

**SANITIZED DECISION - DOCKET NO. 04-454 U - BY ROBERT W. KIEFER, JR. -  
SUBMITTED OCTOBER 12, 2004 - ISSUED APRIL 12, 2005**

**[ SYNOPSIS -- see “Conclusions of Law” section of Order, below ]**

**ORDER**

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner”) conducted an audit of the books and records of the Petitioner. Thereafter, on November 26, 2003, the Director of this Division issued a purchasers’ use tax assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of October 1, 1998, through September 30, 2003, for tax and interest, computed through November 30, 2003, for a total assessed tax liability. Written notice of this assessment was served on the Petitioner on December 1, 2003.

Thereafter, by mail postmarked January 30, 2004, and received in the offices of the West Virginia Office of Tax Appeals, on February 2, 2004, the Petitioner timely filed a petition for reassessment. The petition for reassessment alleged that the assessment was based on an erroneously high estimate of the Petitioner’s purchases; that the Petitioner was exempt on its purchases because it received more than 50% of its support from gifts, grants and direct and

indirect charitable contributions; that the tax was imposed on items purchased for resale; and that the tax was imposed on the purchases of prescription drugs.

At the prehearing conference conducted in this matter, it was stipulated that the Petitioner would amend its petition for reassessment to assert an equal protection claim with respect to its purchases of prescription medications. It was further agreed between the parties and the undersigned that the issues in this matter would be heard on a bifurcated basis, because if it is held that the Petitioner receives more than 50% of its support from gifts, grants and charitable contributions, the Petitioner would be exempt from the purchasers' use tax on all of its purchases and the need for the presentation of evidence and a decision on the remaining issues would be obviated.

#### **FINDINGS OF FACT**

1. For many years, including the entire period in question, the Petitioner has operated a primary care, rural health clinic in West Virginia, as well as a satellite clinic on the premises of a certain high school, and a separate administrative facility, both also in West Virginia. (Transcript, pp. 28-33).

2. Throughout the period in question, the Petitioner has maintained the status of a non-profit, charitable organization that is exempt from income tax on its program revenues and other receipts because it operates for charitable purposes as described in the provisions of Internal Revenue Code §501(c)(3). (Transcript, pp. 47-48; Petitioner's Exhibits Nos. 3 and 4).

3. During the period of 1991 to 2000, the Petitioner operated for the account of, and as a separate division of A college, doing business as B (hereinafter "B"), the faculty practice plan of college A, an instrumentality of the State of West Virginia. (Transcript, pp. 29-31, 80-81)

4. During the six fiscal years, 1998 through 2003 inclusive, the Petitioner received basic reimbursement for providing health care services to Medicaid patients of \$ and to Medicare patients of \$. (Transcript, pp. 31, 41-44, 71-72; Petitioner's Exhibits Nos. 5 and 6).

5. The basic reimbursement received by the Petitioner for providing health care services to Medicaid and Medicare patients is the same type of reimbursement that private health care providers receive for providing health care services to their patients. (Transcript, p. 41).

6. During the fiscal years it operated as a unit of B, the Petitioner, due to its status as a rural health clinic, also received moderately enhanced reimbursements for these same services to Medicaid patients of \$ and to Medicare patients of \$. (Transcript, pp. 31, 41-44, 71-72; Petitioner's Exhibits Nos. 5 and 6).

7. Commencing on November 30, 2000, the Petitioner received its designation as a federally qualified health center (hereinafter "FQHC") look-alike, based on its commitment to providing free or low cost primary health care to the rural, low-income population of its service area. As a result, the Petitioner began operating its clinics for its own account. (Transcript, pp. 31-39, Petitioner's Exhibit No. 2).

8. As an FQHC look-alike, the Petitioner became entitled to receive a variety of benefits, including more enhanced Medicare and Medicaid reimbursements which, during its fiscal years 2001, 2002 and 2003, amounted to a total of \$ for Medicaid patients and \$ for Medicare patients. (Transcript, pp. 31, 41-44, 71-72; Petitioner's Exhibits Nos. 5 and 6).

