

Cite as Det. No. 13-0240, 33 WTD 354 (2014)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 13-0240
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...)	Registration No. ...
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And)	
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...)	Registration No. ...
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[1] RCW 82.04.290(2): SERVICE B&O TAX – FEDERAL PREEMPTION – FEDERAL EMPLOYEES HEALTH BENEFITS ACT (FEHBA) – 5 USC § 8909(f)(1) – HEALTH CARE PROVIDER’S RECEIPTS FROM FEHBA INSURANCE CARRIERS. FEHBA establishes a comprehensive program of health insurance for federal employees. FEHBA contains a preemption provision, 5 USC § 8909(f)(1), forbidding states from imposing a direct or indirect tax on insurance carriers with respect to payments made to them from the FEHB fund. Service B&O tax imposed on a health care provider’s receipts from insurance carriers who participate in the FEHB program is not a direct or indirect tax imposed on a FEHBA carrier with respect to payments made from the FEHB fund and, therefore, is not preempted by 5 USC § 8909(f)(1).

[2] RCW 82.04.290(2): SERVICE B&O TAX – FEDERAL PREEMPTION – 42 CFR § 422.404 – HEALTH CARE PROVIDER’S RECEIPTS FROM MEDICARE ADVANTAGE (MA) PLANS. MA Plans are types of Medicare health plans offered by private companies that contract with the Centers for Medicare & Medicaid Services (CMS) to provide Medicare benefits. 42 CFR § 422.2. Pursuant to 42 CFR § 422.404, states are prohibited from taxing payments CMS makes to MA Plans on behalf of MA enrollees. Service B&O tax imposed on a health care provider’s receipts from MA Plans is not a tax imposed on payments CMS makes on behalf of MA enrollees to MA Plans and, therefore, is not preempted by 42 CFR § 422.404.

[3] RCW 82.04.290(2): SERVICE B&O TAX – FEDERAL PREEMPTION – 10 USC § 1103(a) – 32 CFR § 199.17(a)(7) – HEALTH CARE PROVIDER’S RECEIPTS FROM TRICARE INSURANCE CARRIERS. The TRICARE program is a comprehensive managed health care program for the delivery and

financing of health care services in the Military Health System. 32 CFR 199.17(a). State and local laws relating to TRICARE regional contracts, and premium taxes imposed on TRICARE insurance carrier contractors, are preempted by 10 USC § 1103(a) and 32 CFR § 199.17(a)(7). Service B&O tax imposed on a health care provider's receipts from TRICARE insurance carriers, pursuant to RCW 82.04.290, is not a tax imposed on the premiums or other payments that TRICARE insurance carriers receive from the TRICARE program; therefore, the tax is not preempted pursuant 10 USC § 1103(a) and 32 CFR § 199.17(a)(7).

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

Eckholm, A.L.J. – Health care providers appeal the denials of their requests for refund of service and other activities business and occupation (B&O) tax paid on receipts from insurance carriers who participate in the Federal Employee Health Benefits (FEHB), Medicare Advantage (MA), and TRICARE, federal health insurance programs, asserting the tax is preempted by federal law. The taxpayers' petitions are denied.¹

ISSUES

1. Whether the imposition of B&O tax on a health care provider's receipts from insurance carriers who participate in the Federal Employee Health Benefits (FEHB) program is preempted by 5 USC § 8909(f).
2. Whether the imposition of B&O tax on a health care provider's receipts from insurance carriers who participate in the Medicare Advantage (MA) program is preempted by 42 CFR § 422.404.
3. Whether the imposition of B&O tax on a health care provider's receipts from insurance carriers who participate in the TRICARE program is preempted by 32 CFR § 199.17(a)(7).

FINDINGS OF FACT

[The taxpayers] provide health care services to patients at their Washington hospitals and nursing facilities. Some of the taxpayers' patients are enrolled in health insurance plans funded by the FEHB, the MA, and the TRICARE, federal health insurance programs. The health insurance plans are offered to the patients by third-party insurance carriers that participate in the federal programs. The taxpayers bill the patients' insurance carriers for the health services provided to the patients.

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

The taxpayers submitted to the Department of Revenue (Department) requests for refund of service and other activities B&O tax they paid, for the period January 1, 2007, through December 31, 2011, on receipts from insurance carriers that participate in the federal programs, asserting that Washington's taxation of these receipts is preempted by the federal statutes and regulations governing the federal programs. The Department denied the taxpayers' requests because the taxpayers are not insurance carriers participating in the federal programs and do not receive payments from the programs. The taxpayers timely appealed the denials of their requests for refund.

