

ILLINOIS INDEPENDENT TAX TRIBUNAL

OPTUMRX, INC.

Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE

Respondent.

Judge Brian F. Barov

Case Nos. 20-TT-30 and 20-TT-109

CONSOLIDATED ANSWER¹

The Department of Revenue of the State of Illinois, by and through its attorneys, answers the Taxpayer's Petitions as follows:

PARTIES

1. Petitioner is a multistate business enterprise that engages in business in Illinois.

ANSWER: Admitted that Petitioner is engaged in business in Illinois. Otherwise, the Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph.

2. Petitioner maintains its corporate headquarters at 11000 Optum Circle, Eden Prairie, Minnesota, 55344.

ANSWER: The audit files, which have been provided to the Petitioner, indicate the relevant addresses as 2300 Main Street, Irvine, California 92614-6223 and 9900 Bren Road East,

¹ This Consolidated Answer addresses the paragraphs found in Petitions for 20-TT-30 and 20-TT-109. Separate paragraphs are listed when there are substantive differences. Otherwise, when comparable paragraphs have only slight changes, the more comprehensive paragraphs are included.

Of note, the Revenue Auditor involved with the two Notices at issue in matter 20-TT-30 is Charles Schoen and the Revenue Auditor involved with the Notice at issue in matter 20-TT-109 is Emad Rostom. This is reflected in the attached affidavits.

Minnetonka, Minnesota 55343-9664. Otherwise, the Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph.

3. Petitioner's telephone number is 888-445-8745 and its mailing address is 9900 Bren Road East, Minnetonka, Minnesota, 55343-9664.

ANSWER: Admitted.

4. Petitioner's federal identification number is 33-0441200.

ANSWER: Admitted.

5. The Department is an agency of the State of Illinois and is responsible for administering and enforcing the revenue laws of the State of Illinois.

ANSWER: Admitted.

JURISDICTION

20-TT-30 Para. 6. On or about January 15, 2020, the Department issued two Notices of Tentative Audit Denial of Claim (the "Notices") to Petitioner denying Petitioner's claims for refund on Form ST-1-X Amended Sales and Use Tax and E911 Surcharge Return, letter IDs CNXXX18794758887 & CNXXX13X33289440, respectively. Copies of the Notices are attached hereto as **Exhibit B**.

ANSWER: Admitted. Further admitted that the stated Notices are attached to the Petition for matter 20-TT-30 as Exhibit B.

20-TT-30 Para. 7. The Notices refer to the Audit Periods January 2013 to December 2014, and January 2015 to March 2018 (the "Periods at Issue").

ANSWER: Admitted.

20-TT-30 Para. 8. Petitioner filed a refund claim for the period January 2009 through and including December 2012 in the amount of \$2,662,613.18 on the same grounds as those set forth in this Petition

(“2009 – 2012 Claim”). Petitioner is currently awaiting a determination from the Department on its 2009 – 2012 Claim. Given the identity of issues presented in its claims, Petitioner expects any decision here to apply equally to its 2009 – 2012 Claim.

ANSWER: The Department admits that Petitioner filed a refund claim for the period January 2009 through and including December 2012 in the amount of \$2,662,613.00 on the same grounds as those set forth in the 20-TT-30 Petition. The Department denies that the Petitioner is currently awaiting a determination from the Department on its 2009 – 2012 Claim, as that claim is the basis for the Petition filed in matter 20-TT-109. The Department states that the final sentence in this paragraph is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-109 Para. 6. On August 12, 2020, the Department issued a Notice of Tentative Audit Denial of Claim (the “Notice”) to Petitioner denying Petitioner’s claim for refund on Form EDA-98 Claim for Credit, letter ID CNXXX13656276326 in the amount of \$2,662,613 in tax. A copy of the Notice is attached hereto as **Exhibit B**. A copy of Form EDA-98 Claim for Credit is attached as **Exhibit C**.

ANSWER: Admitted. Further admitted that the stated Notice is attached to the Petition for matter 20-TT-109 as Exhibit B. Admitted that a copy of Form EDA-98 Claim for Credit is attached to the Petition for matter 20-TT-109 as Exhibit C.

20-TT-109 Para. 7. The Notice refers to the audit periods for January 2009 to December 2012 (the “Periods at Issue”).

ANSWER: Admitted.

20-TT-109 Para 8. Petitioner also filed refund claims for the audit periods January 2013 to December 2014 and January 2015 to March 2018 on the same grounds as those set forth in this Petition (“2013-2018

Claims”), for which the Department issued two Notices of Tentative Audit Denial of Claim (“2013-2018 Notices”) to Petitioner denying Petitioner’s claims for refund on Form ST-1-X, Amended Sales and Use Tax and E911 Surcharge Return, letter IDs CNXXX18794758887 & CNXXX13X33289440, respectively.

ANSWER: Admitted.

20-TT-109 Para. 9. On March 13, 2020, Petitioner filed a petition with the Tribunal covering its 2013-2018 Claims to review and reverse the 2013-2018 Notices issued by the Department, which was assigned the case number 20 TT 30 (the “First Petition”).

ANSWER: Admitted.

20-TT-109 Para. 10. The claims set forth herein are substantially identical to the issues presented in the First Petition.

ANSWER: The Department objects to the term “substantially identical” as vague and ambiguous. Otherwise, to the extent the Department can answer, on information and belief the issues involved in matters 20-TT-30 and 20-TT-109 are similar.

20-TT-30 Para. 9 and 20-TT-109 Para. 11. This Tribunal has original jurisdiction over all Department determinations reflected on Notices of Claim Denial, among other notices, where the amount at issue exceeds \$15,000, exclusive of penalties and interest. 35 ILCS 1010/1-45.

ANSWER: Admitted.

