

**SANITIZED DECISION--DOCKET NO. 04-568 C--ROBERT W. KIEFER, JR., ALJ--
SUBMITTED for DECISION on JULY 18, 2005--ISSUED on JANUARY 18, 2006**

SYNOPSIS

CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that the assessment against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

CONSUMERS' SALES AND SERVICE TAX -- TAXPAYER ENGAGED IN PROVIDING A SERVICE, NOT SELLING INTANGIBLE PERSONAL PROPERTY -- In developing, coordinating and maintaining a healthcare provider network, a taxpayer is engaged in the provision of a service, not in the sale of intangible personal property.

CONSUMERS' SALES AND SERVICE TAX -- NOT PRE-EMPTED BY FEDERAL ERISA STATUTE -- The West Virginia consumers' sales and service tax, insofar as it provides for the assessment of tax against a taxpayer for services provided in developing, coordinating and maintaining a healthcare provider network, is not subject to the federal ERISA pre-emption statute.

CONSUMERS' SALES AND SERVICE TAX – AS APPLIED, NO VIOLATION OF EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION OR EQUAL AND UNIFORM TAXATION PROVISION OF THE CONSTITUTION OF WEST VIRGINIA – Taxpayer failed to satisfy burden of proving that other identified taxpayers who are purportedly in the same classification as taxpayer are, in fact, engaged in the same business as the taxpayer and have not been and will not be assessed for taxes in the same manner as the Petitioner, thereby failing to prove a violation, as applied, of the equal protection clause of the United States Constitution and the equal and uniform taxation provision of the Constitution of the State of West Virginia.

CONSUMERS' SALES AND SERVICE TAX – AS APPLIED, NO VIOLATION OF COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION -- The assessment of West Virginia consumers' sales and service tax against the taxpayer for services it provided in developing, coordinating and maintaining a healthcare provider network does not violate, as applied, the Commerce Clause of the United States Constitution because it is fairly apportioned to the services provided by the Petitioner in the State of West Virginia, it does not discriminate against interstate commerce, and it is fairly related to the services provided by the State of West Virginia.

CONSUMERS' SALES AND SERVICE TAX – NO DOUBLE TAXATION BY REASON OF PAYMENT OF TAX ON INSURANCE PREMIUMS BY TAXPAYER'S CUSTOMERS – The payment of the tax on the gross insurance premiums by the taxpayer's customers and the payment of consumers' sales tax on the services provided in developing, coordinating and maintaining a healthcare provider network does not constitute double taxation in violation of the equal and uniform taxation provision of the Constitution of the State of West Virginia, because the two taxes are imposed on two different subjects of taxation.

FINAL DECISION

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an audit of the books and records of the Petitioner. Thereafter, on June 30, 2004, the Director of this Division issued a consumers’ sales and service 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 15 of the West Virginia Code. The assessment was for the period of January 1, 2001, through December 31, 2003, for tax in the amount and interest in the amount computed through May 31, 2004, for a total assessed tax liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by hand delivery on August 27, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

JOINT STIPULATIONS OF FACT AS ENTERED INTO BY THE PARTIES

1. On June 30, 2004, an assessment of consumers’ sales and service tax was issued against the Petitioner. The assessment covered the period January 1, 2001 through December 31, 2003, and is for tax and interest for a total assessed liability. A copy of the assessment is attached as Exhibit A.

2. On August 27, 2004, the Petitioner filed a timely petition for reassessment. A copy of the petition is attached as Exhibit B.

3. The Petitioner is a limited liability company engaged in the business of providing its customers with the right to access healthcare services for the customers' beneficiaries on a discounted fee basis.

4. Since December of 2002, the Petitioner's offices have been located in West Virginia. During the period January 1, 2001, through December, 2002, the Petitioner's offices were located in West Virginia.

5. Customers of the Petitioner include licensed healthcare insurance companies, employers using a program of self-insurance to provide healthcare benefits to their employees, and third party administrators who provide administrative services to self-insured employers. Copies of samples of Petitioner's contracts with its customers are attached as Exhibit C. Although such contracts may vary as to certain terms, *e.g.*, language required by the Health Insurance Portability and Accountability Act (HIPAA), the Petitioner's performance obligations in each of them (as provided to the Respondent on a compact disc) are identical.

6. In order to provide its customers with the right to access discounted healthcare services for their beneficiaries, the Petitioner contracts with various healthcare providers to participate in a network of providers available to render such services to those beneficiaries. Copies of samples of these contracts with providers are attached as Exhibit D. Although such contracts may vary as to certain terms, *e.g.* language required by HIPAA, the Petitioner's performance obligations in each of them (as provided to the Respondent on the compact disc) are identical. Moreover, in no event, are the providers required to pay any dues or like charges to the Petitioner to maintain the relationship provided in those contracts or for any other reason.

7. The Petitioner's customers supply their beneficiaries with individual identification cards bearing the Petitioner's logo which enable those beneficiaries to expeditiously access discounted healthcare services at participating providers.

8. The Petitioner does not directly or indirectly render health care services to its customers' beneficiaries.

9. The Petitioner does not coordinate the rendering of health benefits on behalf of its customers or their beneficiaries.

10. The Petitioner does not determine the eligibility for health care benefits of its customers' beneficiaries.

11. Except for the re-pricing services described in Fact 13 below, during the years 2001, 2002, and 2003, the Petitioner's sole revenue was derived from fees charged its customers to give its customers' beneficiaries the right to access healthcare services from participating providers at predetermined discounted rates which benefit both the Petitioner's customers and their beneficiaries.

12. Other than re-pricing services described below in Fact 13, the Petitioner is not involved in the arrangement of, delivery of, administration of, or payment for, healthcare services.

13. During the years 2001 through 2003, approximately twelve percent (12%) of the Petitioner's revenues were generated by performing the service of re-pricing charges for healthcare services in the following circumstances:

(a) When a customer's beneficiary receives healthcare services from a participating provider, those services are subject to a contractual discount.

(b) When the provider bills the claim for payment for those services to the Petitioner's customer (insurance carrier, self-insured employer or third party administrator), the contractual discount must be calculated before the claim can be adjudicated and processed for disbursement.

(c) The Petitioner will perform the function of calculating the discount, known as re-pricing, for a fee.

(d) In performing that function, after the medical claim to be re-priced is received by the Petitioner or its agent, the relevant data regarding the claim is input into an electronic format and the contracted provider discount is applied electronically.

(e) With the discount thus applied, the data regarding the claim is then forwarded via electronic media to the insurance carrier, self-insured employer and/or third party administrator for adjudication.

(f) In performing the re-pricing function, the Petitioner does not make any benefit determinations regarding the claim.

