

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2009-D42

PROVIDER -

Kindred Hospital-Kansas City
Kindred Hospital-St. Louis

Provider Nos.: 26-2011; 26-2010
(respectively)

vs.

INTERMEDIARY -

Wisconsin Physician Services
(formerly Mutual of Omaha)

DATE OF HEARING -

September 25, 2008

Cost Reporting Periods Ended -
August 31, 2000; August 31, 2001
August 31, 2002; August 31, 2003

CASE NOS: See Attachment 1

INDEX

	Page No.
Issue	2
Medicare Statutory and Regulatory Background	2
Statement of the Case and Procedural History	3
Intermediary's Contentions	6
Provider's Contentions	6
Findings of Fact, Conclusions of Law and Discussion	8
Decision and Order	12

ISSUE:

Whether the Intermediary's adjustments treating the Management Services Corporation (MSC) pool payments the Providers received as provider refunds, which were offset against the allowable provider tax expense, were proper.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

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

The Medicare program was established to provide health insurance to the aged and disabled. 42 U.S.C. §§ 1395-1395cc. 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 administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under Medicare law and interpretive guidelines published by CMS. See 42 U.S.C. §1395h; 42 C.F.R. §§413.20 and 413.24.

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

Medicare reimbursement is governed by 42 U.S.C. § 1395x(v)(1)(A). The statute provides that the reasonable cost of any service "shall be the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." The implementing regulation at 42 C.F.R. § 413.9(a) provides that "reasonable costs" includes "all necessary and proper costs incurred in furnishing the services subject to principles relating to specific items of revenue and cost." In determining what constitutes a reasonable cost, 42 C.F.R. § 413.98 provides for reductions due to purchase discounts, allowances, and refunds of various expenses:

- (a) Discounts and allowances received on purchases of goods or services are reductions of the costs to which they relate. Similarly, refunds of previous expense payments are reductions of the related expense.

* * * * *

(b)(3)*Refunds*. Refunds are amounts paid back or a credit allowed on account of an over collection.

(c) *Normal accounting treatment – Reduction of costs*. All discounts, allowances, and refunds of expenses are reductions in the costs of goods or services purchased and are not income. If they are received in the same accounting period in which the purchases were made or expenses were incurred, they will reduce the purchases or expenses of that period. However, if they are received in a later accounting period, they will reduce the comparable purchases or expenses in the period in which they are received.

Providing additional guidance about purchase discounts, allowances, and refunds, the CMS Provider Reimbursement Manual (“PRM”) 15-1, section 2302.5 defines “Applicable Credits,” that offset or reduce expense items listed on a cost report as follows:

Those receipts or types of transactions which offset or reduce expense items that are allocable to cost centers as direct or indirect costs. Typical examples of such transactions are: purchase discounts, rebates, or allowances; recoveries or indemnities on losses; sales of scrap or incidental services; adjustments of overpayments or erroneous charges; and other income items which serve to reduce costs.

The issue in these cases concerns the Providers’ Medicare cost report treatment of the payments they received from a privately-administered pooling arrangement in which certain Missouri hospitals participated.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

A. Statement of the Case

In 1992, the Missouri Hospital Association (“MHA” or the “Association”) created a voluntary Medicaid pool arrangement on behalf of Missouri hospitals who chose to participate. The pooling arrangement provided for the distribution of funds among participating hospitals to pay for care provided to patients who are uninsured and who are eligible to be Medicaid beneficiaries. Hospitals first paid the FRA tax directly to the State by check or requested that the tax be deducted from their Medicaid reimbursement. The State then issued checks payable to the hospitals for their Medicaid reimbursement. Under the Association’s pooling arrangement, the Association’s Management Services Corporation (“MSC”) was authorized by participating hospitals to endorse and deposit these checks into separate bank accounts maintained by each participating hospital and such funds are in turn transferred to an MSC bank account (the “MSC pool” or “pool”). MSC then reallocated this revenue to hospitals participating in the pool pursuant to an agreed-upon payment methodology. Each hospital received a net payment from MSC equal to their Medicaid claims (including any uninsured add-on payment and upper payment limit payment) less the MSC’s administrative fee and contributions for MCE

scholarship and Missouri poison control network, plus an adjustment for participation in the pool (either an additional amount for revenue received from the pool, or a deduction for the amount of Medicaid revenue paid into the pool). This payment detail was included on monthly account statements issued by MSC to each participating hospital.