9. As an FQHC look alike, the Petitioner became eligible to have its in house pharmacy participate in a subsidized medicine program designated as the 340-B pharmacy program established under the United States Public Health Act, the value of the costs avoided as a result of which subsidy, during its fiscal years 2001, 2002 and 2003, was \$ (Transcript, pp. 31-32, 40, 79-80; Petitioner's Exhibits Nos. 5 and 6).

10. Throughout the entire period in question, the Petitioner has also participated in the West Virginia Rural Health Education Partnership Program (hereinafter, RHEP), which provides, as a part of the education of health sciences professionals, opportunities for clinical training in primary health care in underserved, rural settings. (Transcript, pp. 32, 66-67)

11. Throughout the period in question, the Petitioner has provided extensive community outreach health programs which involved the work of RHEP students, community volunteers and its own employees. (Transcript, pp. 66-68, 93-95).

12. The Petitioner calculates the value of the cost avoided by having such donated, in-kind services during the years 1998-2003 was \$ based on industry standards. (Petitioner's Exhibits Nos. 5 and 6).

13. To be designated as an FQHC, an organization, must, among other things, operate in an area where the population is under Section 330 of the United State Public Health Act. (Transcript, p. 32)

14. To be designated as an FQHC, an organization, must, among other things, operate in an area where the population is underserved in terms of the ratio of primary health care providers, due among other things, to its transient, language-challenged, or abnormally deficient health status. (Transcript, pp. 34-37; Petitioner's Exhibit No. 2)

15. To be designated as an FQHC, an organization must meet be governed by a board made up members of the community, a majority of whom use its services. (Transcript, p. 35).

16. To be designated as an FQHC, an organization must meet an extensive array of programmatic requirements in terms of providing primary health care, ranging from a specialty care referral system, including transportation arrangements, to bioterrorism threat preparedness and many others having the broad focus of generally enhancing the quality of life in the community it serves. (Transcript, pp. 35-37; Petitioner's Exhibit No. 2)

17. Throughout the period in question, in its pharmacy the Petitioner has conducted an indigent care program provided by various pharmaceutical distributors by which it facilitates the process of making prescription medicine available to low-income individuals who are patients at its clinics for a fraction of their retail value. (Transcript, pp. 60-61, 76-79).

18. The indigent care program permits qualifying individuals to apply to be eligible to receive drugs from pharmaceutical companies, at little or no cost to the patient. The Petitioner aids a number of its patients in applying for the indigent care program, although individuals are free to apply directly to the pharmaceutical companies. (Transcript, p. 60, 76).

19. Upon receiving a prescription from a medical care provider, an eligible patient is entitled to take the prescription to be filled at any pharmacy. (Transcript, p. 60).

20. If indigent care program patients fill their prescriptions at the Petitioner's pharmacy, the Petitioner receives the prescribed drugs from the pharmaceutical company, places them in its inventory and holds them for the purpose of tilling the prescription of the identified individual patients. Technically, the drugs are provided directly to the patient. (Transcript, pp. 60-61, 76-77).

21. For each prescription filled under the indigent care program, the Petitioner charges a \$ dispensing fee. (Transcript, p. 61).

22. The value of the drug purchase costs avoided as a result of the indigent care program during the fiscal years 1998-2003, was \$, only \$ of which was reportable for cash basis financial statement purposes. (Transcript, pp. 75-79; Petitioner's Exhibits Nos. 5 and 6).

23. Starting in 2002, the Petitioner began providing behavioral health services at its clinics. (Transcript, pp. 32-33).

24. As an FQHC, the Petitioner is able to participate in the National Health Service Corps program which enables it to recruit physicians to work in its clinics by assisting with the payment of their student loans. (Transcript, p. 40).

