

SANITIZED DECS. – 03-440 RC, 03-438 RC, 03-439 RC, 03-441 RC, 03-442 RC, 03-443 RC, 03-444 RC, 03-445 RC, 03-446 RC, 03-447 RC, 03-448 RC, 03-449 RC & 04-761 RC – BY GEORGE V. PIPER & ROBERT W. KIEFER, JR. - SUBMITTED FOR DECISION ON 6/16/04 – ISSUED ON 12/16/04

SYNOPSIS

PURCHASERS’ USE TAX – The exemption from sales and use tax for the sale of drugs dispensed upon prescription applies only when the sale to the purchaser is pursuant to a prescription that was prepared for a particular, individual patient. W. Va. Code §§ 11-15-2(f) [2001] & 11-15-9(a)(11); W. Va. Code § 11-15A-3(a)(2); Syl. pt. 5, *Syncor International Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001).

PURCHASERS’ USE TAX – Purchases of large quantities of drugs by a medical services provider that are placed in the medical services provider’s inventory, and which are not dispensed until such time as a prescription is prepared for an individual patient (“bulk sales”), do not constitute sales to a purchaser pursuant to a prescription that was prepared for a particular, individual patient. Therefore, “bulk sales” are not subject to the exemption from sales and use tax for the sale of drugs dispensed upon prescriptions that are prepared for particular, individual patients.” W. Va. Code §§ 11-15-2(f) [2001] & 11-15-9(a)(11); Syl. pt. 5, *Syncor International Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001).

PURCHASERS’ USE TAX – The legislative rules promulgated by the State Tax Commissioner respecting the purchase of drugs by medical service providers, and the provision of those drugs to their patients as part of their medical services, accurately reflect the intention of the Legislature, as expressed in the consumers’ sales and service tax statute. W. Va. Code §§ 11-15-2(f) [2001] & 11-15-9(a)(11); W. Va. Code § 11-15A-3(a)(2).

PURCHASERS’ USE TAX – The West Virginia Office of Tax Appeals is required to show due deference to the State Tax Commissioner’s interpretation of statutes that are silent as to specific legal issues or that are ambiguous, so long as the State Tax Commissioner’s interpretation is based on a permissible construction of the statute. Syl. pt. 4, in part, *Appalachian Power Company v. State Tax Commissioner*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

PURCHASERS’ USE TAX – The Petitioners, who purchase drugs for use or consumption in the provision of medical services, are not in the same class of taxpayers as retail pharmacies, who purchase drugs for resale to their customers in the form of tangible personal property, thereby justifying differing sales and use tax treatment for the Petitioners vis-à-vis retail pharmacies.

FINAL DECISION

PROCEDURAL HISTORY

On various dates between October 1, 2002, and May 5, 2003, Petitioner 1, Petitioner 2, Petitioner 3, Petitioner 4, Petitioner 5, Petitioner 6, Petitioner 7, Petitioner 8, Petitioner 9, Petitioner 10, Petitioner 11, Petitioner 12, and Petitioner 13 (referred to herein individually and collectively as “Petitioners”) timely filed, with the West Virginia State Tax Commissioner (referred to herein as “Respondent”), claims for refund of consumers’ sales and service tax or use tax, as the case may be, in the aggregate amount, for various periods between the years 1999 and 2003 (hereinafter, “refund claims”).

By correspondence dated May 22, 2003, Respondent denied the claims for refund filed by all Petitioners except Petitioner 9, Petitioner 11, and Petitioner 13. By correspondence dated May 23, 2003, Respondent denied the claim for refund filed by Petitioner 9. By correspondence dated July 8, 2003, Respondent denied the claim for refund filed by Petitioner 11. The Respondent never formally denied the refund claim filed by Petitioner 13.¹ On July 22, 2003, all of the Petitioners, except Petitioner 13, timely filed petitions for refund with the West Virginia Office of Tax Appeals. *See* W. Va. Code § 11-10A-8(2) [2002]. On September 5, 2003, the Respondent answered the petitions, denying the material allegations of the petitions and denying that the Petitioners were entitled to the refunds. A pre-hearing conference with Administrative Law Judge Piper and the parties’ counsel was conducted on December 15, 2003. On Petitioners’

¹ Although its claim was never expressly denied by Respondent, Petitioner 13 was included in the consolidated cases before this tribunal. At the prehearing conference, Respondent represented that it would issue a written denial of Petitioner 13’s refund claim. However, it does not appear that the Respondent has ever expressly denied Petitioner 13’s claim for refund. Nevertheless, Joint Stipulations of Facts 1 through 18 apply equally to Petitioner 13.

motion, and without objection by Respondent, all of the proceedings in this matter were consolidated for further proceedings.²

On or about December 22, 2003, the parties filed (i) “Joint Stipulations of Facts for All Petitioners Except For Petitioner 12,” and (ii) “Joint Stipulations of Facts for Petitioner 12.” By letter dated January 5, 2004, Administrative Law Judge Piper established a briefing schedule. All briefs were filed by March 30, 2004.

It was agreed by the parties that after the administrative hearing held was held and all briefs filed, the parties would present oral argument. During oral argument, counsel for the Respondent cited a decision that was not cited in the Respondent’s reply brief. At the request of the Petitioners, the presiding administrative law judges allotted Petitioners an additional fourteen (14) days to reply to Respondent’s argument. The Petitioners’ response was received by the Office of Tax Appeals on June 16, 2004, at which time the matter was considered submitted for decision.

Finally, in order to vest this Office with jurisdiction, Petitioner 13 filed a petition for refund on December 13, 2004. Consistent with his representations at the prehearing conference, the Respondent has voiced no objection to the filing of the petition for refund at this time. The Respondent has agreed that Petitioner 13 should be treated in the same manner as the other Petitioners, is subject to the stipulations of fact in the same manner as the other Petitioners, except Petitioner 12, and should be treated as if it has been a Petitioner throughout the course of the entire proceedings in this matter.

**JOINT STIPULATIONS OF FACTS FOR ALL
PETITIONERS EXCEPT FOR PETITIONER 12**

² As to Petitioner 13, see footnote 1.

1. Petitioners are hospitals providing professional medical services to patients in the hospital on an in-patient and out-patient basis.
2. Petitioners, in providing services to patients, sell hospital services to patients and such services are set out in full on medical bills distributed to patients and their medical insurer upon discharge, including charges for drugs dispensed to the patient.
3. Petitioners typically mark up their professional medical service including the drugs it dispenses to patients within the hospital to include a profit.
4. Petitioners filed timely sales or use tax refund claims³ with the West Virginia State Tax Commissioner.
5. Petitioners' claim for sales or use tax refund was denied on November 15, 2002.⁴
6. Petitioners brought a timely appeal of the denial of the refund claim to the West Virginia Office of Tax Appeals.
7. Petitioners bring this proceeding to protest the denial of the refund claim and to recover the amount of taxes shown above.
8. Petitioners pay sales or use tax on their purchases of prescription and non-prescription drugs where the purchases are made prior to the issuance of a prescription of a physician or a licensed professional.
9. Petitioners do not collect sales tax on sales of drugs to patients dispensed pursuant to a prescription of a physician or licensed professional.

³ The refund claims filed by the Petitioners, other than Petitioner 12, total a certain amount, including the refund claim filed by Petitioner 13 of a certain amount. *See* Footnote 5.