While the FRA State tax is mandatory, the MSC pooling arrangement is voluntary and not all hospitals participate. Participating hospitals sign a private contract that authorizes MSC to accept voluntary contributions on behalf of the hospitals and to redistribute such voluntary payments to other participating hospitals pursuant to a pre-established methodology. The State of Missouri has no control over the contractual relations between MSC and participating hospitals, or over the payments made to or from the MSC pool. The State of Missouri has no authority over the means or methodology applied by MSC for receiving Medicaid payments and redistributing such payments to participating hospitals.

The providers are Medicare-certified long-term acute care hospitals located in the State of Missouri that were subject to the FRA tax and have been participants in the MSC pooling arrangement since its inception. The Providers entered into separate contracts with MSC for this purpose. The Providers have received regular statements from MSC listing their payments to and from the MSC pool. On their Medicare cost reports, the Providers reported both their FRA tax payments and the payments they received from the MSC pool. The Providers claimed the amount of provider FRA tax each hospital paid to the State as an allowable expense on their cost reports. The Providers listed payments received from the MSC pool as revenue on their cost reports by reporting MSC pool payments as a reduction of their Medicaid contractual allowance adjustment.

B. Procedural History

The Providers' appeals cover fiscal year ends ("FYE") from 2000 to 2003.

2000

Wisconsin Physicians Service (formerly Mutual of Omaha) (the "Intermediary") audited Kindred – Kansas City's FYE August 31, 2000 cost report and issued an NPR dated September 19, 2003. On the original NPR, the Intermediary made no adjustments with regard to FRA tax expense or the pool payments.

On May 6, 2004, the OIG released a report on its review of 17 Missouri hospitals that purportedly received the largest MSC pool payments from the Association. See "Review of the Classification of Missouri Provider Tax Refunds on Hospitals' Medicare Cost Reports," May 2004, A-07-02-04006 (the "OIG Report"). The OIG found that 15 of the 17 hospitals recorded the pool payments as Medicaid revenue, rather than as a reduction of the FRA tax expense. The OIG concluded that CMS should instruct the Intermediary to reopen these hospitals' cost reports and make adjustments to reclassify the pool payments as tax refunds, to be offset against the FRA tax expense.

At the instruction of CMS, per the OIG report, the Intermediary reopened the Kindred Hospital – Kansas City FYE August 31, 2000 cost report and issued a revised NPR dated

September 15, 2004. Adjustment No. 4 to the revised NPR disallowed \$1,714,610 “to reflect the non allowable FRA tax.” Adjustment No. 5 to the revised NPR disallowed \$2,267 in expenses claimed related to the administration of the Association’s pool. The Intermediary issued a second revised NPR to the same cost report dated October 21, 2004. Adjustment No. 4 to the second revised NPR allowed \$570,033 to “correct the allowable expense for FRA [tax] for previous excess revenue offset.” The Providers determined that these adjustments have a total Medicare reimbursement impact of \$484,728, the amount at issue in appeal PRRB No. 05-0717.

Kindred Hospital – Kansas City appealed these determinations (PRRB No. 05-0717) in a letter to the Board dated February 14, 2005. The Board acknowledged this appeal in a letter dated February 24, 2005.

2001-2003

At the instruction of CMS, per the OIG report, the Intermediary audited additional cost reports of the Providers and issued the NPRs listed in the chart below. As with Kindred Hospital – Kansas City’s NPR for FYE August 31, 2000, these NPRs disallowed FRA tax expense by the amount of pool payments received to decrease FRA tax per a calculation based on review of State of Missouri documentation.