(g) The only function performed by the Petitioner in re-pricing is applying the discount to the medical claim as described in the preceding lettered subsection of this Fact 13.

14. During the years 2001 through 2003, approximately fifty-eight percent (58%) of the Petitioner's revenue was derived from its charges for healthcare access rights provided to healthcare plans governed by the Federal Employee Retirement Income Security Act (ERISA).

15. Customers of the Petitioner subject to ERISA include self-insured employers and third party administrators of self-insured employer plans.

16. One hundred percent (100%) of the Petitioner's health insurance carrier customers were domiciled in states other than West Virginia, all but one of which was licensed by the West Virginia Department of Insurance to sell health care insurance in West Virginia.

17. Seventy-nine percent (79%) of the Petitioner's third party administrator customers were domiciled in states other than West Virginia.

18. During the years 2001 through 2003, twenty-nine percent (29%) of the self-insured employer groups administered by the Petitioner's third party administrator customers, representing fourteen percent (14%) of the total beneficiaries covered by such self-insured employers, were domiciled outside of West Virginia.

19. During the years 2001 through 2003, six percent (6%) of the employer group plans covered by the Petitioner's healthcare insurance carrier customers, representing seventy-eight percent (78%) of the total beneficiaries covered by such insured plans, were domiciled outside of West Virginia.

20. During the years 2001 through 2003, thirty-one percent (31%) of the providers in the Petitioner's network were domiciled outside of West Virginia.

21. All insured health care premiums charged with respect to employees and beneficiary customers domiciled in West Virginia must be filed with, and approved by, the Commissioner of the West Virginia Department of Insurance.

22. The health care insurance premiums include both medical costs and administrative services which are reported to the Insurance Commissioner.

23. Included in the administrative costs are either healthcare access fees paid to a third party (such as the Petitioner) for provider discounts or the costs associated with the insurance carrier's development and maintenance of its own provider network and discount contracts.

24. That premium, once approved by the Department of Insurance, is subject to the premium tax imposed under West Virginia Code §33-3-1 et seq.

25. Healthcare plans governed by ERISA, are not subject to regulation by the West Virginia Insurance Commissioner.

DISCUSSION

I. IN DEVELOPING, COORDINATING AND MAINTAINING A PROVIDER NETWORK FOR HEALTHCARE SERVICES, THE PETITIONER IS ENGAGED IN FURNISHING A SERVICE, NOT THE SALE OF INTANGIBLE PERSONAL PROPERTY.

The first issue to be decided in this matter is whether or not the Petitioner is engaged in business of selling intangible personal property, which is not subject to the consumers' sales and

service tax. In some measure, this depends whether it is the Petitioner's characterization of its business or the Respondent's characterization thereof that more accurately describes the Petitioner's business.

The Petitioner characterizes its business as the sale of intangible personal property. The Petitioner's customers are insurance companies, self-insured employers and third-party administrators for self-insured employers. It maintains that it sells its customers the right for the customers' beneficiaries to access discounted health care services. The Petitioner maintains that it provides cards to the customers' beneficiaries which identify the beneficiaries as participants in the Petitioner's provider network. The Petitioner's position is that because the cards have no intrinsic value, and because they represent a bundle of rights, they are intangible personal property.

The Tax Commissioner characterizes the Petitioner's business as the sale of a service to its customers. The Tax Commissioner cites W. Va. Code § 11-15-2(b)(17), which defines "services." The Tax Commissioner notes that all services are presumed to be taxable until the contrary is clearly established. W. Va. Code § 11-15-6.

Although the Tax Commissioner does not provide a detailed description of the Petitioner's services, this Office is of the opinion that the Petitioner is in the business of providing services to its customers. The service that the Petitioner provides is best described in the second preliminary declaration contained in both its "Payor Access Agreement" and "Claims Administrator Access Agreement:"

WHEREAS, [Petitioner] is a corporation organized for the purpose of developing, coordinating and maintaining provider networks for the delivery of Healthcare Services to Covered Individuals pursuant to Employee Benefit Plan(s), insurance policies or other coverage arrangements, and [Petitioner] has entered into contracts with participating Providers who will provide Covered Services at Network Rates;

See State's Exhibit "C" to the Stipulations of Fact. A nearly identical declaration is contained in several of the Petitioner's contracts with health care service providers. Its "Facility Participation Agreement" contains the following declaration:

WHEREAS, [Petitioner] is a Corporation organized for the purpose of developing, coordinating and maintaining Participating Provider networks for the delivery of Covered Services to Covered Individuals pursuant to employee benefit plans, insurance policies and/or other coverage arrangements;

as does its "Ancillary Provider Agreement:"

WHEREAS, [Petitioner] is a corporation organized for the purpose of coordinating and arranging for the delivery of hospital, physician and ancillary services for Covered Individuals to receive medical services pursuant to employee benefit plans[,] insurance policies or other group coverage arrangements;

See State's Exhibit "D" to the Stipulations of Fact.

The Stipulated Facts in this matter are consistent with the Petitioner's contracts. Stipulated Fact No. 3 states that the Petitioner "is engaged in the business of providing its customers with the right to access healthcare services for the customers' beneficiaries on a discounted fee basis." The Petitioner's customers include "licensed healthcare insurance companies, employers using a program of self-insurance to provide healthcare benefits to their employees and third party administrators who provide administrative services to self-insured employers. Stipulated Fact No. 4.

What the Petitioner does for its customers is to contact various providers of medical services and negotiate with those providers for the provision of medical services at specified, discounted prices. When the Petitioner reaches agreements with health care providers, it then enters into contracts with these providers for the provision of services to the Petitioner's customers' beneficiaries or insureds at prices specified by the contract, described as "discounted prices." These prices are presumably less than the customers or their beneficiaries would be able

to negotiate on their own. By entering into agreements with a number of healthcare providers, the Petitioner, in effect, develops a provider network.

Having developed a provider network, the Petitioner then markets the network to its customers. When its customers enter into an agreement to participate in the Petitioner's network, the customers' beneficiaries then have the right to access the healthcare services of the network providers. The Petitioner has, in effect, relieved its customers of the task of creating their own individual networks or otherwise going out and seeking the services of individual healthcare providers on their own. It also prevents the customers from being placed in the position of having to permit their beneficiaries or insureds to seek health care services from providers of their own choosing, at whatever fee the provider may charge for those services.

The Petitioner is engaged in the business of creating a network of health care services providers and then making that network available to its customers who, in turn, make the network available to their insureds or beneficiaries. This Office is of the opinion that the Petitioner's characterization of its business as the sale of intangible personal property is incorrect. This Office agrees with the Tax Commissioner's characterization of the Petitioner's activities as a service.