25. As an FQHC, the Petitioner receives a higher score in connection with its competition for program grant funding. (Transcript, p. 40).

26. As an FQHC, the Petitioner is the beneficiary of subsidized liability and coverage under the Federal Tort Claims Act. (Transcript pp. 45-46, 65, 86-90).

27. Prior to being designated as an FQHC, the Petitioner received subsidized liability and casualty insurance coverage through the West Virginia Board of Risk Management's coverage of its sponsors/operational underwriters, A and B. (Transcript, pp. 45-46, 65, 86-90).

28. The value of the cost avoided as a result of receiving such subsidized liability and casualty insurance coverage during the years 1998-2003, was \$, based on standard industry rates. (Petitioner's Exhibits Nos. 5 and 6).

29. During the years in question, the Petitioner was able to occupy its premises at below market rental costs due to in-kind contributions to it by the county Board of Education and another, totally unrelated corporation. (Transcript, pp. 64-65, 85-86).

30. The value of the cost avoided due to such discounted rents, during the years 1998-2003, was \$ based on standard rental rates for comparable property. (Petitioner's Exhibits Nos. 5 and 6).

31. During the years that it operated as a unit of B, the Petitioner's operations were financially underwritten by the operating loss sustained by B in the amount of \$ all but \$ of which was included in reported cash basis revenue. (Transcript. pp. 63, 80-85, 91-93; Petitioner's Exhibits Nos. 5 and 6).

32. During the years in question, the Petitioner received in-kind contributions to its operating budget from a certain college in the form of payment of the faculty salary share of the compensation of physicians working at its clinics, the value of which was \$, all but \$ of which was included in reported cash basis income. (Transcript, pp. 63-64, 81-85, 90-92; Petitioner's Exhibits Nos. 5 and 6).

33. During the years in question, in order to manage its finances, comply with various regulatory reporting schemes, and other similar activities, the Petitioner participated in a subsidized community health care information technology network for which use and access it pays less than full market value. (Transcript, pp. 69-70, 96-97).

34. The value of the cost avoided by its participation in that subsidized network during the years 1998-2003 was \$ (Petitioner's Exhibits Nos. 5 and 6).

35. The mix of reimbursement sources for the services the Petitioner provides is approximately 25% Medicaid, 15% Medicare, 25% private insurance and 35% uninsured. (Transcript, pp.44-45).

36. Over the years in question, the Petitioner's operating budget has grown by approximately five fold. (Transcript, p. 44).

37. Without the various subsidies it received in the form of cash grants, subsidized goods and services and in-kind contributions, the Petitioner could not provide the service that it does. (Transcript, pp. 105-110).

## **DISCUSSION**

West Virginia Code § 11-15-9 provides, in relevant part:

(a) . . . The following sales of tangible personal property and services are exempt as provided in this subsection:

. . . .

(6) Sales of tangible personal property or services to a corporation or organization which has a current registration certificate issued under article twelve [ §§ 11-12-1 *et seq.*] of this chapter, which is exempt from federal income taxes under Section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986, as amended, and which is:

. . . . .

(C) A corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees;

. . . . .

(F) For purposes of this subsection:

(i) The term "support" includes, but is not limited to:

(I) Gifts, grants, contributions or membership fees;

(II) Gross receipts from fund raisers which include receipts from admissions, sales of merchandise, performance of services or furnishing of facilities in any activity which is not an unrelated trade or business within the meaning of Section 513 of the Internal Revenue Code of 1986, as amended;

(III) Net income from unrelated business activities, whether or not the activities are carried on regularly as a trade or business;

(IV) Gross investment income as defined in Section 509(e) of the Internal Revenue Code of 1986, as amended;

(V) Tax revenues levied for the benefit of a corporation or organization either paid to or expended on behalf of the organization; and

