

BOARD OF TAX APPEALS  
STATE OF LOUISIANA  
LOCAL TAX DIVISION

DVA HEALTHCARE RENAL CARE, INC.  
Petitioner,

vs.

B.T.A. DOCKET NO. L00094

NEWELL D. NORMAND, SHERIFF AND  
*EX-OFFICIO* TAX COLLECTOR,  
JEFFERSON PARISH; JEFFERSON  
PARISH BUREAU OF REVENUE AND  
TAXATION, SALES AND USE TAX DIVISION,  
Respondents.

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INTERIM ORDER AND REASONS  
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On December 5, 2024, this matter came before the Board by Zoom for hearing on the *Motion for Summary Judgment* filed by DVA Healthcare Renal Care, Inc. (“DHRC”). Presiding at the hearing was Local Tax Judge Cade R. Cole. Appearing before the Board were Jesse R. Adams, III, attorney for DHRC and Kenneth C. Fonte, attorney for the Newell D. Normand, Sheriff and Ex-Officio Tax Collector for Jefferson Parish (“Collector”). At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues the following Interim Order and Reasons.

**Background:**

The facts of this case are virtually identical to the facts presented in *Fresenius Medical Care Lake Forest, LLC v. Garipey*, BTA Docket Nos. L00402 *et. seq.* (La. Bd. Tax App. 6/5/24); 2024 WL 2944081. DHRC operates a Medicare-certified dialysis clinic in Jefferson Parish. DHRC orders prescription drugs for dialysis treatments

through DaVita, Inc.'s ("DaVita")<sup>1</sup> procurement system. DaVita makes centralized purchases of drugs to fulfill clinic orders as needed. The transaction detail for both types of purchases is stored in DaVita's accounts payable system and includes information by clinic on the drugs purchased and their total cost.

AmerisourceBergen Drug Corporation ("ABC") sold prescription drugs to DHRC through ABC's specialty drug distribution unit, ASD Healthcare ("ASD"). For every month during the tax periods January 1, 2009, through December 31, 2011 (collectively, the "Tax Periods"), all prescription drugs were purchased from ASD. ASD provided reports including the purchasing clinic, the drugs purchased, the cost per unit of each drug, the quantity of each drug purchased, and the total cost of each drug purchased.

The Center for Medicare and the Center for Medicaid Services (collectively, "CMS") are the federal bureaus that manage the Medicare and Medicaid programs. CMS develops regulations for minimum health, safety, and patient care standards for the operation of End-Stage Renal Dialysis ("ESRD") clinics. These regulations are known as Conditions for Coverage ("CfC's"). DHRC must comply with CfC's to participate in the Medicare program. The CfC's govern many aspects of patient care and the operation of an ESRD clinic (such as DHRC), but they do not impose any direct requirements on the transactions between DHRC and prescription drug vendors. In addition, neither Medicare nor CMS are party to DHRC's purchases of prescription drugs.

DHRC argues that it purchased prescription drugs for administration to Medicare patients pursuant to Medicare Part B plans. DHRC seeks to prove that it can connect a prescription drug purchase to the administration of that drug to a Medicare patient using the same method that the Board approved in *Fresenius*. As

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<sup>1</sup> DHRC is an affiliate of DaVita. DaVita, through its subsidiaries, provides various administrative services to DHRC, including, but not limited to, operational, accounting, financial, billing, collection, procurement, payroll, and recordkeeping services.

was the case in *Fresenius*, DHRC collected patient and drug administration data through terminals located adjacent to the chairs where patients received treatment. The chairside terminals tracked data including: the types of services provided; the number of distinct individual patients; each patient's insurance coverage; the types of drugs administered to each patient; and the dosage of each drug administered to each patient. This data was recorded in patient electronic medical records and DHRC's recordkeeping systems.

DaVita used the patient data to prepare Utilization Reports ("UR's"). The UR's show procedures administered to patients segregated by the patient's insurance coverage type: Medicaid; Medicare; Commercial; or Other. The UR's also show the number of distinct patients and the count of administrations of each procedure for each coverage category. Each procedure is tied to a Medication Procedure Code that shows what prescription drugs were administered in the treatment. The UR's show the drug dosages used in standardized units of measure. The units of measure that are employed depend on the drug and include: milliliters; milligrams; micrograms; and other "units." DaVita used the UR's to calculate a monthly percentage of doses of each drug administered to Medicare patients over the total doses of each drug administered to all patients.