This conclusion is also supported by the way that the Petitioner is compensated by its customers. The fee charged by the Petitioner to its customers is set forth in Paragraph 5.2 of each both its "Payor Access Agreement" and "Claims Administrator Access Agreement." That provision provides, in relevant part:

5.2 Access Fee and Payment. As compensation *for services* rendered by [Petitioner] under this Agreement, Payor shall pay a monthly access fee ("Access Fee") to [Petitioner] for each month during the Term of this Agreement. The Access Fee shall be calculated in the manner set forth on **Exhibit A** attached hereto.

5.2 Directories. Payor shall pay [Petitioner] a provider directory purchase fee as set forth in **Exhibit A** attached hereto. (Emphasis added.)¹

The fee is charged to the Petitioner's customers, not to the covered individuals. The fee is expressly stated to be for services rendered by the Petitioner, not for the provision of some intangible personal property represented tangibly by a card. The fees charged pursuant these provisions of the contracts constitute the sole revenue earned by the Petitioner during the years of the audit. *See* Stipulation of Fact No. 11.

The Petitioner's contention that it sells intangible personal property to its customers' beneficiaries or insureds, embodied in an identification card, is also contrary to the facts demonstrating how the cards are issued. The Petitioner's contracts with its customers show a different transaction. With respect to identification cards issued to customers' beneficiaries, the "Payor Access Agreement" provides, in relevant part:

3.3 Identification Cards. Payor agrees that Payor shall cause the Network name and/or logo to be printed on, or affixed to, all identification cards issued to Covered Individuals in each Service Area. [Petitioner] may also require the identification cards to display the name of applicable Subnetworks. Payor further agrees that the identification cards shall also display: claims filing instructions and address; customer service telephone number for benefits and eligibility information; utilization management program instructions and telephone number; and the Covered Individual's name and identification number. Upon [Petitioners'] [*sic*] request, Payor agrees to submit a copy of the identification card to [Petitioner] for approval prior to distribution to Covered Individuals.

See State's Exhibit "C" to the Stipulations of Fact. The "Claims Administrator Access Agreement" is nearly identical, providing in relevant part:

3.3 Identification Cards. TPA shall cause the Network name and/or logo to be printed on, or affixed to, all identification cards issued to Covered Individuals in each Service Area. [Petitioner] may also require the identification cards to display the name of applicable Subnetworks. TPA further agrees that the identification cards shall also display: claims filing instructions and address; customer service telephone number for benefits and eligibility information;

¹ The language in the "Claims Administrator Access Agreement" is identical to the "Payor Access Agreement", except that it identifies the Petitioner's customer as "TPA" (presumably "Third-Party Administrator") instead of Payor.

utilization management program instructions and telephone number; and the Covered Individual's name and identification number. Upon [Petitioners'] [sic] request, TPA agrees to submit a copy of each Payor's identification card to [Petitioner] for approval prior to distribution to Covered Individuals.

See State's Exhibit "C" to the Stipulations of Fact. The contractual provisions clearly show that it is the Petitioner's customers who issue the cards to their insureds or their beneficiaries.

That the Petitioner's customers issue identification cards is further borne out by the contracts between the Petitioner and its customers. The "Payor Access Agreement" provides, in relevant part:

3.2 Participant Eligibility and Covered Service Verification. Payor or Payor's agent shall be solely responsible for determining the eligibility of persons to be Covered Individuals. Payor or Payor's agent shall be solely responsible for identifying and verifying the eligibility of Covered Individuals and the full range of Covered Services, and shall provide Participating Providers and [Petitioner] with procedures for contacting Payor or its agent concerning such identification and verification. Payor shall make full payment to any Participating Provider for Healthcare Services rendered in reliance upon any incorrect identification or verification of eligibility resulting from the act or omission of Payor.

See State's Exhibit "C" to the Stipulations of Fact. The "Claims Administrator Access Agreement" is nearly identical in its effect, providing in relevant part:

3.3 Identification Cards. TPA shall be solely responsible for defining and determining the eligibility of persons to be Covered Individuals. TPA shall be solely responsible for identifying and verifying the eligibility of Covered Individuals and the full range of Covered Services, and shall provide Participating Providers and [Petitioner] with specific procedures for contacting TPA or its agent concerning such identification and verification. TPA shall make full payment to any Participating Provider for Healthcare Services rendered in reliance upon any incorrect identification or verification of eligibility resulting from the act or omission of TPA or its agent.

See State's Exhibit "C" to the Stipulations of Fact. These contract provisions demonstrate that the Petitioner's customers are responsible for defining the eligibility of their beneficiaries and then determining whether particular individuals meet the eligibility standard established by them. The Petitioner's customers also bear liability for their own mistakes in incorrectly identifying or verifying eligible beneficiaries. These contractual provisions clearly show that it is the

Petitioner's customers, not the Petitioner, who determine the eligibility of the customers' insureds or beneficiaries, who issue the cards to their insureds or beneficiaries and who bear all responsibility for errors respecting eligibility and issuance of the identification cards.

The Petitioner's attempt to equate its situation to that of the retailer in the State Tax Commissioner's Office of Hearings and Appeals' Amended Administrative Decision 00-405 C & 00-406 C, 2001 W. Va. Tax Lexis 79 (November 7, 2001) does not withstand scrutiny. In that matter, the taxpayers were retailers who sold prepaid phone cards to their customers. The prepaid phone card entitled the customer to a certain amount of long distance service from a long distance service provider. The retailers were assessed for their failure to collect consumers' sales and service tax, because they were purportedly selling long-distance telephone services or tangible personal property. The taxpayers maintained that sale of the prepaid phone card constituted a sale of intangible personal property.

In Amended Administrative Decision 00-405 C & 00-406 C, the State Tax Commissioner held that the taxpayers were correct. The prepaid phone card had no intrinsic value; it was simply the medium by which information to access long-distance telephone service was provided to the customer. It was the information on the card that was valuable. The Commissioner further held that long distance phone services were provided by the long distance company that issued the card, not the retailers who sold the cards.

The Tax Commissioner takes the position that Amended Administrative Decision 00-405 C & 00-406 C is not binding precedent, because it was incorrectly decided by the State Tax Commissioner's Office of Hearings and Appeals prior to the creation of this Office.² Since it is the decision of this Office that the facts of Amended Administrative Decision 00-405 C & 00-406 C are so clearly different from the facts as presented herein as to render it materially

² This is contrary to the position that the Tax Commissioner takes when decisions decided by this Office's predecessor, the Office of Hearings and Appeals, are favorable to his position.

distinguishable from this matter, it is not binding precedent, and this Office does not need to speak to the validity of the prior decision.

As more fully set forth above, the Petitioner is not in the business of selling intangible personal property. It provides a service. Moreover, the service it provides is to its customers, not its customers' insureds and beneficiaries.