(VI) The value of services or facilities (exclusive of services or facilities generally furnished to the public without charge) furnished by a governmental unit referred to in Section 170(c)(1) of the Internal Revenue Code of 1986, as amended, to an organization without charge. This term does not include any gain from the sale or other disposition of property which would be considered as gain from the sale or exchange of a capital asset or the value of an exemption from any federal, state or local tax or any similar benefit;

(ii) The term "charitable contribution" means a contribution or gift to or for the use of a corporation or organization, described in Section 170(c)(2) of the Internal Revenue Code of 1986, as amended; and

(iii) The term "membership fee" does not include any amounts paid for tangible personal property or specific services rendered to members by the corporation or organization; . . . . (Emphasis added.)

The Petitioner possesses a current registration certificate issued under W. Va. Code § 11-12-1, *et seq.*, and is exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code. Therefore, the primary question to be considered is whether the Petitioner receives more than one half of its support from gifts, grants and direct or indirect charitable contributions.

The Petitioner contends that the decision in *Kings Daughters Housing, Inc. v. Paige*, 203 W. Va. 74, 506 S.E.2d 329 (1998), controls this situation, since it is the only case in which the West Virginia Supreme Court of Appeals has discussed W. Va. Code § 11-15-9(a)(6)(C). In *Kings Daughters*, the Supreme Court considered whether a government subsidy to the taxpayer, for the purpose of providing low-cost housing to the elderly, constituted a grant under the statute. “Subsidy” was defined by *Black’s Law Dictionary* as:

A *grant* of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for government aid, because such purpose is likely to be of benefit to the public. [Emphasis added in original.]

Based on this definition of “subsidy” the Court held that the housing subsidies in that case were grants.

Insofar as it is relevant to this action, the Petitioner’s reliance on *Kings Daughters* is well-placed. The Syllabi provide no specific guidance, as they contain only “black letter law” respecting application and interpretation of statutes, based on the statutory language. The single holding is that a “subsidy,” a grant of money, is a “grant.” Beyond that, it provides little guidance. It provides no guidance respecting what constitutes a charitable contribution.

As a general principle, the State Tax Commissioner takes the position that “contribution” should be defined in the manner provided for by the Financial Accounting Standards Board, as established in the “Statement of Financial Accounting Standards No. 116, Accounting for Contributions Received and Contributions Made” (“SFAS 116”). In Paragraph 3, “contribution” is defined as follows:

A contribution is an unconditional transfer of cash or other assets to an entity or a settlement or cancellation of its liabilities in a voluntary **nonreciprocal transfer** by another entity acting other than as an owner. Other assets include securities, land, buildings, use of facilities or utilities, material and supplies, intangible assets, services and **unconditional promises to give** those items in the future.

Paragraph 48 of SFAS 116, entitled “Distinguishing Contributions from Other Transactions” provides:

48. The Board focused on three characteristics that help distinguish contributions from other transactions. – contributions (a) are nonreciprocal transfers, (b) are transfers to or from entities acting other than as owners, and (c) are made or received voluntarily. Those characteristics distinguish contributions from exchange transactions, which are reciprocal transfers in which each party receives and sacrifices approximately equal value, from investments by owners and distributions to owner, which are nonreciprocal transfers between an entity and its owner; and from other nonreciprocal transfers, such as impositions of taxes or fines and thefts, which are not voluntary transfers.

This Office is of the opinion that the standards articulated in SFAS 116, while not controlling, provide relevant guidance for analyzing whether or not a transaction constitutes a contribution, as opposed to a sale, exchange or other like transaction.

The Petitioner has identified a number of subsidies, cash receipts, donations of property and services, and other benefits which it contends are direct or indirect charitable contributions. The Tax Commissioner concedes that some of these items constitute charitable contributions. He further contends that certain of these are not charitable contributions. This Office need only address those items contested by the State Tax Commissioner.