⁴ As set forth in the procedural history, several of the Petitioners had their refund claims denied on other dates.

10. Petitioners pay sales or use tax on their purchases of prescription and non-prescription drugs and other materials used and consumed in the provision of professional services in the hospital.

11. Petitioners dispense all drugs by prescription which are required to be so dispensed.

12. All drugs purchased during the refund period of this claim were dispensed to patients pursuant to a prescription.

13. The Petitioners and pharmacists that staff the hospital pharmacies hold licenses issued by the West Virginia State Board of Pharmacy to dispense drugs by prescription.

14. All hospitals in this refund claim action hold licenses to purchase and dispense drugs by prescription issued by the West Virginia State Board of Pharmacy.

15. These drugs were purchased by the Petitioners prior to the identification of the patient or the issuance of a prescription.

16. The licensure requirement of hospital pharmacists and retail pharmacists are the same. Hospital pharmacists also employed by retail pharmacies are not required to have additional licensure or certification.

17. The retail pharmacist and hospital pharmacist are governed by the same state and federal regulations concerning dispensing and storing drugs.

18. Pursuant to W. Va. Code § 11-15-9(a)(9), retail pharmacy companies are not required to pay sales or use tax to drug manufacturers on the wholesale purchase of drugs which will be dispensed pursuant to a prescription of a physician or other licensed professional.

JOINT STIPULATIONS OF FACTS FOR PETITIONER 12

19. This Petitioner is a hospital providing professional services to patients in the hospital on an in-patient and out-patient basis.

20. Petitioner, in providing services to patients, sells hospital services to patients and such services are set out in full on medical bills distributed to patients and their medical insurer upon discharge including charges for drugs dispensed to the patient.

21. Petitioner typically marks up its professional medical service including the drugs it dispenses to patients within the hospital to include a profit.

22. Petitioner timely filed a sales or use tax refund claim in a certain amount⁵ with the West Virginia State Tax Commissioner.

23. Petitioner's claim for a sales or use tax refund was denied on November 15, 2002.⁶

24. Petitioner brought a timely appeal of the denial of the refund claim to the West Virginia Office of Tax Appeals.

25. Petitioner brings this proceeding to protest the denial of the refund claim and to recover the amount of taxes shown above.

26. Petitioner pays sales or use tax on its purchases of prescription and non-prescription drugs where the purchases are made prior to the issuance of a prescription issued by a physician or a licensed professional.

27. Petitioner does not collect sales tax on sales of drugs to patients dispensed pursuant to a prescription issued by a physician or licensed professional.

28. Petitioner pays sales or use tax on its purchases of prescription and non-prescription drugs and other materials used and consumed in the provision of professional services in the hospital.

29. Petitioner dispenses all drugs by prescription, which are required to be so dispensed.

⁵ Petitioner 12's refund claim was actually in a certain amount.

⁶ As set forth in the procedural history, Petitioner 12's refund claim was denied on May 22, 2003.

30. All drugs purchased during the refund of this claim were dispensed to patients pursuant to a prescription.

31. The Petitioner and the pharmacists that staff the hospital pharmacies hold licensing issued by the West Virginia State Board of Pharmacy to dispense drugs by prescription.

32. All hospitals in this refund claim action hold licenses to purchase and dispense drugs by prescription issued by the West Virginia State Board of Pharmacy.

33. These drugs were purchased by the Petitioner prior to the identification of the patient or the issuance of a prescription.

34. The licensure requirement of hospital pharmacist and retail pharmacist are the same. Hospital pharmacist also employed by retail pharmacies are not required to have additional licensure or certification.

35. The retail pharmacist and hospital pharmacy are governed by the same state and federal regulations concerning dispensing and storing drugs.

36. Pursuant to W. Va. Code § 11-15-9(a)(9), retail pharmacy companies are not required to pay sales or use tax to drug manufacturers on the wholesale purchase of drugs which will be dispensed pursuant to a prescription of a physician or other licensed professional.

37. The Petitioner has contracted with a pharmaceutical company to provide pharmacy services in the hospital or provide prescription drugs to hospital patients and to retail consumer purchasers.⁷

⁷ In "Petitioners' Brief In Support of Petitions for Refund," they state that this contract was executed subsequent to the period encompassing their refund claims. Counsel for the Petitioners further stated that the pharmaceutical company providing pharmacy services to the hospital did not sell drugs to customers who were not patients of the hospital. *See* Transcript, May 27, 2004 Hearing, pp 76-79.

38. Pursuant to *Syncor, infra.*, the pharmaceutical company which provides pharmacy services to the hospitals does not pay the sales or use tax on purchases of drugs whether issued to hospital patients or to retail purchasers.

Although not stipulated to by the parties prior to the oral argument, the Petitioner's attorney stated during oral argument that to his knowledge none of the Petitioner's pharmacies dispensed drugs to persons other than patients.

DISCUSSION

I. "BULK SALES" OF PRESCRIPTION DRUGS TO MEDICAL SERVICE PROVIDERS ARE NOT EXEMPT FROM THE CONSUMERS' SALES AND SERVICE TAX AND THE PURCHASERS' USE TAX, BECAUSE SUCH SALES ARE NOT MADE PURSUANT TO A PRESCRIPTION PREPARED FOR A PARTICULAR INDIVIDUAL, AS REQUIRED BY THE CLEAR AND UNAMBIGUOUS LANGUAGE OF W. VA. CODE §§ 11-15-2(f) [2001] AND 11-15-9(a)(9), AND *SYNCOR INTERNATIONAL CORP. V. PALMER*, 208 W. VA. 658, 542 S.E.2d 479 (2001).

The first issue presented in this matter is whether the Petitioners are entitled to refunds of consumers' sales and service tax or purchasers' use tax that they paid when they purchased drugs from manufacturers or wholesalers. The exemption under which the Petitioners claim their refund provides:

§ 11-15-9 Exemptions.

(a) *Exemptions for which exemption certificate may be issued.* -- A person having a right or claim to any exemption set forth in this subsection may, in lieu of paying the tax imposed by this article and filing a claim for refund, execute a certificate of exemption, in the form required by the tax commissioner, and deliver it to the vendor of the property or service in the manner required by the tax commissioner. However, the tax commissioner may, by rule, specify those exemptions authorized in this subsection for which exemption certificates are not required. The following sales of tangible personal property and services are exempt as provided in this subsection:

(11) Sales of drugs dispensed upon prescription and sales of insulin to consumers for medical purposes; . . .

West Virginia Code § 11-15-2, which defines certain terms used in Article 15, provides the following definition that is relevant to the exemption, “(f) ‘Drugs’ includes all sales of drugs or appliances to a purchaser upon prescription of a physician or dentist and any other professional person licensed to prescribe.” [This 2001 version of the definition is applicable to the time periods involved here.]

