PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2006-D38

PROVIDER -
St. Vincent's Medical Center
Bridgeport, Connecticut

Provider No.: 07-0028

vs.

INTERMEDIARY -
BlueCross BlueShield Association/
Empire Medicare Services

DATE OF HEARING -
January 20, 2005

Cost Reporting Period Ended -
September 30, 1995

CASE NO.: 98-1822

INDEX

ISSUE:

Whether the Intermediary's adjustment to disallow the Connecticut Sales Tax was proper.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the proper amount of Medicare reimbursement due a provider of medical services.

The Medicare program provides health insurance to aged and disabled persons. 42 U.S.C. §§1395-1395cc. The Secretary of the Department of Health and Human Services (Secretary) is authorized to promulgate regulations prescribing the health care services covered by the program and the methods of determining payments for those services. The Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA), is the operating component of the Department of Health and Human Services (DHHS) charged with the program's administration. CMS has entered into contracts with insurance companies known as fiscal intermediaries to maintain the program's payment and audit functions. Intermediaries determine payment amounts due providers of health care services (e.g., hospitals, skilled nursing facilities, and home health agencies) under Medicare law and interpretative guidelines issued by CMS.

At the close of its fiscal year, each provider submits a cost report to its intermediary showing the costs it incurred during the period and the portion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider, and notifies the Provider in a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's determination may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

42 U.S.C. §1395x(v)(1)(A) mandates that for a payment to be considered a reimbursable cost under Medicare, the payment must be the cost actually incurred and should exclude any cost found to be unnecessary. 42 C.F.R. §413.9 states that payments to providers must be based on the reasonable cost of services covered under Medicare and defines reasonable cost to include all necessary and proper costs. Necessary and proper costs are further defined as costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities and are costs which are common and accepted occurrences in the field of the provider's activities.

The Provider Reimbursement Manual (PRM), in accordance with the foregoing principles, contains a general rule that taxes assessed against a provider are allowable costs. PRM §2122.1 reads:

> The general rule is that taxes assessed against the provider, in accordance with the levying enactments of the several

> States and lower levels of government and for which the provider is liable for payment, are allowable costs. Tax expense should not include fines and penalties.

PRM 15-1 §2122.2 then details certain taxes which are levied on providers that are not allowable costs. PRM 15-1 §2122.2G specifically states the following taxes are not allowable:

> Taxes, such as sales taxes, levied against the patient and collected and remitted by the provider.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

St. Vincent's Medical Center (Provider) is a 407 bed acute care facility located in Bridgeport, Connecticut. For the fiscal year ended September 30, 1995, the Provider claimed $3,809,998 in Connecticut sales tax as an Administrative & General (A&G) cost on its Medicare cost report. Empire Medicare Services (Intermediary) disallowed the sales tax expense upon audit, as the cost was deemed non-allowable for Medicare reimbursement. The removal of the sales tax expense resulted in a reduction of Medicare reimbursement of approximately $200,000.

The Provider appealed the adjustment to the Board and met the jurisdictional requirements of 42 C.F.R §§405.1835- 405.1841. The Provider was represented by Steven. B. Roosa, Esquire, of Reed Smith LLP. The Intermediary was represented by Bernard M. Talbert, Esquire, of Blue Cross Blue Shield Association.

PARTIES' CONTENTIONS:

The Provider contends that the Connecticut Sales Tax met the requirement of an allowable tax as identified by the Board in Regions Hospital v. BlueCross and BlueShield Association/Noridian Government Services PRRB Dec. No. 2000-D64, June 22, 2000 in that: (i) the tax must levied and imposed uniformly on all providers, (ii) the tax was a liability subjecting the provider to severe sanctions for non-payment, and (iii) the tax was an ordinary and necessary business expense. The Provider asserts that the tax is imposed on all retailers in the state of Connecticut;[1] the Connecticut General Statute prescribes monetary penalties and interest as the sanction for non-payment of the tax;[2] and that the tax was an ordinary and necessary business expense which all hospitals in Connecticut were required to pay in the ordinary course of their operations by filing monthly and yearly returns.[3]

The Provider also contends that in accordance with the PRM §2122.2G, a tax must exhibit all of the following three characteristics in order to be considered non-reimbursable: (i) the tax must be "levied against the patient," (ii) the tax must be

[1] See Provider's position paper, page 3 and Exhibit S1, C.G.S.A §12-408(1)
[2] See Provider's position paper, page 4 and Exhibit S4, C.G.S.A §12-428
[3] See Provider's position paper, page 4 and Exhibit S5, C.G.S.A §12-414

"collected" from the patient by the hospital, and (iii) the collected tax proceeds must be remitted by the hospital to the State. The Provider asserts that none of these characteristics are present in the Connecticut Sales Tax.

The Provider claims that the Connecticut General Statutes expressly state that the Connecticut Sales Tax is imposed upon hospitals (retailers) and not upon patients (consumers). In addition, the manner in which the Connecticut Sales Tax impacts the hospital also supports the argument that it is imposed on the hospital and not upon the patient. The hospital pays a constant 6% on its cash receipts, while the amount of tax that is theoretically allocable to any particular patient fluctuates based on the patient's insured status. Moreover, the Provider asserts that the Gross Earning Tax (GET Tax), which CMS has conceded is an allowable cost, operates in exactly the same manner as the Connecticut Sales Tax.