II. THE STATE TAX COMMISSIONER CONCEDES THAT THE PETITIONER'S BUSINESS OF RE-PRICING SERVICES OF ITS PROVIDERS CONSTITUTES DATA PROCESSING SERVICES THAT ARE EXEMPT FROM THE CONSUMERS' SALES AND SERVICE TAX.

The second issue presented by this matter is whether certain of the Petitioner's services, specifically "certain re-pricing services," are exempt because they constitute "electronic data processing services" that are exempt pursuant to W. Va. Code § 11-15-9(a)(21). The Tax Commissioner has conceded that these services are, in fact, exempt under this provision of the Code. Consequently, there is no need to address this issue.

III. THE ASSESSMENT OF CONSUMERS' SALES AND SERVICE TAX ON THE PETITIONER'S BUSINESS OF FURNISHING SERVICES IS NOT PRE-EMPTED BY THE FEDERAL ERISA LAW BECAUSE IT DOES NOT "RELATE" TO AN EMPLOYEE BENEFIT PLAN.

The third issue presented by this matter is whether the State Tax Commissioner is precluded from assessing consumers' sales and service tax on the services provided by the Petitioner to its customers who are self-insured employers and third-party administrators for because they are preempted by the provisions of 29 U.S.C. § 1144(a). The preemption clause provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" as described therein. The United States Supreme Court's test for determining pre-emption is as follows:

Our efforts at applying the provision have yielded a two-part inquiry: A "law 'relate[s] to' a covered employee benefit plan for purposes of § 514(a) 'if it [1] has

a connection with or [2] reference to such a plan.'" (Cites omitted). Under the latter inquiry, we have held pre-empted a law that "impos[ed] requirements by reference to [ERISA] covered programs," (cite omitted); a law that specifically exempted ERISA plans from an otherwise generally applicable garnishment provision, (cite omitted); and a common-law cause of action premised on the existence of an ERISA plan, (cite omitted). Where a State's law acts immediately and exclusively upon ERISA plans, . . . , or where the existence of ERISA plans is essential to the law's operation, . . . , that "reference" will result in pre-emption.

A law that does not refer to ERISA plans may yet be pre-empted if it has a "connection with" ERISA plans. Two Terms ago, we recognized that an "uncritical literalism" in applying this standard offered scant utility in determining Congress' intent as to the extent of § 514(a)'s reach. *Travelers*, 514 U.S. at 656. Rather, to determine whether a state law has the forbidden connection, we look both to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," *ibid.*, as well as to the nature of the effect of the state law on ERISA plans, 514 U.S. at 658-659.

Calif. Div. of Labor Stds. Enforcement v. Dillingham Constr., 519 U.S. 316, 324-25, 117 S. Ct. 832, 837-38, 136 L.Ed.2d 791, 799-800 (1997). Likewise, nothing in the West Virginia consumers' sales and service tax statute "acts immediately or exclusively on ERISA plans," nor is "the existence of ERISA plans . . . essential to the law's operation." Thus, there is no reference to an ERISA. Consequently, the consumers' sales and service tax statute may be pre-empted only if it has a connection with ERISA plans.

With respect to state statutes that have a "connection with" ERISA plans, there are two relatively recent United States Supreme Court decisions dealing with state statutes that place economic burdens on employee benefit plans. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995), the Court considered a statute that placed a surcharge on hospital bills for patients covered by commercial insurance, self-insured funds, HMOs and other similar entities, while no surcharge was placed on bills to patients covered by Blue Cross or Blue Shield. The contention of the insurers and HMOs was that the surcharges could have a significant effect on insurers and HMOs which "do or could provide coverage to ERISA plans," which could lead indirectly to an increase in plan costs. *Id.* at 652, 115 S. Ct. 1675, 131 L.Ed.2d 701. After considering the

purposes of the surcharges, which were unrelated to and not directed at ERISA plans, the Court stated that an “indirect economic influence” did not “bind plan administrators” or “preclude uniform administrative practice or the provision of a uniform interstate benefit package.” It simply bore on the “costs of benefits” and the “relative costs of insurance to provide them.” *Id.* at 659-60, 115 S. Ct. at 1679, 131 L.Ed.2d at 707-08. The Court went on to say:

Indeed, to read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase insurance policies or HMO memberships that would cover such services would effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that "pre-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." [Cite omitted.] . . .

In sum, cost uniformity was almost certainly not an object of pre-emption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages in a given State are a far cry from those "conflicting directives" from which Congress meant to insulate ERISA plans. [Cite omitted.] Such state laws leave plan administrators right where they would be in any case, with the responsibility to choose the best overall coverage for the money. We therefore conclude that such state laws do not bear the requisite "connection with" ERISA plans to trigger pre-emption.

Id. at 661-62, 115 S. Ct. at 1679-80, 131 L.Ed.2d at 708-09.

The Supreme Court also considered its decision in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 100 L. Ed. 2d 836, 108 S. Ct. 2182 (1988), which held that ERISA pre-emption did not bar application of a general state garnishment statute to participants' benefits in the hands of an ERISA welfare benefit plan. Noting that the garnishment statute imposed administrative costs on ERISA plans, the Court stated:

If a law authorizing an indirect source of administrative cost is not pre-empted, it should follow that a law operating as an indirect source of merely economic influence on administrative decisions, as here, should not suffice to trigger pre-emption either.

Id. at 662, 115 S. Ct. at 1680, 131 L.Ed.2d at 709.

The Supreme Court also considered the effect of ERISA pre-emption in *DeBuono v. New York Commissioner of Health*, 520 U.S. 806, 117 S. Ct. 1747, 138 L.Ed.2d 21 (1997), which involved a tax (the “Health Facilities Assessment” or “HFA”) imposed on the gross receipts from patient services at hospitals, residential health care facilities, and diagnostic and treatment centers. The tax collected became part of the State’s general revenues, and was designed to raise revenue to reduce the state’s Medicaid revenue deficit. In comparing a tax statute designed to a statute that imposes administrative costs on an ERISA plan, the Supreme Court said:

Following that approach here, we begin by noting that the historic police powers of the State include the regulation of matters of health and safety. [Cite omitted.] While the HFA is a revenue raising measure, rather than a regulation of hospitals, it clearly operates in a field that “has been traditionally occupied by the States.” [Cite omitted.] Respondents therefore bear the considerable burden of overcoming “the starting presumption that Congress does not intend to supplant state law.” [Cite omitted.]

There is nothing in the operation of the HFA that convinces us it is the type of state law that Congress intended ERISA to supercede [sic]. This is not a case in which New York has forbidden a method of calculating pension benefits that federal law permits, or required employers to provide certain benefits. Nor is it a case in which the existence of a pension plan is a critical element of a state law cause of action, or one in which the state statute contains provisions that expressly refer to ERISA or ERISA plans. [All footnotes omitted.]