The Petitioners’ claim has its genesis in the decision of the West Virginia Supreme Court in *Syncor International Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001). In *Syncor*, the Supreme Court held that sales of radiopharmaceuticals to a medical service provider, which were prepared pursuant to a prescription prepared for an individual patient and which were to be administered by the medical service provider to that patient, were exempt from the consumers’ sales and service tax and the purchasers’ use tax pursuant to the exemption contained in W. Va. Code § 11-15-9(a)(11). *See* Syl. pt. 5, *Syncor*. Specifically, the Court held:

The key to whether the exemption found in West Virginia Code § 11-15-9(a)(11) applies in this case, . . . is whether the drugs at issue were dispensed pursuant to prescriptions. Accordingly, we conclude that the sale of a radiopharmaceutical to a medical service provider is exempt from the consumer [sic] sales tax under the provisions of West Virginia Code § 11-15-9(a)(11) where the radiopharmaceutical is purchased and dispensed pursuant to a physician’s prescription that was prepared for a particular, individual patient. (Footnote omitted.)

Id. at 662-63, 542 S.E.2d at 483-84.

The Petitioners seek refunds of consumers’ sales and service tax and purchasers’ use tax paid on purchases of large quantities of drugs that they placed in their inventories, and then either dispensed to patients as a part of the provision of medical services or sold to customers through their retail pharmacies.⁸ (These purchases are hereinafter referred to as “bulk sales.”⁹)

⁸ As discussed below in Section III, the purchase of drugs that are later sold to walk-up customers would be exempt as sales for resale. It should be noted that there is some question as to whether or not any of the taxpayers sold drugs to walk-up customers.

The Petitioners concede that these bulk purchases are not made pursuant to prescriptions issued to particular patients. Relying on certain language in *Syncor*, the Petitioners maintain that bulk purchases of drugs are exempt from consumers' sales and service tax and purchaser's use tax because they are ultimately dispensed to a patient pursuant to a prescription, even though the purchases are not made pursuant to a prescription. According to them, the statute is intended to apply to all sales of drugs that are ultimately dispensed to patients upon prescriptions, regardless of where along the chain that the sale takes place.¹⁰ Thus, they maintain that any purchase of a drug is exempt so long as the drug is either ultimately sold to a purchaser pursuant to an individual prescription or if it is ultimately dispensed to one of their patients pursuant to a prescription as part of their provision of professional medical services.

In *Syncor*, the Supreme Court did not address application of the exemption to bulk sales, because the taxpayer in that action conceded that bulk sales were subject to tax. The Petitioners in this proceeding make no such concession. They contend that in *Syncor* the Supreme Court determined that the statute was clear and unambiguous. Therefore, the statute need only be applied and not interpreted. Specifically, they rely on the following language, "All that is required for entitlement to the exemption under West Virginia Code § 11-15-9(a)(11) is (1) a sale; (2) of a drug; (3) that is dispensed upon a prescription." *Id.* at 662, 542 S.E.2d at 483. They maintain that this language applies to bulk sales as well as sales made pursuant to a prescription issued to a particular, individual patient, as held in *Syncor*. They argue that because

⁹ These types of sales were referred to as "bulk sales" in *Syncor*. The parties have continued to refer to these sales as "bulk sales" in this matter and this tribunal will do the same.

¹⁰ In fact, it is only the sales of drugs to medical service providers that could be subject to tax. Any sales of drugs preceding sales to the Petitioners, if such sales occur, would be sales for resale, which are exempt pursuant to the provisions of W. Va. Code § 11-15-9(a)(9).

they purchase drugs that are ultimately dispensed pursuant to prescriptions, their purchases are exempt.

On the other hand, the Respondent contends that the decision of the West Virginia Supreme Court in *Syncor*, while not expressly holding that these bulk sales are subject to the consumers' sales and service tax or the purchasers' use tax, provided in *dicta* that they are subject to one or the other of the taxes. Specifically, the Respondent relies on footnotes 7 and 9. The Respondent also relies on the comprehensive treatment set out in various legislative rules as they relate to hospitals, drugs, providers of professional and personal services, and purchases of tangible personal property for resale.

While it does provide substantial guidance, the decision of the Supreme Court in *Syncor* is not controlling precedent in this matter. What the Court clearly decided in *Syncor* was that the sales considered therein were exempt because they were made pursuant to prescriptions prepared for particular, individual patients, even though the sales were not to those individuals. It further indicated that it was not deciding whether the exemption applied to bulk sales of drugs to hospitals, because that issue had been conceded by the taxpayer.

The Petitioners cite both W. Va. Code §§ 11-15-2(f) [2001] and 11-15-9(a)(11) and then contend that "the plain and unambiguous language of the sales tax statute would exempt the sale of any drugs which can be shown to be dispensed upon prescription." Petitioner Brief in Support of Petitions For Refund, p. 7. The Petitioners rely solely on § 11-15-9(a)(11). However, the exemption cannot be considered in a vacuum. It must be considered in light of the definition contained in § 11-15-2(f).

This tribunal is of the opinion that the statute governing the exemption for prescription drugs, including the pertinent definition is clear and unambiguous. The plain language of the

statute clearly compels the conclusion that bulk sales of pharmaceuticals to medical service providers are subject to the tax.

This tribunal is required to read W. Va. Code §§ 11-15-2(f) [2001] and 11-15-9(a)(11) *in pari materia*, since they refer to the same subject and the former defines the latter.¹¹ Although the definition of “drugs” does not fit seamlessly into the language of the exemption, reading the two provisions together as they apply to bulk sales to medical service providers, the statutory scheme is clear and free of ambiguity. By statutory definition, for the sale to be exempt, it must be a sale of drugs or appliances *to a purchaser* upon prescription of a physician, dentist or other individual licensed to prescribe. *See* W. Va. Code § 11-15-2(f) [2001].¹² A sale is exempt only if it is made pursuant to a prescription prepared for a particular, individual patient.¹³

In this case, the sales are to medical service providers. Unless the drugs are sold to medical service providers upon prescription prepared for a particular, individual patient, the exemption does not apply and they are required to pay consumers’ sales and service tax or

¹¹ Statutes that have a common purpose will be regarded *in pari materia* to ensure recognition and implementation of legislative intent. Statutes to read *in pari materia* must be construed together and the legislative intention, as gathered from the whole of the enactment, must be given effect. Syl. pt. 2, *Consolidated Natural Gas Co. v. Palmer*, 213 W. Va. 388, 582 S.E.2d 835 (2003); Syl. pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975); Syl. pt. 2, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958).

¹² The Petitioners are correct that in *Syncor*, the Supreme Court stated that “All that is required for entitlement to the exemption under West Virginia Code § 11-15-9(a)(11) is (1) a sale; (2) of a drug; (3) that is dispensed upon a prescription.” *Id.* at 662, 542 S.E.2d at 483. However, this statement must be considered in light of the issue that was presented in *Syncor* and within the context of what the Court actually decided and what it expressly did not decide.

In *Syncor*, the drugs sold to the taxpayer were single doses of radiopharmaceuticals that were custom prepared for individual patients, pursuant to prescriptions prepared for the particular, individual patients. Because the prescriptions were prepared for individual patients and sales to the taxpayer were made pursuant to those prescriptions, it was unnecessary for the Court to emphasize that portion of the definition requiring a sale to a purchaser upon a prescription. However, in this matter, the Petitioner’s primary contention is that no such requirement exists. Therefore, it is necessary to emphasize this indispensable, critical statutory requirement.