Kindred Provider	PRRB Appeal No.	NPR Date	Adj. No.	Costs Disallowed	Medicare Reimbursement Impact
Kansas City	05-0718	August 20, 2004	18	\$1,205,030	\$628,271
Kansas City	06-0165	June 10, 2005	4	\$749,288	\$408,361
Kansas City	06-0166	May 12, 2005	23	\$1,377,838	\$618,798
St. Louis	06-0121	April 27, 2005	9	\$913,069 ¹	\$428,724
St. Louis	06-1729	March 9, 2006	6	\$978,649	\$667,316

The Provider appealed the disallowances to the Board and met the jurisdictional requirements of 42 C.F.R. §§ 405.1835 - 405.1841. The Board agreed to hear these six cases concurrently.

The Providers were represented by Jason M. Healy, Esquire, and Kevin M. Madagan, Esquire, of Reed Smith LLP. The Intermediary was represented by Ms. Stacey Hayes and Mr. Terry Gouger of Wisconsin Physicians Service.

¹ The Intermediary used a summary schedule of MHA invoices to determine total provider tax and total pool payments. From that schedule they determined net allowable tax, subtracting total pool payments from total provider tax. During 2002, specifically on a June 20 invoice and a July 5 invoice, there were negative payments from the pool (or take backs) in the amounts of \$234,535 and \$17,403 respectively. These negative payments effectively reduced pool payments. However, the amounts were incorrectly noted on the Intermediary summary schedule as a pool payments received, therefore understating allowable provider tax. The Providers argue that a reduction in the amount of offset (\$251,938) is needed to correct the adjustment. This is in the nature of a mathematical error in the Intermediary’s adjustment – separate from the substantive basis for that adjustment.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends it properly reduced the Providers' FRA tax assessment (expenses) by the pool payments received from the Missouri Hospital Association. The Intermediary contends that the MSC pool payments are related to the FRA tax payments in such a way as to justify offsetting the pool payments as refunds of FRA tax expense. The Intermediary relies on an OIG report and its witness to contend that the sole purpose of the MSC pooling arrangement is to mitigate the impact of the FRA tax, thus serving as a return or refund. Both the Intermediary and the OIG believe that the State and MHA agreed to refund or at least mitigate the impact of the FRA tax in an effort to increase the State of Missouri's federal financial participation (FFP).

The Intermediary contends that it properly offset the MSC pool payments as returns or refunds of the FRA tax assessment citing Section 1861(v)(1)(A) of the Social Security Act which defines reasonable costs as, ". . . the cost actually incurred," implying that the FRA taxes paid were not actual costs incurred by hospitals that received MSC pool payments. The Intermediary further supports its adjustments under the authority of 42 C.F.R. §413.98(a) which states that "'refunds' of previous expense payments are reductions of the related expense."

The Intermediary also asserts that the MSC pool payments could be considered "applicable credits" which, under PRM § 2302.5, are "transactions that offset or reduce expense items that are allocable to cost centers as direct or indirect costs." An example of an "applicable credit" is "other income items which serve to reduce costs." The Intermediary argues that an MSC payment is an "other income item" because the payment serves to reduce the FRA tax. The Intermediary believes that Montefiore Medical Center (New York, N.Y.) v. BlueCross BlueShield Association/Empire Medicare Services, PRRB Decision No. 2006-D29, (June 5, 2006) (holding that rental income constituted a related income reducing costs) supports this argument.