Id. at 814-15, 117 S. Ct. at 1751-52, 138 L.Ed.2d at 29-30. It went on to state:

A consideration of the actual operation of the state statute leads us to the conclusion that the HFA is one of “myriad state laws” of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not “relate to” them within the meaning of the governing statute. [Cites omitted.]. The HFA is a tax on hospitals. Most hospitals are not owned or operated by ERISA funds. This particular ERISA fund has arranged to provide medical benefits for its plan beneficiaries by running hospitals directly, rather than by purchasing the same services at independently run hospitals. If the Fund had made the other choice, and had purchased health care services from a hospital, that facility would have passed the expense of the HFA onto the Fund and its plan beneficiaries through the rates it set for the services provided. The Fund would then have had to decide whether to cover a more limited range of services for its beneficiaries, or perhaps to charge plan members higher rates. Although the tax in such a circumstance would be “indirect,” its impact on the Fund’s decisions would be in all relevant respects identical to the “direct” impact felt here. Thus, the supposed difference between direct and indirect impact--upon which the Court

of Appeals relied in distinguishing this case from *Travelers*--cannot withstand scrutiny. Any state tax, or other law, that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is pre-empted by the federal statute.

Id. at 815-16, 117 S. Ct. at 1752-53, 138 L.Ed.2d at 30-31.

The West Virginia consumers' sales and service tax is one of a myriad of state laws of general application. Taxation is one of the powers that has traditionally been occupied by the states. As shown by this matter, it imposes a burden on ERISA plans in the same manner as it imposes a burden on every taxpayer subject to the tax, but it does not act immediately or exclusively on ERISA plans. The burden is neither expressly imposed on nor designed to be imposed on ERISA plans. The tax is imposed on the Petitioner, who passes its burden along to its customers, some of whom are ERISA plans. If the tax has any economic effect on ERISA plans, it is indirect. The fact that there is an additional cost to ERISA plans does not render the tax subject to pre-emption.

Like the New York Health Facility Assessment, the purpose of the consumers' sales and service tax is designed to produce revenue for the State. It is clear that the Health Facility Assessment, which was assessed on the gross receipts of various health facilities, more directly affected ERISA facilities and plans than the general West Virginia consumers' sales and service tax which, subject to the exceptions and exemptions provided therein, is imposed on all consumers of tangible personal property and services.

The Petitioner relies on *E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir. 1991), wherein the Court of Appeals held that a Texas tax on administrative or service fees was pre-empted by ERISA. The tax was on fees for those providing services to "employer-employee, multiple employer-employee, self-insurance group, member, or other medical, accident, sickness, injury, indemnity, death, or health benefit plan[s]." In its decision, which was rendered prior to the

Supreme Court decisions cited above, the Court applied a broad definition of “related to” which has since been repudiated by the United States Supreme Court. The Texas statute also clearly applied to plans that, if they were not always ERISA plans, were very likely to be so. Thus, the Texas tax was not a broad-based tax of general applicability.

The West Virginia consumers’ sales and service tax, as assessed herein, is not pre-empted by the Federal ERISA statute.

IV. THE PETITIONER HAS FAILED TO SATISFY ITS BURDEN OF PROVING THAT THE CONSUMERS’ SALES AND SERVICE TAX ASSESSMENT VIOLATES, AS APPLIED, THE EQUAL AND UNIFORM TAXATION PROVISION OF ART X, § 1 OF THE CONSTITUTION OF WEST VIRGINIA BECAUSE, ALLEGEDLY, THE TAX COMMISSIONER HAS SINGLED IT OUT FOR ENFORCEMENT TO THE EXCLUSION OF OTHER TAXPAYERS IN THE SAME CLASSIFICATION.

The fourth issue presented by this matter is whether assessing consumers’ sales and service tax on the Petitioner’s fees violates, as applied, the equal protection clause of the Constitution of the United States and the equal and uniform taxation provision of the Constitution of West Virginia. In its brief, the Petitioner maintains that other taxpayers who provide the same services have not collected consumers’ sales and service tax on their services, and have not been assessed for the same. In his brief, the Tax Commissioner responds by asking the Petitioner to identify those taxpayers who the Petitioner believes are not paying consumers’ sales and service tax on the same services on which the tax has been assessed against the Petitioner, and represents that he will proceed to enforce consumers’ sales and service tax against those taxpayers, if appropriate. In its reply brief, the Petitioner identified the taxpayers that it believes are in the same classification as it, who are not paying the tax. There are several problems with the Petitioner’s contention.

The first problem with the Petitioner’s argument is that it has failed to present any evidence to show that the taxpayers it identifies are in the same classification as it, or are

similarly situated to it. This Office cannot presume, based on the mere representation of the Petitioner that the other taxpayers are of the same classification for constitutional purposes.

Second, the Petitioner has not shown that the taxpayers it identified are not collecting the consumers' sales and service tax or have not been assessed for their failure to collect consumers' sales and service tax. Thus, it has not shown the factual predicate necessary to sustain its constitutional argument.

Third, the mere fact that other taxpayers may not be collecting and remitting consumers' sales and service tax, and that the State Tax Commissioner has not yet assessed the other taxpayers for their failure to collect the same, does not entitle the Petitioner to escape liability. It is possible that the State Tax Commissioner may have audited other taxpayers and may be preparing to issue assessments against them. He may be in the process of auditing other taxpayers. The fact that, so far as it knows, the Petitioner is the only taxpayer to be assessed for this activity does not entitle it to relief from the assessment. Even if the Petitioner's belief is correct and it is the only taxpayer currently assessed for this activity, it is not entitled to relief from the assessment. The Tax Commissioner can still enforce tax against other taxpayers, which abates the constitutional problems about which the Petitioner complains.

Lastly, even if the Tax Commissioner is aware that other taxpayers in the same class as the Petitioner are not collecting the consumers' sales and service tax against the Petitioner and does not have any intention of enforcing the tax against those other taxpayers, this Office is without authority to require the Tax Commissioner to cease enforcing the tax against the Petitioner or to commence some action to require the Tax Commissioner to enforce the tax against other taxpayers. This would require the Petitioner to institute a petition for writ of mandamus or prohibition in a court having jurisdiction over such a proceeding.