¹³ As was held in *Syncor*, the prescription need not be prepared for the purchaser. The sale of a drug is exempt so long as it is “purchased and dispensed pursuant to a physician’s prescription that was prepared for a particular, individual patient.” *Id.* at 663, 542 S.E.2d at 484.

purchaser's use tax. The stipulations of facts clearly establish that the drugs are not sold to the medical service providers, the Petitioners, upon prescriptions prepared for particular, individual patients. At the time of the sale, no prescription exists. The drugs are placed in inventory until such time as a prescription is issued to a patient by a person licensed to issue a prescription. Only when a prescription is issued to an individual patient is can the exemption possibly apply, and then only if the other statutory requirements are satisfied. Therefore, this Office concludes that the plain language of the statute mandates that bulk sales of drugs to the Petitioners, which are used or consumed by them in the provision of their professional medical services, are not exempt from the consumers' sales and service tax or the purchasers' use tax. The statutory scheme is simply not susceptible to any other reading respecting the tax treatment to be afforded bulk sales of drugs.

II. GIVING DUE DEFERENCE TO THE LEGISLATIVE RULES PROMULGATED BY THE STATE TAX COMMISSIONER, THEY ARE VALID, AS THEY ARE CONSISTENT WITH THE LANGUAGE OF THE STATUTE AND ARE BASED ON A PERMISSIBLE CONSTRUCTION OF THE STATUTE.

Although this tribunal is of the opinion that the statutory scheme, incorporating both the exemption and the definition, is clear and unambiguous as it relates to bulk sales of prescription drugs, it will also examine the statute as if it were ambiguous or silent on the issue of whether or not the exemption for prescription drugs applies to Petitioner's purchases. If it were, the statutory scheme would be subject to interpretation. Therefore, this tribunal will address the issue of whether or not the Tax Commissioner's interpretation, as set out in the legislative rules, is consistent with the statutory language. Only if the statute is subject to interpretation does this tribunal need to give any consideration, and due deference to the legislative rules promulgated by the State Tax Commissioner.

In determining whether the State Tax Commissioner’s interpretation of the statute, as set forth in the legislative rule, is permissible, this Office is guided, in large measure by the decision of the West Virginia Supreme Court in *Appalachian Power Co. v. State Tax Commissioner*, 195 W. Va. 573, 466 S.E.2d 424 (1995). This decision is the West Virginia Supreme Court’s most detailed, comprehensive examination of the law with respect to the interpretation to be given legislative enactments by administrative agencies charged with administration of those enactments.

In *Appalachian Power*, relying on its decision in *Sniffin v. Cline*, 193 W. Va. 370, 456 S.E.2d 451 (1995), and the decision of the United State Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court held, *inter alia*, that “[R]eview of an agency’s legislative rule and construction of a statute that it administers involves two separate, but interrelated, questions.” Syl. pt. 3, in part, *Appalachian Power*. See also Syl. pt. 2, in part, *City of Wheeling v. Public Service Commission*, 199 W. Va. 252, 483 S.E.2d 835 (1999); Syl. pt. 4, in part, *Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W. Va. 326, 472 S.E.2d 326 (1996). A tribunal reviewing an agency’s interpretation of a statute must first ask “whether the Legislature has directly spoken to the precise [legal] question at issue.” *Id.* The Supreme Court devoted substantial discussion to this issue, ultimately concluding that a determination of whether or not the Legislature has spoken on a particular question involves two smaller steps. First, if the language of the statute, given its plain meaning, answers the question, the clear and unambiguous language of the statute must prevail and further inquiry is foreclosed.¹⁴ *Id.* at 587, 466 S.E.2d at 438. See also *State ex rel. Stanley v. Sine*, ___ W. Va. ___, 594 S.E.2d 314, 320 (2004); *Berkeley*

¹⁴ As discussed above in Section I, it is this step of the *Chevron/Appalachian Power* test that this tribunal is of the opinion controls in the present matter.

County Public Service Sewer v. Public Service Commission, 204 W. Va. 279, 284, 512 S.E.2d 201, 206 (1998); *Albright v. White*, 202 W. Va. 292, 305, 503 S.E.2d 860, 873 (1996); *Chico Dairy Company v. Human Rights Commission*, 181 W. Va. 238, 382 S.E.2d 75 (1989). If no readily apparent meaning springs from the text of the statute, the next step is to examine other extrinsic sources, such as the overarching design of the statutory scheme and legislative history, in search of an unmistakable expression of legislative intent.¹⁵ After undertaking these two steps, “If the intention of the Legislature is clear, that is the end of the matter, and the agency’s position only can be upheld if it conforms to the Legislature’s intent.” Syl. pt. 3, in part, *Appalachian Power*. Syl. pt. 2, in part, *City of Wheeling v. Public Service Commission*.

The second stage of the analysis comes into play, only when an analysis of the plain language of the statute or other extrinsic sources fails to yield an unmistakably clear expression of legislative intent. This second stage involves an analysis of the agency’s interpretation to see

¹⁵ The Petitioners contend that this tribunal should consider legislative history to find that the Legislature intended the statute to be construed as they contend it should be construed. Specifically, they ask this tribunal to consider bills that were introduced in the Legislature to amend 11-15-9(a)(11) in response to the *Syncor* decision. None of these bills were enacted by the Legislature. According to the Petitioners, the Legislature’s failure to enact these bills indicates that it concurs in the *Syncor* decision which, they contend, holds in their favor. There are several problems with this contention.

First, the Petitioners aren’t really asking this tribunal to consider legislative history. Instead, they ask this tribunal to consider the legislative *reaction* to a Court decision occurring well subsequent to passage of the statute. How the Legislature reacted in 2004, to a court decision respecting a statute, is not necessarily indicative of what the Legislature intended in 1969, when it passed that statute.

Second, legislative history in West Virginia is not extensive. As such, it provides little or no guidance as to what the Legislature intended when it passed a statute. And, as already noted, what the Petitioners point to is not legislative history. In fact, they provide no true legislative history demonstrating what the Legislature intended when it passed this statutory scheme.

Third, the value of legislative history, to the extent that there is any, is in explaining why the Legislature enacted a particular law. Where, as here, the purported legislative history is the failure of the Legislature to enact proposed amendments to the statute, this tribunal is of the opinion that virtually nothing regarding legislative history can be discerned. The failure of the Legislature to act may be the result of sheer disinterest or apathy, may evidence the Legislature’s determination to give greater priority to other issues, or may be the result of other considerations having nothing to do with a court decision. “The failure of harried legislatures awash in statutes to modify or explain statutory details is as likely the result of inattention or overwork as it is of implicit legislative approval [or disapproval].” *Bailey v. SWCC*, 170 W. Va. 771, 777, 296 S.E.2d 901, 907 (1982).

how it relates to the statute. *Appalachian Power Co.*, 195 W. Va. at 587-88, 466 S.E.2d at 438-39. It requires that great weight be given to the agency's interpretation of the statute, unless the interpretation is clearly erroneous. *Id.* at 588, 466 S.E.2d at 439. See also *Pendleton Citizens for Community Schools v. Marockie*, 203 W. Va. 310, 316, 507 S.E.2d 673, 679 (1998); Syl. pt. 3, *Shawnee Bank, Inc. v. Paige*, 200 W. Va. 20, 488 S.E.2d 20 (1997); Syl. pt. 7, *Lincoln Co. Board of Education v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992). The agency need not promulgate a rule that serves the statute in the best or most logical manner. It need only promulgate a rule that flows rationally from the statute. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [reviewing tribunal] is whether the agency's answer is based on a *permissible* construction of the statute." Syl. pt. 4, in part, *Appalachian Power*. (Emphasis added.) See also *City of South Charleston v. Public Service Commission*, 204 W. Va. 566, 573, 514 S.E.2d 622, 629 (1999); Syl. pt. 3, in part, *City of Wheeling v. Public Service Commission*. (emphasizing that an agency's interpretation may be based on a "permissible construction" of a statute). Only when there is clearcut evidence of an inconsistency between a formally adopted legislative rule and the authorizing statute may the agency rule be set aside. *Appalachian Power*, 195 W. Va. at 588, 466 S.E.2d at 439.