PROVIDERS' CONTENTIONS:

The Providers argue that it was improper for the Intermediary to treat MSC pool payments the Providers received as provider tax refunds and to offset these funds as a reduction to the allowable provider tax expense. The Providers argue that paying the mandatory FRA tax and making voluntary payments to or receiving payments from the MSC pool are separate, unrelated transactions. The Providers contend that the MSC payments from the pool are "other revenue," and can never qualify as refunds, credits, or returns of the FRA tax paid. The Providers also contend that the transfers of funds via the MSC pool between hospitals qualify as donations or contributions to fund care provided to Medicaid and uninsured patients. Other revenue is not a "refund" of expenses to be offset against allowable expenses. Therefore, there is no basis to offset the revenue the Providers received from the MSC pool against the allowable provider tax expense the Providers incurred. Likewise, the Providers assert that, as voluntary contributions or donations, the payments from the MSC pool could not be properly offset against the Providers' FRA tax expense.

The Providers assert that payments from the MSC pool are not tax refunds for at least four reasons. First, the Missouri statute, Mo. Rev. Stat. § 208.461(1), precludes a refund of FRA taxes. Second, MSC is a private entity without authority to tax or issue a tax refund. Third, MSC is an agent of the Providers and other hospitals participating in the pooling arrangement under private contracts between the hospitals and MSC. MSC is not an agent of the State of Missouri. Fourth, the State-issued IRS Form 1099 reflects revenue amounts for tax purposes and the lack of any MSC pool payments on the State-issued Form 1099 confirms that an MSC pool payment is not a tax refund. The Providers further argue that the FRA tax and MSC pooling arrangement are not related so that the Intermediary or the OIG could conclude that an MSC payment constitutes a tax refund. Rather than upholding the reimbursement principle that Medicare pays its fair share of the costs of services to program beneficiaries, the Providers contend that the Intermediary has violated this principle by offsetting payments from the MSC pool against the FRA tax expense – an unrelated expense that shares none of the underlying characteristics of the MSC pool.

The Providers also contend that, under generally accepted accounting principles (“GAAP”), and Medicare reimbursement rules, payments from the MSC pool are not to be offset against the FRA tax expense. The Providers contend that the MSC pool payments are not some type of refund or credit; rather, payments from the MSC pool are properly considered “other revenue” in accordance with the American Institute of Certified Public Accountants (“AICPA”) Audit and Accounting Guide for Health Care Organizations §10.07, because such payments are part of the ongoing major or central operations of the hospital. The Providers state that payments from the MSC pool are not “other revenue which serve to reduce costs” under the Provider Reimbursement Manual (PRM) §2302.5. Therefore, such payments cannot be deemed credits under the PRM. The Providers argue that, as “other revenue,” PRM § 2302.5 directs that payments from the MSC pool should not be offset against the FRA tax expense because those pool payments are not an income item which serve to reduce costs. The Providers assert that the MSC pool payments are generated from a voluntary contractual arrangement among certain Missouri hospitals to help fund hospital services for Medicaid and uninsured patients. As such, payments from the MSC pool are not a reduction or a refund of the expense incurred by the Providers to pay the FRA tax.

The Providers argue that this reporting treatment is consistent in principle with guidance provided by a national accounting firm to MSC regarding how hospitals participating in the MSC pooling arrangement should treat the pool payments for financial accounting purposes, and consistent with the Providers’ Medicare cost reporting treatment of payments from the MSC pool as a reduction in the Medicaid contractual allowance. Whether reported as the Providers have or as the accounting firm recommended, the payments from the MSC pool are revenue, consistent with the proper statement of revenues versus expenses under GAAP.

The Providers contend that the transfers of funds between hospitals also qualify as donations or contributions to fund care provided to Medicaid and uninsured patients. MSC pool payments, whether contributed to the pool or received from the pool, are the

result of this voluntary arrangement between the hospitals – an arrangement to which the State is not a party. Therefore, the Providers assert that these payments can be considered donations or unrestricted grants from one hospital to another. The Providers refer to PRM § 600 in support of their position that payments from the MSC pool should not be deducted or offset against the FRA tax expense.