V. THE CONSUMERS' SALES AND SERVICE TAX, AS APPLIED BY THE STATE TAX COMMISSIONER TO THE PETITIONER'S BUSINESS OF FURNISHING SERVICES, DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Petitioner next contends that assessing consumers' sales and service tax on the Petitioner's activities violates the Commerce Clause of the Constitution of the United States, citing the test articulated in *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed.2d 326 (1977). The Petitioner concedes that the tax satisfies the first test of *Complete Auto*, there being substantial nexus with the State of West Virginia because the Petitioner's offices are located in the State. The Petitioner asserts that the consumers' sales and service tax, as applied here, violates the remaining parts of the *Complete Auto* test.

The Petitioner contends that the tax levied on the Petitioner's services provided to its customers is not properly apportioned to the State of West Virginia. It rests this contention primarily on the grounds that substantial number of its customers and a substantial number of its customers' insureds and beneficiaries are located outside of the State of West Virginia.

There are two problems with this contention, which are related. First, the consumers' sales and service tax is levied on the service provided by the Petitioner. If the service is provided in the State of West Virginia, it does not matter that the customer may reside in another state. Second, the evidence in the record, such as it is, shows that the Petitioner's services are provided in the State of West Virginia. Stated differently, there is no evidence in the record to show that the Petitioner provides services outside of the State of West Virginia. The fact that its customers reside outside the State of West Virginia may be relevant in some situations, but it is not conclusive evidence that services are provided outside of the State.

In considering the services provided by the Petitioner, one facet of its services is the development, coordination and maintenance of provider networks for their customers. There is no evidence in the record that directly reflects the activities that the Petitioner undertakes in

developing, coordinating and maintaining its provider networks. Instead, what the Petitioner actually does must be inferred from other evidence.

It seems that in developing a provider network, the initial task is for the Petitioner to identify the range of health care services necessary to attract a sufficient number of customers to maintain its business. The Petitioner would likely have to research the health care needs of the population of the geographic area to be served by the network providers, so as to contract with a sufficient number and type of providers.

Once it determines the type and quantity of health care services necessary to serve the population, the Petitioner would need to contact healthcare practitioners able to serve the geographic area of the network, such as physicians, dentists, ophthalmologists, osteopaths, optometrists, physical therapists, chiropractors, podiatrists and the like. The Petitioner would need to contact various facilities providers, including hospitals, clinics and other like providers. It would also be required to contact pharmacies, rehabilitation facilities, physical therapy facilities, and other providers of health care services. Presumably, its contact with providers would entail determining whether or not they provide services that could be incorporated into the network. The Petitioner would also need to determine if prospective network providers have any interest in participating in its provider network. These initial contacts would likely involve one or more of contact by phone, facsimile transmission, the United States mail, private couriers (Federal Express, United Parcel Service, etc.), e-mail or personal contact.

If providers have any interest in participating in one of the Petitioner's provider networks, the next step would be to negotiate contracts with interested providers. Presumably, this would entail the Petitioner determining the reasonable and customary charges for providing specific health care services in the geographic area served by the network, as well as the customary charges of interested providers. The fact that the providers in the networks provide health care

services at “discounted” rates leads to the conclusion that, as part of its negotiations with the providers, the Petitioner must negotiate discounted rates with the providers, as well as the terms and conditions on which such health care services are delivered. Again, it would stand to reason that these contacts would likely involve one or more of contact by phone, facsimile transmission, the United States mail, private couriers, e-mail or personal contact.

Another aspect of the Petitioner’s business is the marketing of its services to potential customers. After developing and coordinating the provider network, the Petitioner would need to solicit potential customers. This would likely entail presenting the Petitioner’s potential customers with the details of its provider network, including the identity and location of the providers, the geographic boundaries of the network, the healthcare services offered by the providers, the cost of those services and certain details respecting procedures, administration and coordination of the delivery of services. Again, it is likely that contacts with potential customers would likely involve one or more of contact by phone, facsimile transmission, the United States mail, private couriers, e-mail or personal contact.

The common thread of the services provided by the Petitioner is that some action of the Petitioner’s employees or agents is indispensable to the development, coordination and maintenance of the provider network. Although there is little to no evidence in the record to show that the Petitioner’s employees and agents perform most of their work at the Petitioner’s offices in West Virginia, there is less evidence in the record to show that the Petitioner’s employees or agents perform more of their services out-of-state. This Office is convinced that the Petitioner performs most its service where its employees and agents are located. That location is at the Petitioner’s offices located in this State.

Given that the Petitioner’s office is located in the State of West Virginia and the absence of proof to the contrary, it must be presumed that the Petitioner’s services occur within the State

of West Virginia. The Petitioner's activities in putting together a provider network are integrated. Any personal contact occurring outside of the State of West Virginia is ancillary to services provided by the Petitioner at its offices located in the State. The Petitioner's activities do not lend themselves to separation on a geographic basis.

The services delivered by the Petitioner are clearly different than services offered by providers who perform services on tangible property, either real and personal. In the case of services performed on tangible property, the services rendered are almost always, if not always, performed on the tangible property by the service provider. In those instances, the situs of the service is the location of the tangible property on which the service is provided. This is also the situs of the individual performing the service, at least at the time that the service is performed. In fact, in the case of the provision of services, it is the "presence" of the individual performing the service that is indispensable.

In this matter, it is the Petitioner's employees who are indispensable to the provision of the services. At least one employee of the Petitioner is present any time it undertakes to perform some aspect of its services. The customer is not required to be present when the service is performed. The Petitioner was capable of performing the service at its West Virginia offices, even though the providers and customers may have been located out of state. This leads to the conclusion that the Petitioner's services were either provided entirely in the State or that services performed outside the State were merely incidental to services performed in West Virginia. Therefore, the consumers' sales and service tax, as assessed against the Petitioner, was properly apportioned to the State of West Virginia.

The Petitioner contends that the situs of the services it provides to its customers should be the customers' geographic locations. However, this Office does not agree. Provision of the service requires the indispensable participation of the Petitioner's employees and agents. The

indispensability of the Petitioner's employees and agents to the provision of Petitioner's services leads this Office to conclude that the location of its customers is not a primary consideration, and certainly is not controlling.

This determination satisfies the constitutional requirements of the Commerce Clause of the United States Constitution. So long as the State of West Virginia taxes the services provided by taxpayers like the Petitioner who are located in West Virginia and other states do not, there will be no double taxation. So long as other states limit their attempts to tax taxpayer in the same business as the Petitioner to those who are located in their state, and do not attempt to tax taxpayers like the Petitioner who are located in West Virginia or some other state, there will be no double taxation. In other words, the tax is properly apportioned.