Any rules or regulation drafted by an administrative agency must faithfully reflect legislative intent, as expressed in the statutory language. Where the statutory language is clear and unambiguous, legislative rules must give that language the same clear and unambiguous force as required by the statutory language. See Syl. pt 4, *Repass v. Workers' Compensation Division*, 212 W. Va. 86, 569 S.E.2d 162 (2002); Syl. pt 2, *CNG Transmission Corporation v. Craig*, 211 W. Va. 170, 564 S.E.2d 170 (2002); Syl. pt 3, *Leary v. McDowell County National*

Bank, 210 W. Va. 44, 552 S.E.2d 420 (2001); and Syl. pt 4, *Maikotter v. University of West Virginia Board of Trustees*, 206 W. Va. 691, 527 S.E.2d 802 (1999).

If the administrative agency has promulgated a legislative rule that flows rationally from the statute, a reviewing tribunal is not at liberty to affirm or overturn the agency decision merely because it agrees or disagrees with the policy. A formally adopted legislative rule may not be overturned without clearcut evidence of an inconsistency between the rule and the authorizing statute. *Id.*

When a legislative rule is constitutionally acceptable, only an unambiguous conflicting statute, contradictory legislative history, a defect in the rulemaking process, evidence of bias or abuse of power, or some other startling revelation of fact [will] overcome the clearly erroneous burden and justify . . . interference with an agency's legitimate rulemaking authority. *See Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995).

Id. at 589, 466 S.E.2d at 440.

“The Legislature may specifically provide the exact issues to be considered when promulgating a rule.” If it does not so provide, but instead leaves a gap in the statute, then it is presumed that the Legislature is entrusting the administrative agency to fill the gap in the legislation. In filling the gap, the administrative agency is entitled to deference.¹⁶ *Id.* “A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.” Syl. pt. 4, in part, *Appalachian Power*. *See also City of South Charleston v. Public Service Commission*; Syl. pt. 3, in part, *City of Wheeling v. Public Service Commission*. Deference requires that the agency's interpretation

¹⁶ This Office perceives that a statute may be ambiguous in one of two manners: 1) The statute does not directly address the precise legal issue presented; or 2) The Legislature recognized the existence of the precise legal issue and either attempted to answer the question, but did not use statutory language so precise as to provide an answer to the legal issue presented, or it deliberately used vague language, intentionally leaving it to the administrative agency charged with administering the statute to use its expertise to develop an answer to the precise legal issue through the promulgation of legislative rules.

of the statute will stand unless it is arbitrary, capricious or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782, 81 L.Ed.2d at 703; *Appalachian Power*, 195 W. Va. at 589, 466 S.E.2d at 440. Deference is particularly important where there is a technically complex statute backed by a complex and comprehensive set of regulations. *Id.* at 589-90, 466 S.E.2d at 440-41.

The Supreme Court has also stated the effect to be given to legislative rules in another way:

Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.

Syl. pt. 2, *Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W. Va. 326, 472 S.E.2d 326 (1996). *See also Clark v. West Virginia Board of Medicine*, 203 W. Va. 394, 401, 508 S.E.2d 111, 118 (1998); *Appalachian Power*, at 585, 466 S.E.2d at 436.

This Office believes it can be argued that the statutory scheme applicable to this matter is ambiguous. Arguably, the Legislature has not directly addressed the precise legal issue presented by this matter. Nowhere in the statute has it expressly stated that hospitals and other providers of professional medical services are taxable on their purchases of drugs and other items that are provided to patients in the course of the provision of medical services. It has not expressly stated that medical service providers are exempt from payment of the consumers' sales and service tax or purchasers' use tax on bulk purchases of pharmaceuticals that are used or consumed in the provision of professional medical services to their patients.¹⁷ Although, for the

¹⁷ The Petitioners seem to be of two minds in contending that they are exempt from consumers' sales and service tax or purchasers' use tax on their purchases. On one hand, they contend that their purchases are exempt from tax by reason of the exemption contained in W. Va. Code § 11-15-9(a)(11), purportedly as required by *Syncor*. On the other hand, in their equal protection argument, Section III, below, they seem to take the position that their

reasons stated above, this Office is of the opinion that the statute in this matter clearly and unambiguously requires that Petitioner to pay purchasers' use tax on their bulk purchases of drugs, the silence of the Legislature on this subject could be construed as ambiguity.

Where a statute is ambiguous, the analysis of the agency that is charged with administering the statute is subject to examination. In this matter, the State Tax Commissioner is charged with administering the statute. In administering the statute, the State Tax Commissioner has apparently determined that there is an ambiguity in the statute or that the Legislature has not addressed the precise legal issue. In response, the Commissioner promulgated legislative rules designed to address this perceived ambiguity or gap in the statute.

The legislative rule promulgated by the State Tax Commissioner governing the treatment of purchases made by hospitals for purposes of the consumers' sales and service tax treatment respecting its purchases is 110 C.S.R. 15, § 36 (May 1, 1992), which provides, in relevant part:

§ 110-15-36. Hospitals.

36.1. The serving of meals, rental of rooms, sale of drugs, blood, oxygen, dressings, appliances and other tangible personal property to patients is a part of the services rendered by hospitals. These sales and services are so interrelated with professional and personal services, that such sales and services rendered to patients by hospitals are not subject to the consumers [sic] sales and service tax.

* * *

36.4. Hospitals are engaged in the business of providing a professional service not subject to the consumers [sic] sales and service tax. Therefore, they are taxable on purchases of property and services for use in the conduct of their professional services, and are not considered to be making purchases for resale. See Section 9.3.1 of these regulations for rules governing sales to hospitals owned by state, county or municipal governments.

purchases of pharmaceuticals are purchases for resale to their patients (rendering their purchases exempt as being for resale and the sale to the patient exempt as being a sale pursuant to a prescription), while the remainder of their purchases are subject to the use tax. As is more fully discussed below, this position is conceptually inconsistent. If Petitioners' purchases of pharmaceuticals are exempt as purchases for resale, then their other purchases that are provided to patients should also be exempt. While, under this theory, purchases of other items would be exempt, sale of those items to patients would be subject to consumers' sales and services tax, which the Petitioners would have a duty to collect.

The legislative rule specifically governing the purchase and sale of prescription drugs by medical service providers, including the exemption, is 110 C.S.R. 15, § 92 (May 1, 1992), which provides:

§ 110-15-92. Drugs.

92.1. Sales of drugs dispensed upon written prescription and sales of insulin to consumers for medical purposes are exempt from consumers sales and service tax. The term "drug" shall include all sales of drugs or appliances to a purchaser, upon written prescription of a physician or dentist and any other professional person licensed to prescribe. This is a per se exemption and no exemption certificate or direct pay permit is needed to obtain the exemption.