1. Medicare and Medicaid Reimbursements.

The first issue presented is whether Medicare and Medicaid reimbursements received by the Petitioner constitute “gifts, grants, [or] direct or indirect charitable contributions” to the Petitioner. If they are, they count toward the one-half that would exempt the Petitioner from the payment of consumers’ sales and service tax.

The Petitioner contends that Medicare and Medicaid reimbursements should be considered “gifts, grants, [or] direct or indirect charitable contributions[.]” It maintains that the reimbursements should be so considered because Medicare and Medicaid are social insurance programs enacted by Congress to aid the general welfare, relying on rulings by state courts in

other jurisdictions. See *Wojtkowski v. Hartford Acc. & Indem. Co.*, 27 Ariz. App. 497, 556 P.2d 798 (1976); *Atkins v. Allstate Ins. Co.*, 382 So.2d 1276 (1980); *Imvris v. Michigan Millers Mut. Ins. Co.*, 39 Mich. App. 406, 198 N.W.2d 36 (1972); *Jones v. Aetna Cas. & Sur. Co.*, 497 S.W.2d 809 (1973); and *Witherspoon v. St. Paul Fire & Mar. Ins. Co.*, 86 Wash. 2d 641, 548 P.2d 302 (1976).

On the other hand, the State Tax Commissioner contends that Medicare and Medicaid reimbursements are amounts that are paid to the Petitioner in payment for services rendered to eligible patients. He relies on Example 5, Paragraph 181, Appendix C of SFAS 116, which provides:

181. Hospital F provides health care services to patients that are entitled to Medicaid assistance under a joint federal and state program. The program sets forth various administrative and technical requirements covering provider participation, payment mechanisms, and individual eligibility and benefit provisions. Medicaid payments made to Hospital F on behalf of the program beneficiaries are third-party payments for patient services rendered. Hospital F provides patient care for a fee – and exchange transaction – and acts as an intermediary between the government provider of assistance and the eligible beneficiary. The Medicaid payments are not contributions to Hospital F.

The evidence in this matter supports the position taken by the Tax Commissioner. A portion of the amounts received by the Petitioner as Medicare and Medicaid reimbursements, those identified in Petitioner's Exhibit No. 5 as either "Medicare Reimbursement for service" or "Medicaid Reimbursement for service," clearly are payments of fees for services rendered by the Petitioner, in the same manner that private medical providers are reimbursed by Medicare and Medicaid. Simply stated, these are fees paid by a third-party payor for services rendered. As such they cannot be considered as charitable contributions, either direct or indirect.

While it is not as apparent that enhanced Medicare and Medicaid reimbursements constitute payments of fee for services rendered, this Office concludes that they are. The Petitioner is in the business of providing health care services to its patients. The costs for which

it receives enhanced reimbursements are incurred in the provision of these health care services. The amount of the reimbursements are based on the costs incurred in providing these services, and are designed to reimburse the Petitioner for some or all of those costs. As such, the enhanced reimbursements do not constitute direct payments for specific, identified services rendered. However, they are, for lack of a better term, indirect fee for services payments. Like direct fee for service reimbursements, the enhanced reimbursements do not constitute charitable contributions.

This Office is of the opinion that this situation is clearly distinguishable from the situation presented in *Kings Daughters*. *Kings Daughters* involved cash subsidies. The Medicare and Medicaid reimbursements in this action are just that, reimbursements. They are direct reimbursements for specific procedures, or reimbursements for costs incurred in providing medical services. Therefore, *Kings Daughters* is not controlling with respect to this issue.

## 2. Donations of Services.

The Petitioner contends that services donated by certain individuals constitute charitable contributions. The Petitioner received contributions of services from RHEP students, licensed social workers and an ophthalmologist, which it maintains are gifts or charitable contributions. The Tax Commissioner apparently does not dispute the Petitioner's contention respecting the services donated by social workers and ophthalmologist. However, he does maintain that services donated by RHEP students are not gifts or charitable contributions.