There is no evidence in this action to show that the tax discriminates against interstate commerce. The tax is levied on services that are performed in the State of West Virginia. The Petitioner's office is located in the State of West Virginia. It is likely that the overwhelming majority of the Petitioner's services take place in the State of West Virginia. While it is possible that some portion of the services is performed outside of the State, it appears likely that portion of the services is minimal.³ However, there is no evidence in the record which clearly demonstrates that this is the case. Given the lack of evidence in the record, at best the Petitioner has failed to satisfy its burden of proof on this issue.⁴

It further appears that the tax levied in this action is fairly related to the services provided by the State of West Virginia. By reason of being located in the State of West Virginia, the Petitioner derives all of the benefits of all of the police powers exercised by the State of West

³ There is evidence showing the percentage of the Petitioner's customers and the customers' beneficiaries who are located in states other than the State of West Virginia. The tax is on the "furnishing" of services. W. Va. Code §§ 11-15-3(a) [2003] and 11-15-8 [2003]. It appears that the services are performed or furnished primarily, if not entirely, in the State of West Virginia. There is certainly no evidence in the record to the contrary.

⁴ It stands to reason that the Tax Commissioner cannot assess consumers' sales and service tax against taxpayers located out of state who provide the same services as the Petitioner.

Virginia. Again, while some of the services performed by the Petitioner may take place outside of the State, there is no evidence to that effect.

VI. THE ASSESSMENT OF CONSUMERS' SALES AND SERVICE TAX ON THE PETITIONER'S BUSINESS OF FURNISHING SERVICES AND THE COLLECTION OF THE TAX ON INSURANCE PREMIUMS DOES NOT CONSTITUTE "DOUBLE TAXATION" IN VIOLATION OF ART. X, § 1 OF THE CONSTITUTION OF WEST VIRGINIA, BECAUSE THEY ARE TWO, SEPARATE SUBJECTS OF TAXATION.

The Petitioner's final contention is that the fees paid to the Petitioner by its customers are already subject to taxation as insurance premiums by the Insurance Commissioner pursuant to W. Va. Code §§ 33-3-14 and 33-3-14a, and that to subject those costs to consumers' sales and service tax constitutes double taxation in violation of W. Va. Const., art. X, § 1. In support of this contention, the Petitioner argues that the administrative costs incurred by its customers, along with its medical costs, are included in amounts reported to the West Virginia Insurance Commissioner. These administrative costs go into determining the insurance premiums charged by the Petitioner's customers to their insureds or their beneficiaries, which are approved by the Insurance Commissioner. The Petitioner's customers then pay tax on the insurance premiums charged to their insureds or their beneficiaries.

The Tax Commissioner contends that double taxation is not expressly prohibited by W. Va. Const., art. X, § 1. He points out that what is prohibited is that one person or one subject of taxation may not be required to contribute twice to the same tax burden, while other persons or subjects are required to contribute to the tax burden only once. The Tax Commissioner also contends that the insurance premium tax and the consumers' sales and service tax, as levied on the services provided by the Petitioner, tax two different subjects.

Initially, it should be noted that the tax paid on insurance premiums to the State of West Virginia is paid by an insurer on its gross premiums. *See* W. Va. Code §§ 33-3-14 and 33-3-14a. In this instance, premiums are paid to the Petitioner's customers who are insurers, self-insured

employers and third-party administrators for self-insured employers.⁵ The premium tax is paid by the insurers, self-insured employers and third-party administrators for self-insured employers, not the Petitioner. The consumers' sales and service tax, as levied by the Tax Commissioner in this context, is paid by the Petitioner's customers. The Petitioner merely has the duty to collect the consumers' sales and service tax from its customers. Therefore, if there is, in fact, a double tax burden, it falls on the Petitioner's customers, not the Petitioner. Because the burden of double taxation, if it does exist, does not fall on the Petitioner, the Petitioner has no standing to assert this issue on behalf of its customers.

Regardless of the Petitioner's lack of standing to assert double taxation on behalf of its customers, the Petitioner has not shown that there is double taxation due to the collection of the tax on insurance premiums. In response to the Petitioner's argument, the Tax Commissioner cites *Douglass v. Koontz*, 137 W. Va. 345, 71 S.E.2d 319 (1952); and *Harvey Coal & Coke v. Dillon*, 59 W. Va. 605, 53 S.E. 928 (1905). Both cases stand for the principle that it does not constitute double taxation to levy separate taxes upon two different subjects, although the tax may appear to fall on one person or one property. As was stated in *Douglass*:

By duplicate taxation is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once." 18 M. J., *Taxation*, Section 18. . . .

Id. at 363-64, 71 S.E.2d 329. As stated in *Hope Natural Gas*:

"Double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay one tax with respect to property, another with respect to the privilege or occupation: hence the taxation is not double." [Cite omitted.]

The foregoing decisions uphold the right of the legislature to classify the subjects of taxation. When the right to classify is conceded, it necessarily follows that the legislature has the right to select the differences upon which the

⁵ Although not expressly stated in the stipulations, it appears that contributions made by employees to their health insurance coverage constitute premiums, which are subject to the premium tax.

classification will be based. . . . The statute makes no discrimination in favor of one as against another of the same class.

Id. at 277-78, 135 S.E.2d 585.

This facts presented by this matter do not demonstrate that there is double taxation in violation of Article X, Section 1 of the Constitution of West Virginia. The premium tax is levied on the gross premiums collected by the Petitioner's customers from their insureds and beneficiaries. The subject of the tax is gross receipts of the Petitioner's customers. The consumers' sales and service tax paid to the Petitioner by its customers are for services provided by the Petitioner to its customers. Clearly, the incidence of the respective taxes is on two separate subjects: premiums collected vs. services provided.

The fact that the tax paid by the Petitioner's customers is included in administrative costs used to determine the rates charged by the Petitioner's customers to its insureds or beneficiaries does not necessarily render the two taxes double taxation. This situation bears some similarity to *Douglass v. Koontz*. In that case, an insurance agent paid business and occupation tax on his commissions from selling insurance policies for insurers, while the insurers paid a premium tax on their gross premiums, which included amounts paid by them to the agent. Thus, according to the agent, his commissions were "double taxed", once as a component of gross premiums and once as commissions paid to him by the insurers.