As support that the Connecticut Sales Tax fails the second test for disallowance, the Provider cites the Connecticut Pricemaster Law,[4] which makes it unlawful for a hospital to collect the tax, either in the first instance by itemizing the tax on its bill or, thereafter, by taking any action to recover the tax against the patient. Finally, the Provider claims that since the Connecticut Sales Tax is neither levied upon the patient nor collected from the patient by the hospital, the tax is not remitted by the hospital on behalf of the patient.

The Intermediary argues that the plain language of the Connecticut statute requires that retailers collect the tax from the consumer, and Connecticut's sales tax operates just like any other sales tax. The consumer pays the tax and the retailer is responsible for the administration of the sales tax, including collecting the tax and remitting it to the state. The term "collect" in the sales tax statute has no necessary reference to a legal action in the event of the failure to pay. The Intermediary notes that the Pricemaster Law does not preclude contact by a hospital with a patient with respect to his bill. It simply states that the taxes are to be included in the price of each service and that hospitals may not lodge charges in excess of those placed on a list required by the law. Finally, the hospital remits the taxes when it transmit them to the state in the customary manner in which any sales tax might be administered.

The Intermediary distinguishes the Connecticut Sales Tax from those taxes that the Board found to be allowable in St. Joseph's Hospital v. Blue Cross and Blue Shield of Minnesota, Dec No. 2000-D47, April 20, 2000 and First PPS Year v. Blue Cross and Blue Shield Association, Dec No. 1990-D61, September 20, 1990. In both cases, neither tax statute required the tax to be collected from the consumer. In addition, the sole purpose of both statutes was to collect funds to afford services to indigent individuals in need of medical care.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and program instructions, the evidence and the parties' contentions, the Board finds and concludes as follows:

[4] See Provider's position paper, Exhibit S14, C.G.S.A §19a-681

The Connecticut Sales Tax Statute at C.G.S.A §12-408 reads:

> For the privilege of making any sales, as defined in subdivision (2) of section 12-407, at retail, in this state for a consideration, a tax is hereby imposed on all retailers at the rate of six percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail or from the rendering of any services constituting a sale in accordance with subdivision (2) of section 12-407. . . .

PRM 15-1 §2122.2 clearly states that sales taxes levied against the patient and collected and remitted by the provider are not allowable costs. The Provider has attempted to demonstrate to the Board that the Connecticut sales tax is not a "true" sales tax as is described above, but a tax which is incurred by the Provider. However, the Board finds that C.G.S.A §12-408 applies to all retailers in the state of Connecticut, and the Provider has made no distinction between hospitals and other retailers in the state.

The Provider claims that due to a state statute prohibiting hospitals from itemizing taxes on a patient's bill, hospitals were unable to collect the tax from their patients; therefore, the hospitals were burdened with the cost of the tax. The Board finds that Connecticut's Pricemaster Law at C.G.S.A 19a-681 only bars hospitals from identifying the tax on the bill; it does not bar them from collecting the tax from the patient. On the contrary, C.G.S.A §19a-681(a) states, "Each hospital shall include all applicable taxes in the price of each item in its pricemaster for each charge." Therefore, hospitals were not precluded from collecting the taxes but were instructed to include the taxes in the total price of each item. Hospitals were only precluded from identifying the tax separately on the bill.

The Provider argues that severe penalties would be levied on the hospital if the taxes were not paid to the state. The Board finds that although penalties would be levied on the Provider for non-remittance of the taxes to the state, the same penalties would apply to all retailers if the taxes were not remitted. The Provider has made no distinction between hospitals and other retailers.

The Provider argues that the Connecticut Sales Tax is identical to the GET which has been deemed an allowable cost by CMS in states such as Florida and Minnesota. The Board finds, however, that the Florida Indigent Care Tax and the Minnesota Care Tax are assessed against health care providers and used to fund indigent care, but the Connecticut Sales Tax is not assessed in this manner or used for this purpose. Rather, the sales tax is imposed on retail sales transactions, collected from consumers by retailers and remitted to the state for deposit in its General Fund. Furthermore, the Board finds that the Provider's statement that the GET Tax also exists in Connecticut negates its argument that the taxes are identical, as they are separate taxes, funded in a different manner and used for a different purpose. The sole similarity is that both are based on a percentage of the Provider's gross revenue. The Board finds that this similarity does not make the taxes identical and that under the principles of Medicare reimbursement, they are not afforded the same treatment.

DECISION AND ORDER:

The Connecticut Sales Tax is not a reimbursable cost under Medicare law and program instructions. The Intermediary properly disallowed the Connecticut Sales Tax. The Intermediary's adjustment is affirmed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Gary B. Blodgett, D.D.S.
Elaine Crews Powell, C.P.A.
Anjali Mulchandani-West
Yvette C. Hayes

FOR THE BOARD:

DATE: July 26, 2006

Suzanne Cochran
Chairperson