The Providers label the OIG argument as unconvincing when considered alongside a previous review of the Missouri FRA hospital tax and MSC pooling arrangement conducted by CMS over a ten year period. In that review, CMS ultimately concluded the pooling arrangement was *not* being used to hold hospitals harmless from the FRA tax. Conversely, the Providers contend that, in their own review, the OIG ignored federal laws governing acceptable health care related taxes as well as the relevant facts in order to reach the opposite conclusion. The Providers assert that the OIG’s vague references to unwritten “agreements” to help so-called “loser” hospitals that in some unspecified way made the payments from the MSC pool conditional lack merit. The Providers state that the contracts between the Providers and MSC confirm that these payments are unconditional and that participation in the pooling arrangement is voluntary. In sum, the Providers contend that the OIG Report cannot be used as a basis to support the Intermediary’s adjustments.

The Providers also challenge the Intermediary’s ability to recoup Medicare reimbursement on a retroactive basis when these hospitals reported their costs consistent with prior years, as audited by the Intermediary, received no notice of a change in policy, and were unfairly chosen for cost report reopening when many other Missouri hospitals were not. The Providers argue that they fully disclosed their treatment of the FRA tax expense and Medicaid pool payments to the Intermediary for eight years. They state that they relied upon the Intermediary’s audit of their Medicare cost reports during those eight years without adjustment to offset such costs. The Providers also indicate that they received no prior notice of the new policy from the OIG report regarding the need to offset FRA tax expense with pool payments received. The Providers assert that it was inequitable for the Intermediary to single out only 17 Missouri hospitals to disallow legitimate FRA tax expense when well over 100 Missouri hospitals participated in the MSC pooling arrangement.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After consideration of Medicare law and guidelines, the parties’ contentions and the evidence presented at the hearing, the Board finds that the Intermediary incorrectly treated the MSC pool payments the Providers received as refunds of the FRA tax and improperly offset such payments against the allowable FRA tax expense for the following reasons:

A. MSC Pool Payments Are Not Tax Refunds

The MSC pool payments are not refunds of the FRA tax. Missouri Statute §208.461(1) makes no provision authorizing a refund of FRA taxes. The only way under State law to

change the amount of FRA tax assessed on a hospital is for the hospital to petition the State before the tax is due.

The Board finds that payments from the MSC pool are not “refunds of previous expense payments” as contemplated under 42 C.F.R. § 413.98(a) (“‘Refunds’ of previous expense payments are reductions of the related expense.”). The creation of the FRA tax and the MSC pooling arrangement at approximately the same time does not necessarily support the conclusion reached by the the Intermediary or the OIG that an MSC pool payment constitutes a tax refund that should be used to offset the FRA tax. The Board finds that the MSC pool payments derive from private contracts and that hospitals may voluntarily choose to participate in the MSC pooling arrangement. Not all Missouri hospitals subject to the mandatory FRA tax participate in the voluntary MSC pooling arrangement and, accordingly, the Board finds that the FRA tax and the pooling arrangement are independent of one another. Further, the Board was not persuaded by the Intermediary’s argument that participation in the pooling arrangement was conditional. The contracts between participating hospitals and MSC express terms to the contrary.

Moreover, under 42 C.F.R. § 413.98(b)(3), refunds are “amounts paid back or a credit allowed on account of an overcollection.” The Board finds no evidence of an overcollection (a prerequisite to qualifying a payment as a refund under section 413.98(b)(3)) in these cases.

The Board also finds that a payment from the MSC pool does not qualify as a tax refund because MHA and MSC are private entities. A tax refund may only be issued by a governmental authority or its representative and neither MHA nor MSC is a governmental authority or such representative. Neither of these entities can collect a tax or issue a tax refund. In addition, if a tax refund were issued at all by the State, it would be reflected on the State issued IRS Form 1099. The OIG report states that the pool payments were not reflected on the 1099s. The absence of MSC payments on the State issued IRS Form 1099 is evidence that the State played no role in making payments from the MSC pool.