The Supreme Court held that this situation did not constitute double taxation. The Court identified the two subjects of taxation therein, stating:

While the incidence of the two per cent tax under 33-2-37, . . . and the one per cent tax, under Code, 11-13, . . . falls upon the amount which plaintiff is entitled to receive as commissions, that does not result in double taxation so as to inhibit the application of Code, 11-13, . . . to the plaintiff; neither does it evince a legislative intent that Code, 11-13, . . . should not apply to plaintiff and other insurance agents similarly situated; nor does it violate the inhibitory provision of Article X, Section 1 of the Constitution of West Virginia, which provides that taxation shall be equal and uniform. We say this because the two per cent tax is paid and payable by insurance companies and the one per cent tax, under our

holding, is payable by insurance agents licensed by the insurance commissioner to insurance companies. . . . Thus, it has been held that the assessment of income from property, apart from the property producing the income, does not constitute double taxation. *Harvey Coal & Coke Co.*, 59 W. Va. 605, 53 S.E. 928, 6 L.R.A. (N.S.) 628; nor is a license tax on a business or occupation and an *ad valorem* tax on capital of the business or the property used therein double taxation. *Hope Natural Gas Co. v. Hall*, 102 W. Va. 272, 135 S.E. 582, affirmed in 274 U.S. 284, 47 S. Ct. 639, 71 L. Ed. 1049. There is no double taxation where the subject is held by different titles. It has thus been held that both a debtor and a creditor may be taxed, one on his property and the other on his security, though the mortgagor is taxed on the full value of his property, and the mortgagee on the full amount of the debt secured by the mortgage. *Myers v. Commonwealth*, 110 Va. 600, 66 S.E. 824. Likewise the taxing of both a leasehold and the property leased is not double taxation. *Harvey Coal and Coke Co. v. Dillon, supra*.

Id. at 363-64, 71 S.E.2d at 329-30.

In the present matter, as in *Douglas v. Koontz*, the subject of the gross receipts tax is gross premiums received by the Petitioner's customers. The subject of the consumers' sales and service tax are services received by the Petitioner's customers, which is measured by the funds expended by those customers. Clearly the subjects of the two taxes are entirely different. Thus, there is no double taxation under these circumstances.

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 to show that the assessment against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).
2. In developing, coordinating and maintaining a healthcare provider network, the Petitioner is engaged in the provision of a service, not in the sale of intangible personal property.
3. The assessment of West Virginia consumers' sales and service tax against the Petitioner for services it provided in developing, coordinating and maintaining a healthcare

provider network is not subject to the federal ERISA pre-emption statute, because the consumers' sales and service tax is a statute of general applicability and, to the extent it imposes a burden on ERISA plans, the burden is only an incidental, economic burden.

4. The Petitioner failed to satisfy its burden of proving the consumers' sales and service tax assessment violated, as applied, the equal protection clause of the United States Constitution and the equal and uniform taxation provision of the Constitution of the State of West Virginia, because it failed to show that other identified taxpayers who are purportedly in the same classification as the Petitioner are, in fact, engaged in the same business as the taxpayer and have not been and will not be assessed for taxes in the same manner as the Petitioner.

5. The assessment of West Virginia consumers' sales and service tax against the Petitioner for services it provided in developing, coordinating and maintaining a healthcare provider network does not violate, as applied, the Commerce Clause of the United States Constitution because it is fairly apportioned to the services provided by the Petitioner in the State of West Virginia, it does not discriminate against interstate commerce, and it is fairly related to the services provided by the State of West Virginia.

6. The assessment of West Virginia consumers' sales and service tax against the Petitioner for services it provided in developing, coordinating and maintaining a healthcare provider network does not constitute double taxation in violation of the equal and uniform taxation provision of the Constitution of the State of West Virginia, because imposition of the consumers' sales and service tax on the Petitioner's services and the imposition of the insurance premium tax, W. Va. Code §§ 33-3-14 & 14a, on the Petitioners' customers' gross insurance premiums are two different subjects of taxation.

**DIRECTIVES RESPECTING COMPUTATION
OF THE AMOUNT OF TAX DUE**

1. In accordance with W. Va. Code St. R. § 121-1-73.1.1 (Apr. 20, 2003), the above shall constitute a statement of the opinion of the West Virginia Office of Tax Appeals determining the issues in the above-captioned matter.

2. As a result of the State Tax Commissioner's concession that the Petitioner's activities consisting of re-pricing services to its customers were exempt as data processing services, the portion of the assessment related to data processing services must be abated.

3. The West Virginia Office of Tax Appeals is withholding entry of its decision for the purpose of requiring the parties to submit computations of tax and interest due and owing as a result of the partial abatement of the assessment due to the Tax Commissioner's concession that the Petitioner's re-pricing services constitute exempt data processing services, consistent with the opinion set forth above.

4. The parties shall make every attempt to reach an agreement with respect to a computation of amount of tax and interest due and owing in accordance with the above-stated opinion of the West Virginia Office of Tax Appeals.

5. The parties shall compute interest on tax due through the last day of the month for which the parties compute interest.

6. If the parties are able to reach an agreement with the respect to the amount of tax and interest due and owing, then within 45 days of service of this decision, and in accordance with W. Va. Code St. R. § 121-1-73.1.2, the parties shall file an agreed upon computation of tax and interest due.

7. Within 15 days of service of this opinion, the parties are to confer for the purpose of making a preliminary attempt to identify the amounts or computations upon which the parties agree and those upon which they disagree.

8. Within 30 days of service of this opinion, the parties shall meet in an attempt to reach an agreement with respect to the computation of tax and interest due in accordance with the above-stated opinion.

8. If, after meeting in an attempt to reach an agreement with respect to the above-stated computations, the parties are unable to agree upon an amount of tax and interest due, then in accordance with the provisions of W. Va. Code St. R. § 121-1-73.2.1, and within 45 days of service of this opinion, either party may submit a computation of the amount of tax and interest that it believes is due, and serve its computation on the West Virginia Office of Tax Appeals and on the other party.

9. If only one party submits a computation of the amount of tax and interest it believes is due, the Office of Tax Appeals shall proceed in accordance with the provisions of W. Va. Code St. R. § 121-1-73.2.2.

10. If both parties submit a computation of the amount of tax and interest they believe is due, either in accordance with the provisions of W. Va. Code St. R. § 121-1-§ 73.2.1 (where both parties file their computations simultaneously) or W. Va. Code St. R. § 121-1-73.2.2 (where one party files its computation and other party files its computation in response), the Office of Tax Appeals shall proceed in accordance with the provisions of W. Va. Code St. R. § 121-1-73.2.3.

11. Any computation submitted by the parties pursuant to W. Va. Code St. R. § 121-1-73.2, shall contain such information as shall be sufficient to permit the West Virginia Office of Tax Appeals to understand how such computation of interest was arrived at by said party.

12. If, after the submission of computations of the amount of tax and interest due by both parties, either party believes that an evidentiary hearing is necessary, within 10 days of receipt of the opposing party's computation, it shall submit a request for an evidentiary hearing, clearly and succinctly setting forth the grounds upon which its request is based, and describing the nature of any evidence that it intends to introduce.

Upon receipt of an agreed upon computation of tax and interest due, pursuant to W. Va. Code St. R. § 121-1-73.1.2, or upon resolution of any dispute in the computations of interest due submitted by the parties, pursuant to W. Va. Code St. R. §§ 121-1-73.2.1 & -2, the West Virginia Office of Tax Appeals will enter its computation of interest due.