92.2. Drugs sold to hospitals, licensed physicians, nursing homes, etc., which are to be consumed in the performance of a professional service are subject to consumers sales and service tax.

92.3. Sales to consumers of non-prescription drugs are subject to consumers [sic] sales and service tax.

The legislative rules adopted by the State Tax Commissioner clearly mandate that medical service providers are required to pay consumers' sales tax on their purchases. 110 C.S.R. 15, § 36 establishes two basic principles that are applicable to the Petitioners in the context of this case. First, drugs (as well as other items of tangible personal property) sold to hospitals who, in turn, provide those drugs to their patients, are part and parcel of professional and personal medical services provided to the patients. The medical services provided to the patients consist of professional and personal services that are not subject to the consumers' sales and service tax. 110 C.S.R. 15, § 36.1. *See also* W. Va. Code § 11-15-8. Second, because the medical services they provide to patients consist of personal and professional services that are not subject to the consumers' sales and service tax, hospitals are subject to tax on their purchases that are used or consumed in providing medical services. The purchases have been used in the

conduct of the hospitals' business, and are not purchases that were made for resale in the form of tangible personal property. 110 C.S.R. 15, § 36.1. *See also* 110 C.S.R. 15, § 9.3.4.2,¹⁸ 110 C.S.R. 15, § 99.1,¹⁹ 110 C.S.R. 15, § 35.2,²⁰ With respect to drugs, the legislative rules provide that the sale of drugs to, *inter alia*, hospitals, which are used or consumed in the provision of medical services to their patients, are subject to the consumers' sales and service tax. 110 C.S.R. 15, § 92.2.

In the opinion of this Office, as they apply to bulk purchases of drugs, the Tax Commissioner's legislative rules fully and faithfully reflect the intention of the Legislature, as reflected in the language of the statute. The drugs are used or consumed by the Petitioners in the provision of medical services. The sale of these drugs to them, as medical service providers, for their use or consumption in the provision of medical services, renders them subject to the tax. *See* W. Va. Code § 11-15-10. It is not the fact that medical services are professional and personal services that is important. It is the fact that the prescription drugs are used or consumed

¹⁸ "The exemption allowed by this Section permits vendors of tangible personal property, whether they be wholesalers, distributors, jobbers, retailers, providers of taxable services (but not providers of services excepted from tax under W. Va. Code § 11-15-8) or others to purchase tangible personal property for the purpose of resale in the form of tangible personal property without paying the consumers sales and service tax or the use tax. However, when such vendors purchase tangible personal property or services for use or consumption in their business of selling tangible personal property, they must pay the consumers sales and service tax or the use tax on such purchases. Therefore, purchases of janitorial services, equipment repairs, adding machines, etc., are taxable. In other words, vendors of tangible personal property are exempt from tax only on purchases of tangible personal property which are purchased for the purpose of resale in the form of tangible personal property, unless the purchases are exempt under some other provision of this Section. For application of this exemption for personal services providers, see Section 35 of these regulations."

¹⁹ "Persons who are engaged in a business and are deemed to be professionals . . . are not required to collect and remit consumers sales and service tax on their services rendered or on any sales of tangible personal property incidental to such services. However, such professionals must pay consumers sales and service tax on all purchases for use in their business, except for purchases for resale when the resale is a nonprofessional sale subject to the consumers [sic] sales and service tax, for which an exemption certificate may be issued."

²⁰ "[Providers of personal services] are the consumers of the various items of tangible personal property and services which they use in the rendition of their personal services, and the consumers [sic] sales and service tax and use tax will apply upon their purchases of all such services and property, including equipment. However, articles purchased for resale to consumers may be purchased without imposition of tax by [providers of personal services]."

by medical service providers in providing those services that renders them subject to consumers' sales and service tax or purchasers' use tax. Under the rules, sales of drugs to the Petitioners are not exempt, unless the sale *to them* is pursuant to a prescription prepared for a particular individual. W. Va. Code § 11-15-9(a)(11). *See also* Syl. pt. 5, *Syncor*. There is no conflict between the Tax Commissioner's legislative rules and the statutes they interpret.

This Office is of the opinion that the Tax Commissioner's legislative regulations are based on a permissible construction of the statutes. Although it is not required that legislative rules serve the statute in the best or most logical manner, the Tax Commissioner's legislative rules are certainly logical and internally consistent, as they apply to hospitals, other businesses in the medical services industry, to other industries that provide personal and professional services and to businesses that purchase tangible personal property for resale as tangible personal property.²¹ The Commissioner need only promulgate a rule that flows rationally from the statute. Certainly the Commissioner's rules are based on a rational construction of the statutes. A reading of the legislative rules leads this office to conclude that the rules are not arbitrary, capricious or manifestly contrary to the statute. There is no clearcut evidence that the Commissioner's interpretation and application of the statute to various industries is clearly erroneous. Accordingly, this tribunal is required to accord deference to the legislative rules. Since it has the duty to show due deference to the Tax Commissioner, under the circumstances this Office has no authority to disregard the legislative rules even if even if it were inclined to do so.

²¹ Professional and personal service providers include attorneys, medical service providers, architects, court reporters, barbers, massage therapists, manicurists and others, none of whom collect tax from those to whom they provide their services, but who pay tax on their purchases.

With respect to the exemption for drugs that will ultimately be dispensed pursuant to prescriptions, the legislative rules are entirely consistent with the clear and unambiguous language of the statute. The statute provides an exemption for sales of drugs dispensed upon prescription, and defines drugs to include sales to a purchaser upon prescription. The legislative rules faithfully reflect this requirement by limiting the exemption to those sales.

More importantly, the legislative rules have been authorized and approved by the Legislature. 110 C.S.R. 15, § 1.1.²² Because they have received the official approval of the Legislature, presumably consistent with the statute, they have the force and effect of statutes. As authorized by legislation, these legislative rules may be ignored only if the Tax Commissioner has exceeded his constitutional or statutory authority or is arbitrary or capricious. As already noted, he has not done so. Therefore, this Office believes that these legislative rules must be accorded more than mere deference. They are entitled to controlling weight.

The reason for this is that they are providers of professional medical services, the sale of which are exempt, and are not in the business of reselling items of tangible personal property purchased by them. Their purchases, including drugs that will ultimately be dispensed pursuant to prescriptions, are used and consumed in the provision of medical services. It is the use and consumption of these items that constitutes the taxable event.

This validity of the Tax Commissioner's interpretation, as embodied in the legislative rules, was given some recognition by the Supreme Court in *Syncor*. In footnote 7 of *Syncor*, the Supreme Court stated, "[W]e acknowledge the possibility that, as the circuit court suggested, the language of 110 C.S.R. 15, § 92.2 was enacted merely to differentiate between those drug sales

²² Legislative rules are, by definition and by practice, submitted to and approved by the Legislature. W. Va. Code § 29A-1-2(d) and W. Va. Code §§ 29A-3-9 to -13.

that are dispensed pursuant to a prescription (i.e. core) and those that are made without a prescription (i.e. bulk).” *Id.* at 662, 542 S.E.2d at 483. In footnote 9, the Supreme Court stated:

We find no basis in law for [the] Tax Commissioner’s contention that the pertinent regulations identify when drugs will be considered to be dispensed pursuant to a prescription. Rather than defining what qualifies as a prescription-type sale, the regulatory provisions emphasize the distinction between those sales pursuant to a prescription (the exempt) and those that are sold to medical service providers in bulk form without the issuance of prescriptions (the non-exempt). *See* 110 C.S.R. § 15-92.1-3.