DaVita has employed the same consultant used in *Fresenius*, Mr. Morty Steindler, to prepare its refund claims. Mr. Steindler multiplied the cost of purchasing each prescription drug in each month by the percentage of doses of that drug that were administered to Medicare patients in the same month. Mr. Steindler performed this calculation separately for different order quantities. In other words, for a drug sometimes purchased in single units and sometimes purchased in bulk, Mr. Steindler would multiply the ratio by sum of the bulk purchases separately from multiplying the ratio by the sum of the individual purchases. Mr. Steindler added the products of these multiplications together to arrive at an aggregate proportion of the price paid for each drug attributable to the doses of that drug that were administered



to Medicare patients. Mr. Steindler then multiplied this Medicare portion by the applicable sales tax rate to calculate a refund amount, minus vendor's compensation, for each month in the Tax Periods. Mr. Steindler's calculations are reflected in schedules shown on Attachments 14(a) and 14(b) to his Affidavit.<sup>2</sup> For DHRC, he calculated a refund in the amount of \$30,407.82.

**Summary Judgment Standard:**

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); *Beteta v. City of New Orleans*, 06-0972 (La. App. 4 Cir. 1110/07), 950 So.2d 862, 865. Normally, the party moving for summary judgment bears the burden of proving that no genuine issue of material fact exists. La. C.C.P. art. 966(D)(1). A material fact is one that ensures or precludes recovery, bears on a party's ultimate success, or is determinative of the legal dispute. *Hines v. Garrett*, 04-0803, p. 1 (La. 6/25/04), 876 So.2d 764, 765. A genuine issue is one upon which reasonable persons could disagree. *Larson v. XYZ Ins. Co.*, 16-0745, pp. 6-7 (La. 5/3/ 17), 226 So.3d 412, 416.

**Discussion:**

The substantial question presented is whether DHRC's refund calculation is based on a sufficiently convincing and reliable methodology, and if so, the amount of the refund to which they are entitled, if any. La. R.S. 47:337.9(F) (the "Exemption") provides in pertinent part:

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.

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<sup>2</sup> Mr. Steindler's Affidavit is attached as Exhibit F to DHRC's *Motion for Summary Judgment*.

The Collector argues that the Exemption can never apply to bulk purchases of prescription drugs by a medical care provider. Thus, in the Collector's view, the Exemption cannot apply to any purchase of prescription drugs by DHRC from ASD. The Collector relies on the First Circuit's decision in *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, which addressed similar issues.

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 BioMedical is not entitled to a sales tax exemption . . . .

*Crowe*, 2014-0917, p. 26, 208 So.3d at 490- 91.

The Board has interpreted *Crowe* to leave open the possibility that the Exemption can apply to individualized purchases. *Iasis Glenwood Regional Medical Center, LP v. City of Monroe*, Docket No. L00033 (La. Bd. Tax App. 12/1/20); 2020 WL 8473317 (*Iasis I*). Medicare Part B applies to medically necessary doctor services, delivered either on an in-patient or an out-patient basis, as well as other out-patient 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. As such, to the extent that it is necessary for the provider to purchase prescription drugs in bulk to provide medically necessary treatment to Medicare patients, those bulk purchases

are made pursuant to a Medicare Part B plan. The competent summary judgment evidence demonstrates that such purchases are necessary.

However, proving the amount of the refund to which the plaintiff is entitled requires the claimant to overcome the high evidentiary challenge of connecting the particular drugs purchased to the administration of said drugs to Medicare patients. *Iasis Glenwood Regional Medical Center, LP v. City of Monroe*, Docket No. L00033 (La. Bd. Tax App. 4/7/22); 2022 WL 2168846 (*Iasis II*) (denying motion for new trial). As was the case in *Iasis I*, *Iasis II*, and *Fresenius*, the difficulty lies in proving the proportion of said purchases that are necessary for the treatment of Medicare patients. The refund calculation formula in *Iasis I* and *Iasis II* was a reasonable approximation but only a “best guess” attempt by the taxpayer to meet this evidentiary burden—not enough to carry their burden on the merits at trial.

The formula used by the taxpayer in *Fresenius*, however, was not a simple estimation of a refund. The *Fresenius* formula demonstrably quantified the actual portion of drugs purchased that were administered to Medicare patients. DHRC is applying that same formula to the facts of this case. DHRC’s formula uses the same data which tracks the type and quantity of drugs administered, the patients to which they were administered, and the patients’ insurance providers. Further, DHRC collects patient and drug administration data at the time and place of treatment via adjacent terminals. Additionally, DHRC’s refund calculation is based on consistent units of measurement and the dosages purchased translate to the dosages administered. As was the case in *Fresenius*, DHRC’s Medicare ratio is derived from doses administered to Medicare patients and its methodology applies that ratio to the doses purchased. Thus, DHRC, like the clinics in *Fresenius*, has overcome the evidentiary challenge identified by the Board.