ANALYSIS

RCW 82.04.220 imposes the B&O tax "for the act or privilege of engaging in business activities." Persons, such as the taxpayers, who are engaged in a service business or business that is not specifically taxed under another B&O tax classification are generally required to pay B&O tax under RCW 82.04.290(2) measured by the "gross income of the business."

Pursuant to the Supremacy Clause, U.S. CONST., ART. VI., cl.2, federal law can preempt state law through: (1) express preemption; (2) field preemption (sometimes referred to as complete preemption); and (3) conflict preemption. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491, 107 S.Ct. 805 (1987). Express preemption exists where Congress enacts an explicit statutory command that state law be displaced. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382, 112 S.Ct. 2031 (1992). Absent explicit preemptive text, preemption may be inferred based on field or conflict preemption, both of which require us to imply Congress' intent from the statute's structure and purpose. *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403 (1990).

When considering preemption, no matter which type, "[t]he purpose of Congress is the ultimate touchstone." *Cipollene v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608 (1992); *New York State Conference of Blue Cross & Blue Shiled Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671 (1995). In order to avoid an unintended encroachment on state authority, the Supreme Court has made clear that when interpreting a federal statute, courts should be reluctant to find preemption. *CSX Transportation v. Easterwood*, 507 U.S. 658, 662-64, 113 S.Ct. 1671 (1995); *Travelers*, 514 U.S. at 654. Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890 (1983). "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX*, 507 U.S. at 664.

When interpreting a statute, it must be presumed "that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 252, 112 S.Ct. 1146 (1992). The preemption provisions for the three federal programs are each reviewed below.

1. Federal Employees Health Benefits (FEHB) Program

The Federal Employees Health Benefits Act of 1959 (FEHBA), 5 USC § 8901 *et seq.*, establishes a comprehensive program of health insurance for federal employees. The FEHBA authorizes the Office of Personnel Management (OPM) to contract with private carriers to offer federal employees an array of health care plans. 5 USC § 8902(a). To purchase insurance under a FEHB plan, enrollees make payments, matched by contributions from the federal government, into a specifically designated account in the United State Treasury, entitled the Federal Employees Health Benefits Fund (FEHB Fund). 5 USC §§ 8906, 8909. Carriers draw against the FEHB Fund to pay for covered health care benefits. *Id.*; *see also* 48 CFR § 1632.170(b).

The FEHBA contains the following preemption provision forbidding states from taxing health insurance carriers with respect to payments made to them from the FEHB Fund:

No tax, fee, or other monetary payment may be imposed, **directly or indirectly, on a carrier** or an underwriting or plan administration subcontractor of an approved health benefits plan by any State, . . . with respect to any payment made from the Fund.

5 USC § 8909(f)(1) (emphasis added).

The FEHBA defines a “carrier” as:

[A] voluntary association, corporation, partnership, or other nongovernmental organization which is lawfully engaged in providing, paying for, or reimbursing the cost of, health services under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, or similar group arrangements, in consideration of premiums or other periodic charges payable to the carrier, including a health benefits plan duly sponsored or underwritten by an employee organization and an association of organizations or other entities described in this paragraph sponsoring a health benefits plan.

5 USC § 8901(7).

The FEHBA preemption provision was reviewed in relation to Seattle’s B&O tax in *Group Health Cooperative v. City Seattle*, 146 Wn. App. 80, 189 P.3d 216 (2008), where the court set forth the established requirements to invoke the preemption:

“Under 5 USC § 8909(f)(1), state regulation is preempted if it is (1) a state or local tax, fee, or other monetary payment; (2) imposed directly or indirectly on a carrier; and (3) with respect to payments made from the [FEHB Fund].” *Health Maint. Org. of N.N., Inc. v. Whitman*, 72 F.3d 1123, 1128 (3rd Cir. 1995).

Group Health, 146 Wn. App. at 94 (bracketed term ours).

Group Health Cooperative, a health maintenance organization (HMO), received premium payments from its patient members in exchange for health services, and received premium payments made by the federal government from the FEHB Fund for those patients that are covered by the FEHB program. *Id.* at 83-84. The court held that Group Health Cooperative was a carrier, as defined by the FEHBA, that contracts with the federal government to provide health care coverage in exchange for payments from the FEHB Fund; therefore, 5 USC § 8909(f)(1) preempts the city's imposition of its B&O tax on the HMO's receipts from the FEHB Fund. *Group Health*, 146 Wn. App. at 95-96.