Id. at 663, 542 S.E.2d at 484. Read together, these two footnotes indicate the Supreme Court’s recognition that the Tax Commissioner’s interpretation of the statute is that bulk sales are not exempt, because the sale is not made pursuant to a prescription prepared for an individual patient.

Thus, the statute can be reasonably read to require that in order to be exempt, sales of drugs must be made to a purchaser upon a prescription.²³ The legislative rules accurately reflect the statutory scheme in this respect. Thus, to the extent that the statutory scheme can be considered to be ambiguous or silent on the subject, and giving due deference to the Tax Commissioner, this Office must uphold the Tax Commissioner’s interpretation of the statute as set out in the legislative rules.

III. THE DIFFERING TREATMENT BETWEEN THE PETITIONERS AND RETAIL PHARMACIES DOES NOT DENY THE PETITIONERS THE EQUAL PROTECTION OF THE LAW, BECAUSE THE PETITIONERS AND RETAIL PHARMACIES ARE NOT IN THE SAME CLASS OF TAXPAYERS.

The second issue raised by the Petitioners is whether the exemption results in a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

²³ In other contexts, such as sales by retail pharmacies, where there is a sale to a purchaser without an individual prescription, it is likely that the sale is exempt by reason of the sale for resale exemption, not because of the prescription drug exemption.

and equal protection principles contained the Constitution of the State of West Virginia. They contend that their tax treatment is inconsistent with, and less favorable than, the tax treatment afforded retail pharmacies. A necessary foundation underlying this assertion is that they are in the same class of taxpayers as are retail pharmacies. Essentially, they contend that they are selling prescription drugs in the same manner as retail pharmacies.

This Office, as part of the executive branch of the government, has no authority to rule with respect to issues involving the constitutionality of statutes. Determinations respecting the constitutionality of statutes is a power that that is assigned to the judicial branch under the Constitution. However, Courts are to rely on the expertise of the agencies charged with administering and interpreting the statutes assigned to them. Since this Office, through its specially trained administrative law judges, charged with applying and interpreting the state tax statutes of the State of West Virginia, including the consumers' sales and service tax statutes and legislative rules the Tax Commissioner applies to taxpayers, including the Petitioners, it has expertise within this area. In order to aid the Courts of this State in determining the constitutionality of the consumers sales and service tax statutes as it pertains to the Petitioners, this Office will lend its expertise to an analysis of the State Tax Commissioner's interpretation of the statute, as it applies to both hospitals and retail pharmacies, specifically with respect to similarities and differences between these two classes of business.

Retail pharmacies are in the business of selling tangible personal property to their customers. For purposes of this action, as it relates to a comparison between the activities of retail pharmacies and hospitals, retail sales by pharmacies fall into two categories: 1) Sales of drugs dispensed upon prescription, and 2) Sales of other items of tangible personal property that are not dispensed upon prescription. All purchases by a retail pharmacy for the purpose of resale

to consumers are exempt from purchasers' use tax because they are purchases for resale. *See* W. Va. Code § 11-15-9(a)(9). *See also* Joint Stipulations of Fact Nos. 18 & 36. This applies to both purchases of drugs dispensed upon prescription and all other items of tangible personal property. Sales of drugs dispensed upon prescription, when sold to the pharmacy's customer at retail, are not subject to consumers' sales and service tax because they are statutorily exempt pursuant to the provisions of W. Va. Code § 11-15-9(a)(11). However, sales of other tangible personal property by retail pharmacies to their customers are subject to consumers' sales and service tax, unless they are sales of items that are otherwise exempt pursuant to some provision of the West Virginia Code. The parties agree that this is the manner in which the statutory scheme treats purchases for resale by retail pharmacies.

The activities of medical service providers, including the Petitioners, are fundamentally different from the activities of retail pharmacies. In making this argument, the Petitioners tend to characterize their activity as purchasing drugs dispensed on prescription for resale to their patients.²⁴ If this argument were valid, their purchases of drugs sold upon prescription would be exempt from purchasers' use tax as purchases for resale. *See* W. Va. Code § 11-15-9(a)(9). They then contend that their sale of drugs to their patients would not be taxable by reason of the exemption for drugs dispensed upon prescription. *See* W. Va. Code § 11-15-9(a)(11).

With respect to their treatment of their other purchases of tangible personal property that is provided to patients in the course of providing medical services, the Petitioners do not contend that these purchases are exempt as purchases for resale. They concede that these items are used

²⁴ Of necessity, this must be their argument. Otherwise, they are not operating in the same manner as retail pharmacies. It would follow that they are not engaged in the same business as retail pharmacies and, therefore, are not in the same class. If they are not in the same class as retail pharmacies, then different tax treatment is justified and does not violate their right to equal protection under the law. *See Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). *See also Town of Burnsville v. Cline*, 188 W. Va. 510, 425 S.E.2d 186 (1992).

in the provision of professional and personal medical services, which are exempt. *See* W. Va. Code § 11-15-8. The reason for this is apparent. If these items were purchased for resale, the Petitioners would be engaged in the business of selling tangible personal property at retail, not the provision of professional and personal services. If they were engaged in the business of selling tangible personal property at retail, they would be obligated to collect consumers' sales and service tax from their customers, the patients. There is no evidence that they have ever collected the tax from their patients, and they would be liable for their failure to do so. This tribunal speculates that the Petitioners have no desire to put themselves in that position in the future.

In providing prescription drugs to their patients, medical service providers do not operate in the same manner as do retail pharmacies. Patients of medical service providers are not in the habit of seeking out the services of medical service providers solely for the purpose of purchasing prescription drugs in the form of tangible personal property at retail. Instead, they seek professional medical services for the purposes of obtaining treatment toward curing or correcting an ailment, injury or other affliction. Administration of prescription drugs is merely a component of the overall service provided, which will likely include diagnosis and may include other forms of treatment, such as surgery, non-invasive testing, laboratory testing monitoring of the patient's condition, administration of non-prescription drugs, rehabilitation and other types of therapy. Medical service providers are not in the business of reselling drugs to their patients in the form of tangible personal property. *See* Joint Stipulations of Fact Nos. 1, 2, 10-12, 19, 20 & 28-30.

This position is also entirely inconsistent with the true nature of their business. As provided by the legislative rules, hospitals must pay purchasers' use tax on their purchases of

tangible personal property, including drugs and appliances that dispensed to patients pursuant to prescriptions. The reason for this is that hospitals use or consume these items in the business of providing professional and personal medical services to their patients. *See* 110 C.S.R. 15, § 36.4. As providers of professional and personal medical services, their charges for these services, including the provision of items of tangible personal property, are exempt from the consumers' sales and service tax. *See* 110 C.S.R. 15, § 36.1. They do not collect consumers' sales and service tax from their patients. *See* 110 C.S.R. 15, § 36.4. Therefore, hospitals' purchases of tangible personal property are subject to the purchasers' use tax.

