then the documented purchases of prescription drugs for Medicare patients would have been proven to be excluded from taxation. *Id.*

Here, Fresenius has a record of the specific drugs administered to each patient, including the specific amount of each dose. Although the specific patient records are not a part of the competent summary judgment evidence, their existence is established by Fresenius’s uncontested affidavit that was attached to its

Memorandum. The existence of said records is sufficient to at least create a genuine dispute of material fact that precludes the City from obtaining summary judgment. Notably, the City does not genuinely dispute that Fresenius has these patient-specific records. Rather, the City maintains that the facts of this case are simply identical to the facts of *Crowe*. However, *Crowe* was a three-way split decision and hopelessly confused approach. Further, the Board cannot reconcile the rationale of *Crowe* with the clear text of La. R.S. 47: 47:337.9(F)'s exemption for purchases made under the provisions of Medicare Part B.

Accordingly, the Board will deny the City's *Motion for Summary Judgment*. Fresenius has demonstrated that there is a genuine issue of material fact as to its ability to connect the prescription drugs purchased to the actual drugs administered to Medicare patients. Resolution of that dispute will likely require a trial on the merits.

BATON ROUGE, LOUISIANA, THIS 2ND DAY OF MAY, 2024.

FOR THE BOARD:



LOCAL TAX JUDGE CADE R. COLE