The general provision respecting contributions of services, Paragraph 9 of SFAS 116 provides:

9. Contributions of services shall be recognized if the services received (a) create or enhance nonfinancial assets or (b) require specialized skills, are provided by individuals possessing those skills, and would typically need to be purchased if not provided by donation. Services requiring specialized skills are provided by accountants, architects, carpenters, doctors, electricians, lawyers, nurses, plumbers, teachers, and other professionals and craftsmen. Contributed services

and promises to give services that do not meet the above criteria shall not be recognized.

The Tax Commissioner cites Example 14, Paragraphs 203 and 204 of SFAS 116, which elaborates on Paragraph 9 in this area. Example 14, Paragraphs 203 and 204 of SFAS 116 provide:

203. Hospital P provides short-term inpatient and outpatient care and also provides long-term care for the elderly. As part of the long-term care program, the hospital has organized a program whereby local high school students may contribute a minimum of 10 hours a week, from 3:00 p.m. to 6:00 p.m., to the hospital. These students are assigned various duties, such as visiting and talking with the patients, distributing books and magazines, reading, playing chess, and similar activities. The hospital does not pay for these services or similar services. The services are accepted as a way of enhancing or supplementing the quality of care and comfort provided to the elderly long-term care patients.

204. Hospital P would be precluded from recognizing the contributed services because the services contributed do not meet either of the conditions of paragraph 9 of [SFAS 116]. Condition (a) is not relevant. Condition (b) has not been met because the services the students provide do not require specialized skills nor would they typically need to be purchased if not provided by donation.

The Tax Commissioner takes the position that the services provided to the Petitioner by the RHEP students are similar to those of the students in the example. He maintains that the services rendered by RHEP students do not require specialized skills. He also maintains that it would not be necessary to acquire these same services in the open market if they were not provided by the RHEP students. However, not all of the services provided to the Petitioner by the RHEP students clearly lack specialization, like those described in Example 14. At the same time, some of the services they provide do not require any degree of specialization. Stated differently, some of the RHEP student activities can be considered specialized, so that they might be considered contributions, while others are not specialized, so that they can't be considered contributions.

The RHEP Program students are medical, dental, pharmacy, nursing and physician assistant students. As students, they do not possess the same degree of knowledge, training and experience as individuals who are licensed in these fields. However, the skills they possess are

specialized. Stated differently, they possess some degree of specialized skills, which are not as advanced as those who have earned degrees in their respective fields, have undergone all training and practical experience required for licensure, and have practiced in these areas for some time.

The services provided by RHEP students that require specialized skills including working with the clinicians and conducting health screenings, which may require them to take vital signs, blood pressure, screening for glucose and cholesterol, and other similar activities. The RHEP students also perform activities that do not require specialized skills, such as planning and participating in a health fair and conducting lectures in the community. (In some instances, conducting lectures might require specialized skills.) The RHEP students also conduct community needs assessments. It is not clear whether all community needs assessments require specialized skills.

Some of the activities performed by the RHEP students, such as working with the clinicians and activities performed in conducting health screenings, would have to be purchased if they were not performed by the students. These are not activities that could be performed by lay persons. Others appear to be of the type that they could be performed by lay persons, such as certain classroom teaching and preparing and conducting health fairs. These activities would not have to be purchased if they were not provided by the RHEP students.

### 3. Indigent Care Program.

The indigent care program is one provided by the pharmaceutical companies. The program is designed to provide free pharmaceutical drugs to patients, based on the individual financial circumstances of the patients. A patient applies to participate in the program. The Petitioner provides aid to some patients in preparing complicated applications, although an individual patient may apply directly with the pharmaceutical company. A qualifying patient is entitled to receive prescription drugs from the pharmaceutical company free of charge. The

prescription drugs are sent by the pharmaceutical company to the Petitioner. The Petitioner orders, receives and tracks the drugs, provides counseling to the patient as required by law, and then delivers the drugs to the patient. The Petitioner is paid a fee for dispensing the drugs to the patients.