The circumstances in the present appeals are entirely different from those in *Group Health*. Here, taxpayers are not FEHBA carriers that receive payments from the FEHB Fund; therefore, the FEHBA preemption provision does not apply to them. The taxpayers' assertion on appeal is based on an economic pass-through theory. The taxpayers assert that the imposition of Washington's B&O tax on its gross receipts from FEHBA insurance carriers is a tax imposed *indirectly* on the FEHBA carrier's receipts from the FEHB Fund because the taxpayers may pass along their tax costs to the carriers in setting the charges for their services. Arguments based on similar economic pass-through theories were made by the federal government in *United States v. West Virginia*, 339 F.3d 212 (4th Cir. 1995), and more recently by a medical products retailer in *Mobility Medical, Inc. v. Mississippi Dep't of Revenue*, No. 2011-CA-01780-SCT, 2013 WL 246684 (Miss. Sup. Ct., June 6, 2013). The courts in both cases held that taxing the gross income of a business that receives payments from a FEHBA carrier was not an indirect imposition of a tax on a FEHBA carrier with respect to payments from the FEHB Fund. *West Virginia*, 339 F.3d at 218-219; *Mobility Medical*, 2013 WL 246684, at *2.

In *West Virginia*, the Fourth Circuit held that even though health care providers *could* pass the economic costs of a gross receipts tax to an insurance carrier, that potential choice by the providers did not constitute a prohibited imposition of an indirect tax on the insurance carrier. *West Virginia*, 339 F.3d at 218-219. The court stated that the legal incidents of the state gross receipts tax fell on the providers alone and a possible economic pass-through of costs to FEHBA carriers does not equate to the indirect imposition of a tax.² *Id.* In further support of its holding, the court relied on the Supreme Court's rejection of economic pass-through theories in determining what constitutes indirect taxation in the analogous constitutional field of preemption of state taxation of the federal government. *Id.* at 216 (*citing United States v. Fresno*, 429 U.S. 452, 459, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977) (state's tax of federal employees' housing benefit, though passing an economic burden through to the federal government by lowering the effective pay rate of its employees, was not a prohibited tax on the federal government because the tax equally applied to other similarly situated constituents of the state)). The *West Virginia* court

² The Fourth Circuit did not find helpful the federal government's citation to OPM regulation 48 CFR 1631.205-41 that provides, in part: "5 USC § 8909(f)(1) prohibits the imposition of taxes . . . , directly or indirectly, on FEHB premiums . . . and it applies to all forms of direct and indirect measurements of FEHBP premiums . . . regardless of how they may be titled, to whom they must be paid, or the purpose for which they are collected" See *West Virginia*, 339 F.3d at 214, fn 1. The court stated, "[t]his regulatory instruction, saying nothing about from whom the tax is collected, sheds no light on what constitutes indirectness, as such relates to the relationship between a tax and its payer." *Id.*

determined that the rule espoused by the *Fresno* Court should also apply to the FEHBA preemption provision because of the similarities between the prohibitions:

Fresno's holding therefore results in the rule that an economic pass-through of a generally applicable tax does not constitute a tax, direct or indirect, of the recipient of the pass-through. . . .

Fresno's rule should apply here by analogy because of the many similarities between section 8909(f)'s preemption and the Constitution's preemption of state taxation of the federal government. Section 8909(f) precludes states from taxing the Carriers directly or indirectly. The Constitution precludes states from taxing the federal government directly or indirectly. Both ensure that state tax laws do not thwart the will of the federal government. Both face the economic reality that the states' tax regimes would be seriously hampered were all state taxes of non-protected taxpayers that create pass-through economic burdens on protected taxpayers treated as indirect taxes of those protected taxpayers.

West Virginia, 339 F.3d at 216-217.