The Intermediary’s own witness testified that only Medicaid reimbursement is contributed by hospitals into the MSC pool. There is no basis to conclude that Medicaid reimbursement going into the MSC pool converted to tax refunds coming out of the MSC pool. The Board also finds it inconsistent that the OIG’s report concluded under PRM §2122.1 that payments *into* the MSC pool may not be claimed by hospitals as tax expenses,² yet the report concludes that any payments *from* the MSC pool constitute tax refunds. Funds going into the MSC pool that are not tax expenses for cost reporting purposes are not transformed into tax refunds for cost reporting purposes when coming out of the MSC pool. The FRA tax expense is an unrelated expense that shares none of the underlying characteristics with payments from the MSC pool.

The Board agrees with the Providers that, unlike in Montefiore Medical Center (New York, N.Y.) v. BlueCross BlueShield Association/Empire Medicare Services, PRRB

² Exhibit P-4 page 14, footnote 3.

Hearing, Dec. No. 2006-D29 (June 5, 2006), there is no direct link between the expense (FRA tax) and the revenue (MSC pool payments) to warrant an offset of expense. In Montefiore, the Board found that rental income generated from renting apartments to employees should be prorated and offset against the operating and capital expenses of the apartments, rather than against the apartment operating expenses alone. The Board believes that the independent nature of the MSC pooling arrangement and the different underlying characteristics of the FRA tax and MSC pool payments make Montefiore inapplicable to the facts and circumstances of this case. The applicable Medicare principles and the relevant facts in the instant cases show that a direct expense-revenue relationship or link similar to the one in Montefiore does not exist in these cases.

B. MSC Pool Payments Are Not Credits, Give-Backs or Returns

The Board finds that the MSC pool payments are not credits or returns. In making this argument, the Intermediary asserts that the MSC pool payments could be considered an “other income item” under the definition of “applicable credits” which, under PRM §2302.5, are transactions that offset or reduce expense items that are allocable to cost centers as direct or indirect costs:

2302.5 Applicable Credits.--Those receipts or types of transactions which offset or reduce expense items that are allocable to cost centers as direct or indirect costs. Typical examples of such transactions are: purchase discounts, rebates, or allowances; recoveries or indemnities on losses; sales of scrap or incidental services; adjustments of overpayments or erroneous charges; and *other income items which serve to reduce costs*.

(Emphasis added.)

Only “other income items *which* serve to reduce costs” qualify as applicable credits, not all “other income” items. The MSC pool payments are part of a funding mechanism for the state-wide care provided to Medicaid and uninsured patients. Consequently, the Board finds that a hospital’s payment into the MSC pool does not constitute an allowable expense. Therefore the hospital’s receipt of a payment from the MSC pool cannot result in the reduction of that expense. As a result, a payment from the MSC pool cannot be an income item which serves to reduce costs.

C. MSC Pool Payments Qualify as Other Revenue or Donations

The Board agrees the payments from the MSC pool are properly characterized as “other revenue” or as donations for financial accounting and Medicare cost reporting purposes. According to the AICPA Audit and Accounting Guide for Health Care Organizations §10.07, “other revenue” is derived from “services other than providing health care services or coverage to patients, residents, or enrollees.”³ Although reporting the payments from the MSC pool as “other revenue” or donations is different from the

³ Exhibit P-17, page 264.

manner in which the Providers reported these payments, it is consistent in the sense that these are transactions which do not offset the FRA tax expense.

Revenues from operations are derived from activities that constitute an entity's ongoing major or central operations. The Board finds that MSC pool payments are derived as a result of the provision of services to Medicaid and uninsured patients. The Board, therefore, finds that this revenue is properly reported as "other revenue" and should not be used as an offset to the FRA tax expense.

The Board finds that even if MSC pool payments may qualify as donations under PRM §600, for the fiscal years at issue, PRM §600 requires that donations are not to be offset against expense, stating as follows:

Unrestricted grants, gifts, and income from endowments should not be deducted from operating costs in computing reimbursable costs. Grants, gifts, or endowment income designated by a donor for paying specific operating costs for cost reporting periods beginning before October 1, 1983, should be deducted from the particular operating cost or group of costs. Restricted grants, gifts, and income from endowments designated for cost reporting periods beginning October 1, 1983, should not be deducted from the particular operating costs or group of costs.