Counsel for the Petitioners stipulated at oral argument that at none of the pharmacies operated by the Petitioners sold drugs to individuals who were not patients of the hospital. *See* Transcript, May 27, 2004 Hearing, pp 76-79. This is further evidence that the Petitioners are not operating in the same manner as retail pharmacies. This lends credence to the Respondent's argument that the Petitioners are not in the same class as retail pharmacies, thereby rendering invalid their contention that taxation of their bulk sales violates the Equal Protection Clause of the United States Constitution and the equal protection principles of the Constitution of the State of West Virginia.

The stipulations indicated that Petitioner 12 and an unidentified pharmaceutical company whereby the company operates the pharmacy for Petitioner 12. The stipulations further indicate that the contract was entered into subsequent to the periods covered by the Petitioners' refund claims. As it relates to the time periods covered by these Petitions, the Petitioners are complaining about something that happened in the "future." Assuming, *arguendo*, that the Petitioners are correct and that the way that Petitioner 12 operates its pharmacy does create an equal protection problem, such problem did not exist until after the periods covered by the

Petitioners' refund claims. It would be inappropriate for this tribunal to rule on an abstract question, involving "future" time periods, i.e. time periods occurring subsequent to the refund claims.

Even if this Office were inclined to make a determination with respect to these "future" time periods, it could not find for the Petitioners. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioners to show that they are entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003). The Petitioners in this matter have failed to meet their burden of proof.

The stipulations present the only evidence respecting the nature of the contract between Petitioner 12 and the pharmaceutical company with which it has contracted to operate its pharmacy. These stipulations present no evidence respecting the mechanics of the operation of pharmacy by the pharmaceutical company under this contract. This Office is left to speculate as to how the patient is provided and billed for drugs that are provided as part of that Petitioner 12's medical services. Does the pharmaceutical company bill the patient directly? Does the pharmaceutical company bill Petitioner 12, who then passes the charge through to the patient? Does Petitioner 12 make payments to the pharmaceutical company? If so, for what is it paying? The answers to these questions, and possibly others, would shed light on the nature of the relationships among the pharmaceutical company, Petitioner 12 and the patient. An understanding of these relationships is necessary to any determination respecting sales of drugs by retail pharmacies and drug sales involving Petitioner 12 and the pharmaceutical company operating its pharmacy. This comparison is absolutely necessary to any decision respecting a violation of the Petitioners' right to the equal protection of the law.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon the Petitioners to show they are entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. Because the exemption from consumers' sales and service tax and purchasers' use tax (W. Va. Code § 11-15A-3(a)(2)) for sales of prescription drugs, W. Va. Code § 11-15-9(a)(11), and the definition of "drugs," W. Va. Code § 11-15-2(f) [2001], relate to the same subject and the latter defines the former, the two must be read *in pari materia*.

3. Reading W. Va. Code § 11-15-9(a)(11) and W. Va. Code § 11-15-2(f) [2001] *in pari materia*, they clearly and unambiguously require that in order for the exemption from sales and use taxes for sales of prescription drugs to apply to the particular sale, the sale must be to a purchaser upon prescription.

4. The prescription drug exemption requires that in order for the sale of a drug to a medical service provider to be exempt from the consumers' sales tax under the provisions of West Virginia Code § 11-15-9(a)(11), the drug must be purchased and dispensed pursuant to a physician's prescription that was prepared for a particular, individual patient. *Syncor International Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001).

5. Large quantities of drugs purchased by a medical service provider that are not purchased pursuant to a prescription prepared for a particular individual, but which are placed in the inventory of the medical service provider and dispensed to a patient upon a prescription that is issued at a later date ("bulk sales"), are not exempt from the consumers' sales and service tax and purchasers' use tax pursuant to the provisions of W. Va. Code § 11-15-9(a)(11).

6. To the extent that the statutory scheme in this matter can be considered to be ambiguous, the interpretation of the statute by the State Tax Commissioner, as established in the legislative rules promulgated by him, is entitled to deference and great weight, unless the interpretation is clearly erroneous, arbitrary or capricious, manifestly contrary to the statute, or as a result of the unconstitutional exercise of authority. *Appalachian Power Co., supra.*

7. The State Tax Commissioner's interpretation of the statute, as established in the legislative rules promulgated by him, faithfully reflects the legislative intent as expressed in the language of the statute. *See* Syl. pt 4, *Repass v. Workers' Compensation Division*, 212 W. Va. 86, 569 S.E.2d 162 (2002).

8. The Office of Tax Appeals may not substitute its judgment for that of the State Tax Commissioner, where the Tax Commissioner's interpretation of the statute is based on a permissible construction of the statutory scheme. Syl. pt. 4, in part, *Appalachian Power Company v. State Tax Commissioner*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

9. The Petitioners failed to carry their burden of proving that they operate in the same manner as retail pharmacies, thereby failing to show that they are in the same class of taxpayers as are retail pharmacies. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

10. The Petitioners are not in the same class of taxpayers as are retail pharmacies. Therefore, they have failed to prove any violation of the Equal Protection Clause of the United States Constitution, or any violation of the equal protection principles contained in the Constitution of the State of West Virginia.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioners' petitions for refund of consumers' sales and service tax or purchasers' use tax, for various periods between the years 1999 and 2003, inclusive, are hereby **DENIED**.

APPEAL PROCEDURES

If an aggrieved party wishes to appeal this Final Decision to an appropriate West Virginia circuit court, W. Va. Code § 11-10A-19(a), as last amended, sets forth that such an appeal must be filed within sixty (60) days after the date of service of this Final Decision upon the party. W. Va. Code § 11-10-19, as last amended, sets forth the outline for the procedure for the appeal to circuit court (an appeal petition filing fee is normally required), including, in most cases, filing an appeal bond by a taxpayer. Under W. Va. Code § 11-10-19(b), as last amended, the West Virginia Office of Tax Appeals (or one or more of its administrative law judges), as a totally independent, quasi-judicial tribunal, is not a party to the appeal and is not to be named as a party to the appeal.

On the other hand, under W. Va. Code § 11-10A-19(f), as last amended, and under W. Va. Code § 29A-5-4(b), as last amended, to provide the record to the circuit court, the **appellant** to the circuit court is to provide the West Virginia Office of Tax Appeals (as well as the other party to the appeal, that is, the State Tax Commissioner's Office or the Taxpayer) with a certified copy of the filed petition for appeal (showing the circuit court in which the petition was filed, the date filed, and the "civil action number" for the appeal from an administrative agency), along with a certified copy of any order filing the petition or of any other initial process document setting forth the directives of the court with respect to processing the appeal.

Within fifteen (15) days after receipt of this written notice of the appeal, or within such further time as the circuit court may allow, the West Virginia Office of Tax Appeals, pursuant to the provisions of W. Va. Code § 29A-5-4(d), as last amended, will prepare and transmit to the circuit court a certified copy of the entire record in the matter.

As set forth in 121 C.S.R. 1, § 86 (Apr. 20, 2003) (Rules of Practice and Procedure before the West Virginia Office of Tax Appeals), the West Virginia Office of Tax Appeals will: (1) send to the parties a detailed index of the record at the same time it transmits to the circuit court a certified copy of the entire record, § 86.4; (2) at the same time send to the appellant(s) a bill (payable to the “State of West Virginia”), due within twenty (20) days, for the reasonable costs of preparing the record, § 86.3; and (3) upon payment of such record preparation costs, send to the parties a certified copy of the entire record.