Nevertheless, the Collector raises three legal arguments that were not raised in *Fresenius*. First, the Collector argues that the La. R.S. 47:301(10)(u) and La. R.S. 47:337.9(F) are in conflict. According to the Collector, this conflict is resolved by

applying La. R.S. 47:337.9(F), as it is the more specific statute. The Collector further posits that the Taxpayer's method of connecting purchases to Medicare patients is an after-the-fact re-characterization of the subject transactions that is contrary to the canons of construction applicable to an exemption statute.

La. R.S. 47:337.9(F) begins with the prefatory language "notwithstanding any law to contrary." Normally, this language indicates that, within the scope of the provision that follows, no other statute applies. Therefore, the Collector may be correct in asserting that the La. R.S. 47:337.9(F) takes primacy over La. R.S. 47:301(10)(u). However, the Board finds that this construction requires there to first be a conflict to resolve, and we do not find one here.

La. R.S. 47:301(10)(u) applies to sales made "under the provisions of medicare." La. R.S. 47:337.9(F) applies to "prescription drugs purchased through or pursuant to a Medicare Part B and D plan." A sale of prescription drugs to a Medicare patient is directly subject to certain Medicare provisions. Such a transaction is within the scope of La. R.S. 47:301(10)(u). However, a provider's purchases of prescription drugs from a wholesaler or distributor are not directly subject to any Medicare provisions. As the Court observed in *Crowe*, such transactions are not within the scope of La. R.S. 47:301(10)(u). Such transactions may, nevertheless, be purchases made pursuant to a Medicare Part B plan within the scope of La. R.S. 47:337.9(F). With respect to those transactions, which are the types of transactions at issue in this case, La. R.S. 47:337.9(F) applies in the absence of La. R.S. 47:301(10)(u). The statutes are not in conflict but actually complement one another.

However, the Collector asks the Board to interpret La. R.S. 47:337.9(F) to conflict with and override La. R.S. 47:301(10)(u) so as to make something taxable that would otherwise be excluded from the scope of taxation *ab initio* under our statutory law. An exemption is a special privilege that relieves the burden of taxation, but the result urged by the Collector paradoxically flips the exemption statute into an indirect imposition of a tax. Moreover, the plain language of La. R.S. 47:337.9(F) does



not expand the scope of what is taxable, its intent is clearly the opposite. Finally, the Board found that the taxpayer in *Fresenius* met their burden of proof under La. R.S. 47:337.9(F), which is an exemption statute. DHRC has made the same showing here. Thus, the proof provided to the Board is sufficient for DHRC to be entitled to relief under the exemption provided by La. R.S. 47:337.9(F).

The Collector's second and third arguments are both directed at the identity of the entity that can claim the Exemption. On the one hand, the Collector argues that the Taxpayer cannot avail itself of La. R.S. 47:337.9(F) because it is not the entity who purchased the prescription drugs. On the other hand, the Collector argues that the actual purchasing entity, DaVita, cannot claim the exemption because it is not the entity that operated the ESRD clinic.

Nothing in La. R.S. 47:337.9(F) forbids the use of a purchasing agent. The statute is directed at the prescription drugs that are purchased and the Medicare plan pursuant to which the purchase is made. The statute does not express a restriction on who purchases the drugs or who operates the ESRD clinic. Moreover, any dispute as to the identity of the taxpayer is academic. DHRC is the entity that remitted the taxes under protest, and it is the entity with the right of action to a refund of its payment under protest. Its internal operations among affiliate companies does not change the outcome.

**Conclusion:**

DHRC's evidence establishes that it purchased prescription drugs pursuant to a Medicare Part B plan. DHRC has further proved the amount of tax attributable to its purchases of prescription drugs that were administered to Medicare patients pursuant to a Medicare Part B plan. None of the Collector's evidence controverts this connection, nor does the Collector's evidence call the Taxpayer's refund calculation formula into question. Consequently, DHRC is entitled to a refund under La. R.S. 47:337.9(F).



Accordingly, **IT IS HEREBY ORDERED** that DHRC is entitled to refunds for the Tax Periods in the amount of \$30,407.82 plus interest as provided by law.

IT IS FURTHER ORDERED on or before February 21, 2025, the parties shall submit a joint proposed Judgment granting DHRC's *Motion for Summary Judgment* in accordance with this Interim Order and Reasons with the parties' calculation of the total amount of the refund and interest as provided for by law due to DHRC.

IT IS FURTHER ORDERED that if the parties cannot agree on the form of a proposed Judgment on or before February 28, 2025, that a party may submit its own proposed Judgment and Memoranda by that date. Either party may file a response to the other party's proposed Judgment and Memoranda on or before March 7, 2025.

**BATON ROUGE, LOUISIANA, THIS 27<sup>th</sup> DAY OF JANUARY, 2025.**

**FOR THE BOARD:**



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**LOCAL TAX JUDGE CADE R. COLE**