Under the Financial Accounting Standards Board Statement Pronouncement No. 116, a contribution or gift is "an unconditional transfer of cash or other assets to a not-for-profit entity or a settlement or cancellation of its liabilities in a voluntary nonreciprocal transfer by another entity acting other than as an owner." The OIG and Intermediary assert that a hospital's participation in the pool redistribution is conditioned on their own self-benefit (namely, the additional Medicaid revenue generated from the FRA tax), which would prohibit a payment from the MSC pool as qualifying as a gift or donation. However, the Board can find no evidence in the record to support a finding that hospitals participating in the MSC pooling arrangement make conditional payments into the MSC pool.

D. MSC is a Separate and Unrelated Entity to the State

The Board notes that the Intermediary and OIG contend that the State and MHA colluded to create the FRA tax and MSC pooling arrangement, and that an additional unwritten agreement was negotiated and existed between these two entities. Even if this were true, those issues are not relevant to the Board's decision. Accordingly, the Board reaches no conclusions relative to the intermediary's speculation about motive. The Board finds persuasive the fact that before the OIG conducted its review, CMS concluded a ten-year review of the same FRA hospital tax and MSC pooling arrangement. In December 2002, CMS ultimately concluded after a lengthy review and discussions with the State of Missouri that the FRA tax did not violate the hold-harmless provisions of 42 C.F.R. §433.68(f).⁴ These provisions specify that health care related taxes are permissible if they do not hold providers harmless for their tax costs. The argument posited by the

⁴ Exhibit P-4, page 14.

Intermediary and the OIG is that hospitals agree to participate in the MSC pooling arrangement because they are held harmless from the FRA tax as a result. Use of the term “mitigate” by the Intermediary and the OIG as an alternative to “hold harmless” does not bring the analysis out from under the applicable federal laws and regulations governing acceptable health care related taxes. Nor is it plausible to ignore the Medicaid rules governing the FRA tax in connection with the Medicare reimbursement rules upon which the Intermediary relies to offset that tax. The OIG’s insistence that they used a “form over substance” analysis to reach their conclusions is troubling and equally unconvincing. In sum, this is not an analysis that can be detached from the laws governing State health care related taxes and the specific facts of both the Missouri FRA hospital tax and the MSC pooling arrangement.

The MSC and hospital contracts clearly state that the purpose of the MSC pooling arrangement is to pool funds to enhance the ability of Missouri hospitals to provide health care services to beneficiaries of the Missouri Medicaid Program and to the uninsured. The subset of Missouri hospitals participating in the pooling arrangement voluntarily agreed to a redistribution of their Medicaid reimbursement from the State by directing their agent, the MSC, to administer the pool. The evidence submitted supports these representations.

DECISION AND ORDER:

The Intermediary’s decision to treat payments the Providers received from the MSC pool as provider tax refunds, and offset such payments against allowable FRA tax expense, was inconsistent with the facts, Medicare laws, and program guidance. The Intermediary’s adjustments are reversed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esq., Chairman
Yvette C. Hayes
Michael D. Richards, C.P.A.
Keith E. Braganza, C.P.A.
John Gary Bowers, C.P.A.

FOR THE BOARD:

Suzanne Cochran, Esquire
Chairperson

DATE: September 29, 2009

Attachment 1
Kindred Hospitals
Provider and Case number Summary

<u>Provider Name</u>	<u>Provider#</u>	<u>Case#</u>	<u>FYE</u>
Kindred Hospital – Kansas City	26-2011	05-0717	8/31/00
		05-0718	8/31/01
		06-0165	8/31/02
		06-0166	8/31/03
Kindred Hospital – St. Louis	26-2010	06-0121	8/31/02
		06-1729	8/31/03