Mr. X testified that upon being presented with a prescription, the Petitioner purchases drugs from its wholesaler. He testified that patients' prescriptions are filled with the drugs purchased from the wholesaler. These drugs are then replaced by the pharmaceutical company. As testified to by Mr. X, the design and practical effect of this program is to allow the pharmaceutical companies to provide drugs directly to the patient. The Petitioner merely handles the drugs that are provided to the patient.

This Office concludes that the indigent care program does not provide subsidized or free drugs to the Petitioner. Instead, it provides subsidized or free drugs directly to the patient, with the Petitioner merely acting as an agent of or conduit for the patient. As such, this is not a subsidy to the Petitioner, which might be considered a charitable donation.

#### 4. 340-B Drug Program.

The 340-B Drug Program is a pricing subsidy that allows the Petitioner to purchase drugs at a substantial discount, paying substantially less than it would normally be required to pay its wholesaler. The Petitioner is then free to sell the drugs to its patients for whatever amount it can obtain. It may sell them at full retail price to patients who have health insurance, while it will sell them at discounted prices to uninsured patients who cannot afford to pay the full retail price.

With respect to the 340-B Drug Program, the State Tax Commissioner makes the same arguments that it made with respect to the Indigent Care Drug Program, that the drugs are provided directly to the patients. However, the evidence does not bear this out. Unlike the Indigent care program, the Petitioner purchases the drugs and resells them to its patients.

This Office is convinced that the 340-B Drug Program is a subsidy, which constitutes a gift, grant or charitable contribution to the Petitioner.

5. Donated Information Services .

The Petitioner receives access to information services provided by the Health Network. It pays an amount that is less than the fair market value for the information services it receives. It contends that the difference between fair market value and the amount it pays constitutes a charitable donation of those services.

The State Tax Commissioner contends that the information services do not constitute a charitable contribution because the Petitioner pays consideration for the services. According to the Commissioner, the transaction is a sale, not a donation. The Petitioner responds to this contention by stating that the transaction is nonreciprocal, because the amount paid is less than fair market value.

Clearly the transaction between the Petitioner and the Health Network is a contribution in accordance with Paragraph 48 of SFAS 116. The transaction is not reciprocal, because the Health Network receives less than approximate equal value for the services it provides. There is no evidence in the record which could cause this Office to conclude that there is any ownership relationship between the Petitioner and the Health Network. The evidence in the record supports the conclusion that the exchange is voluntary. Concluding that the transaction is a contribution of services, it follows that the difference between the fair market value and the amount paid is a gift, grant or charitable contribution to the Petitioner.

6. College and B Contributions.

As set out in the findings of fact, during the years 1998 through 2000, the Petitioner operated for the account, and as a separate division, of B. During the years that it operated as a unit of B, the Petitioner's operations were financially underwritten by the operating loss

sustained by B in the amount of \$, all but \$ of which was included in reported cash basis revenue. During these years, the B physicians who provided medical services to the Petitioner's patients received a portion of their salaries from A college. The Petitioner contends that the operating loss suffered by B and the portion of the salaries paid by the college are charitable contributions.

There is testimony in the record that B provided services at the Petitioner's location. The patients or their third-party payors were billed for these services from B's business office in a town in this State. Amounts paid were mailed to B in that town, except for some payments that were collected by B personnel at the Petitioner's location.

The Tax Commissioner contends that these amounts are not charitable contributions because they do not constitute nonreciprocal exchanges. The Commissioner, consistent with Paragraph 48 of SFAS 116, bases his contention that the exchange is reciprocal (not nonreciprocal) on the fact that the Petitioner was operated as a division of B. Stated differently, B had an ownership interest in the Petitioner.

This Office agrees with the State Tax Commissioner that the fact that B has an ownership interest in the Petitioner during the years in question renders the contribution reciprocal. The fact that the transaction is not nonreciprocal means that it is not a charitable contribution.