The Mississippi Supreme Court also refused to equate a potential economic pass-through of costs to an indirect tax on FEHBA carriers in *Mobility Medical, Inc. v. Mississippi Dep't of Revenue*, No. 2011-CA-01780-SCT, 2013 WL 246684. *Mobility Medical*, a medical products retailer, asserted that the FEHBA preempted Mississippi's gross receipts tax on its revenues from FEHBA carriers because any state tax that *might* result in an increase in costs for the FEHB Fund is an indirect tax. *Mobility Medical*, 2013 WL 246684, at *2. The court held that nothing in the Mississippi tax law requires the retailer to pass on the tax (or any of its costs) to its customers, or that the retailer be reimbursed its costs by the FEHB Fund; therefore, there is no preemption because there is no indirect tax on the carrier, or conflict between the state and federal laws. *Id.* The court noted that if an economic cost "trickle-down effect" amounted to an indirect tax, then preemption would equally apply to all state and local taxes born by the retailer, including inventory tax, unemployment tax, property taxes, franchise tax, license fees, and the numerous taxes or fees that a retailer might "indirectly" pass along to its customers, and that there was no evidence of such expansive Congressional intent in the FEHBA. *Id.* at *3.

The taxpayers' reliance on *Health Maint. Org. of New Jersey v. Whitman*, 72 F.3d 1123, 1125 (3rd Cir. 1993), and *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 716 (2d Cir. 1993) is misplaced, as both cases involve the preemption of a tax on a FEHBA carrier. See Appeal Petition supplement, August 3, 2012, at pages 8-10. In *Whitman*, the imposition was levied by the state on the carriers as a direct special assessment, and in *Travelers*, the imposition was levied by the hospital on the carriers, under the state's dictate, as a surcharge added to invoices paid by the carriers. *Whitman*, 72 F.3d at 1125; *Travelers*, 14 F.3d at 716³; see *West Virginia*, 339 F.3d at 217.

³ In *Travelers*, the court found that New York's hospital surcharge was preempted by both the FEHBA and the Employee Retirement Income Security Act (ERISA). *Travelers*, 14 F.3d at 725. The Supreme Court granted

The taxpayers also cite to a Minnesota Tax Court decision, *Health Partners, Inc. v. Comm’r of Revenue*, No. 6925, 1999 WL 123289, at *6 (Minn. Tax March 4, 1999), that involved Minnesota’s gross revenues tax on hospitals and health care providers. The Minnesota Tax Court determined that the FEHBA preempted the state tax as applied to HealthPartners, Inc., an HMO and FEHBA carrier, because the tax on a carrier’s gross revenues amounted to an indirect tax on the carrier with respect to payments from the FEHB Fund, a holding along the same lines as the holding in *Group Health, supra*. *Health Partners*, 1999 WL 123289, at *6. The Minnesota Tax Court emphasized the significance of the fact that the taxpayer was an HMO and, therefore, a carrier as well as a health service provider, just as the *Group Health* Court emphasized Group Health’s HMO/carrier status. *Health Partners*, 1999 WL 123289, at *6-7; *Group Health*, 146 Wn. App. at 95.⁴

As recognized by the above authorities, 5 USC § 8909(f)(1) limits preemption to taxes “imposed, directly or indirectly, on a carrier” and this limitation is clearly expressed in the plain language of that preemption provision. We need look no further than the plain language of the preemption provision in discerning Congress’s intent. *See CSX*, 507 U.S. at 664. The taxpayers have not established that Washington’s imposition of B&O tax on their gross revenues as health service providers is a direct or indirect tax imposed on a FEHBA carrier and preempted by 5 USC § 8909(f)(1).

2. Medicare Advantage (MA) Program

A Medicare Advantage (MA) Plan is a type of Medicare health plan offered by a private company that contracts with the Centers for Medicare & Medicaid Services (CMS) to provide Medicare benefits. *See* 42 CFR § 422.2. The taxpayers assert that Washington’s B&O tax on their gross revenues from carriers who receive payments from the Medicare program is preempted by 42 CFR § 422.404, which provides:

§ 422.404 State premium taxes prohibited.

certiorari solely in regards to the Second Circuit’s holding that the ERISA preempted New York’s hospital surcharge, and reversed, holding that the surcharges only indirectly affected the relative prices of insurance policies and Congress could not possibly have intended to eliminate the myriad of state and local regulation that could have such an indirect affect on price. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995).

⁴ In *Group Health*, the court rejected the city’s assertion that it was permissible to impose the B&O tax on the HMO because it was also a health care provider:

No statute, regulation, federal agency interpretive statement, court case, or any other legal authority supports the contention that, by unilaterally recharacterizing an HMO as a health care “provider” rather than a carrier (which is how the federal government characterizes Group Health), the City may avoid the prohibition imposed by 5 USC § 8909(f) and thus tax FEHBF revenue.