With respect to the college, the amounts they purportedly contribute to the Petitioner are, at best, derivative. The college pays a portion of the salaries earned by B doctors, because those doctors are professors at the college. The salary they are paid by the college is for teaching at the college. Those same doctors are engaged in the private practice of medicine, for which they earn a separate salary from B. In their capacities as employees of B, they provide professional medical services to the Petitioner. It makes no sense that a portion of the salaries they earn for

teaching at the college should be attributed to the time they spend providing medical services to the Petitioner in their capacities as practicing physicians, working for B.

This reasoning also applies to the insurance provided by the college, B, and BRIM for the years 1998, 1999 and 2000.

### **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 reassessment, the burden of proof is upon the petitioner-taxpayer to show that the assessment is made contrary to law. *See* W. Va. Code § 11-10A-10(e) [2002].

2. For purposes of W. Va. Code § 11-15-9(a)(6)(C), Medicare and Medicaid reimbursements do not constitute charitable contributions, because they constitute payments of fees for services.

3. For purposes of W. Va. Code § 11-15-9(a)(6)(C), the services provided by RHEP students have not been shown to be charitable contributions, because a portion of the services they provide are not specialized services and would not be required to be purchased by the Petitioner if they were not provided by the students.

4. For purposes of W. Va. Code § 11-15-9(a)(6)(C), the value of drugs which are furnished to patients pursuant to pharmaceutical companies' indigent care programs do not constitute charitable contributions because they are provided directly to the patients, based on the individual financial circumstances of the patients.

5. For purposes of W. Va. Code § 11-15-9(a)(6)(C), the subsidy that the Petitioner receives in purchasing through the 340-B Drug Program constitutes a grant or a charitable contribution.

6. For purposes of W. Va. Code § 11-15-9(a)(6)(C), the discounted information services which are donated by the Health Network constitute a charitable contribution of the difference between the amount paid and the value of the services.

7. For purposes of W. Va. Code § 11-15-9(a)(6)(C), the losses incurred by B and the college, and the insurance coverage provided by B and the college do not constitute charitable contributions, since they were provided by entities that were in an ownership relationship with the Petitioner.

8. For purposes of W. Va. Code § 11-15-9(a)(6)(C), the insurance coverage provided by BRIM and the insurance coverage provided under the FTCA constitute charitable contributions.

9. Based on the figures provided by the Petitioner in its Exhibit No. 5, the amount of its “support” that is derived from “gifts, grants and direct or indirect charitable contributions” for each of the years of the audit period, and its percentage of the Petitioner’s total support, is as follows:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Percentage of Support From Gifts, Grants and Charitable Contributions	35.42%	31.92%	31.36%	30.18%	37.69%	43.56%

10. Based on the figures provided by the Petitioner in its Exhibit No. 5, the amount of its “support” that is not derived from “gifts, grants and direct or indirect charitable contributions,” and its percentage to the Petitioner’s total support, is as follows:

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Percentage not from such “gifts”, etc.	64.58%	68.08%	68.64%	69.82%	62.31%	56.44%

11. The Petitioner is not totally exempt for any of the years of the audit period because its support from gifts, grants and direct or indirect charitable contributions does not exceed 50% of its total support for any of those years.

## DISPOSITION

**WHEREFORE**, with respect to the issue of whether the Petitioner is a corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner does not receive more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees. Consequently, it is the **FURTHER DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the tax assessment issued against the Petitioner for the period of October 1, 1998, through September 30, 2003, for tax and interest, computed through November 30, 2003, for a total assessed tax liability, should be **NEITHER ABATED NOR MODIFIED** on these grounds.

The Petitioner has raised other issues respecting the assessment, and as those issues remain to be heard, the **WEST VIRGINIA OFFICE OF TAX APPEALS** will set this matter down for a status and prehearing conference and an evidentiary hearing with respect to the remaining issues raised by the Petitioner.