Group Health, 146 Wn. App. at 95.

(a) Basic rule. **No premium tax, fee, or other similar assessment may be imposed by any State, . . . with respect to any payment CMS makes on behalf of MA enrollees under subpart G of this part, or with respect to any payment made to MA plans by beneficiaries, or payment to MA plans by a third party on a beneficiary's behalf.**

(b) Construction. Nothing in this section shall be construed to exempt **any MA organization** from taxes, fees, or other monetary assessments related to the net income or profit that accrues to, or is realized by, the organization from business conducted under this part, if that tax, fee, or payment is applicable to a broad range of business activity.

(Emphasis added.) The terms “MA organization” and “MA plan” are defined in 42 CFR 422.2 as follows:

MA organization means a public or private entity organized and licensed by a State as a risk-bearing entity (with the exception of provider-sponsored organizations receiving waivers) that is certified by CMS as meeting the MA contract requirements.

MA plan means health benefits coverage offered under a policy or contract by an MA organization that includes a specific set of health benefits offered at a uniform premium and uniform level cost-sharing to all Medicare beneficiaries residing in the service area of the MA plan

Similar to the FEHBA preemption provision, 42 CFR 422.404 is limited to taxing payments made by CMS from the federal fund. The taxpayers are not MA plans or MA organizations and do not receive any payments from CMS or the Medicare fund. The taxpayers receive payments from MA plans for health services provided to their patients who are MA enrollees. Washington’s B&O tax on the taxpayers’ gross receipts from health services is not a tax or other assessment imposed “with respect to any payment CMS makes on behalf of MA enrollees . . . or any payment made to MA plans . . .” and is not prohibited by 42 CFR 422.404(a). The taxpayers’ economic pass-through argument that their tax costs may be passed along to MA plans does not amount to a prohibited tax or assessment under the same analysis of *Fresno*, *West Virginia*, and *Medical Mobility* discussed above in regards to preemption under the FEHBA.

3. TRICARE Program

The TRICARE program is a comprehensive managed health care program for the delivery and financing of health care services in the Military Health System. 32 CFR 199.17(a). The taxpayers assert that Washington’s B&O tax on their gross revenues from carriers who receive payments from the TRICARE program is preempted by 32 CFR § 199.17(a)(7), which provides:

(ii) . . . any State or local law relating to health insurance, prepaid health plans, or other health care delivery or financing methods **is preempted and does not apply in connection with TRICARE regional contracts.** Any such law, or regulation pursuant to such law, is without any force or effect, and State or local governments have no legal authority to enforce them **in relation to the TRICARE regional contracts.** . . .

(iii) The **preemption** of State and local laws set forth in paragraph (a)(7)(ii) of this section **includes State and local laws imposing premium taxes on health or dental insurance carriers or underwriters or other plan managers, or similar taxes on such entities. . . .** For purposes of assessing the effect of Federal preemption of State and local **taxes and fees in connection with DoD health and dental services contracts**, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 USC § 8909(f).

(Emphasis added.) *See* 10 USC § 1103(a).⁵

Preemption is limited to state and local laws relating to TRICARE regional contracts and premium taxes imposed on the insurance carrier contractors. Washington's B&O tax is imposed on the taxpayers' receipts from insurance carriers, not on the premiums or other payments the insurance carriers may receive from the TRICARE program. The taxpayers have not established that Washington's B&O tax on their receipts from TRICARE contractors is preempted pursuant to 32 CFR § 199.17(a)(7). Their economic pass-through theory of preemption fails under the same analysis applied to the FEHBA preemption provision above. The taxpayers' petitions are denied.

DECISION AND DISPOSITION

The taxpayers' petitions are denied.

Dated this 6th day of August, 2013.

⁵ The statutory preemption provision in 10 USC § 1103(a) provides:

(a) Occurrence of preemption. A law or regulation of a State or local government relating to health insurance, prepaid health plans, or other health care delivery or financing methods shall not apply to any contract entered into pursuant to this chapter by the Secretary of Defense or the administering Secretaries to the extent that the Secretary of Defense or the administering Secretaries determine that:

(1) the State or local law or regulation is inconsistent with a specific provision of the contract or a regulation promulgated by the Secretary of Defense or the administering Secretaries pursuant to this chapter; or

(2) the preemption of the State or local law or regulation is necessary to implement or administer the provisions of the contract or to achieve any other important Federal interest.