20-TT-30 Para. 10 and 20-TT-109 Para. 12. The amount at issue in this matter exceeds \$15,000 exclusive of penalties and interest such that this Tribunal has original jurisdiction over the matter.

ANSWER: Admitted.

BACKGROUND

20-TT-30 Para. 11 and 20-TT-109 Para. 13. Petitioner is a pharmacy benefits manager (“PBM”) that specializes in providing PBM services, such as establishing and maintaining a pharmacy network,

providing administrative and general support, operating a claims processing system, adjudicating and processing prescription claims, developing and managing a formulary, negotiating and collecting rebates for pharmacy transactions, and operating a mail order pharmacy.

ANSWER: The Department admits, as stated in its audit files, that Petitioner provides pharmaceutical benefit management services for Medicare programs administered by United Healthcare. Petitioner also acts as a mail order pharmacy for individuals insured through various United Healthcare programs. Otherwise, the Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 12 and 20-TT-109 Para. 14. United HealthCare Services, Inc. (“UHS”) provides healthcare benefits to customers across various markets, including to Medicare Part D beneficiaries.

ANSWER: The Department admits, as stated in its audit files, UnitedHealth Group is comprised of two entities, United Healthcare and Optum. United Healthcare provides health insurance benefits to various market segments such as employer, individual, Medicare, retirement, state and community groups. Otherwise, the Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 13 and 20-TT-109 Para. 15. UHS submits bids and contracts with the Centers for Medicare and Medicaid Services (“CMS”) to operate Medicare Advantage (“MA”) and/or Medicare Voluntary Prescription Drug (“PDP”) Plans.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 14 and 20-TT-109 Para. 16. CMS makes monthly payments to UHS for its operation of MA and PDPs, and UHS provides the Medicare beneficiary with access to medical care and prescription drugs approved by CMS.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 15 and 20-TT-109 Para. 17. Petitioner provides PBM services to UHS, including prescription drug benefits associated with MA and PDPs, pursuant to an agreement with UHS, hereinafter the “Administration Agreement.”

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation, in particular the referenced Administration Agreement.

20-TT-30 Para. 16 and 20-TT-109 Para. 18. Under the Administration Agreement, Petitioner adjudicates and processes prescription drug claims, develops and manages a formulary, negotiates and collects rebates for pharmacy transactions, establishes network pharmacies, provides administrative and general support, and operates a mail-order pharmacy in return for administrative fees.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation, in particular the referenced Administration Agreement.

20-TT-30 Para. 17 and 20-TT-109 Para. 19. Under the Administration Agreement, Petitioner manages Medicare Part D benefits of Medicare beneficiaries, among other things.

ANSWER: Admitted that, as stated in the audit files, Petitioner provides pharmaceutical benefit management services for Medicare related programs. Otherwise, the Department

does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation, in particular the referenced Administration Agreement.

20-TT-30 Para. 18. As a part of its PBM and mail-order pharmacy services under the Administration Agreement, Petitioner delivers prescription medications to Medicare Part D beneficiary-customers in Illinois. These deliveries were shipped into Illinois, via common carrier, from out-of-state locations.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation, in particular the referenced Administration Agreement.

20-TT-109 Para. 20. As a part of its PBM and mail-order pharmacy services under the Administration Agreement, Petitioner delivers prescription medications to Medicare Part D beneficiary-customers located in Illinois, via common carrier, from out-of-state locations.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation, in particular the referenced Administration Agreement.

20-TT-30 Para. 19 and 20-TT-109 Para. 21. When a Medicare beneficiary in Illinois purchases prescriptions drugs from Petitioner, the Medicare beneficiary pays Petitioner a co-payment, which is a partial payment for the cost of the prescription drugs.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 20 and 20-TT-109 Para. 22. Petitioner thereafter processes and submits a claim to UHS for reimbursement of the remaining balance of the cost for prescription drugs under Medicare Part D prescription drug plans, and UHS reimburses Petitioner.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 21 and 20-TT-109 Para. 23. UHS, in turn, passes on these charges by Petitioner for the costs of prescription drugs sold to Medicare Part D beneficiaries to CMS.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 22 and 20-TT-109 Para. 24. CMS reimburses UHS for these costs/charges through payments made from CMS to UHS, pursuant to an agreement.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation, in particular the referenced agreement.

20-TT-30 Para. 23. Pursuant to section 17 of the Illinois Service Occupation Tax (“SOT”) and section 17 of the Service Use Tax (“SUT”), Petitioner filed Form ST-1-X, Amended Sales and Use Tax and E911 Surcharge Return, seeking a refund of \$1,813,432.00 for tax that was paid in error during the January 2013 to December 2014 period.

ANSWER: The Department acknowledges the existence, force and effect of the Illinois Service Occupation Tax Act (35 ILCS 115/1, *et. seq.*) and the Illinois Service Use Tax Act (35 ILCS 110/1, *et. seq.*) and states that those laws speak for themselves. The Department denies

that the \$1,813,432.00 for tax was paid in error. The Department clarifies that monthly ST-1-X forms were filed for the monthly periods within the January 2013 to December 2014 periods. Otherwise, admitted.

20-TT-30 Para. 24. Pursuant to section 17 of the Illinois SOT and section 17 of the SUT, Petitioner filed Form ST-1-X, Amended Sales and Use Tax and E911 Surcharge Return, seeking a refund of \$3,818,595.00 for tax paid in error for the January 2015 to March 2018 period.

ANSWER: The Department acknowledges the existence, force, and effect of the Illinois Service Occupation Tax Act (35 ILCS 115/1, et. seq.) and the Illinois Service Use Tax Act (35 ILCS 110/1, et. seq.) and states that those laws speak for themselves. The Department denies that the \$3,818,595.00 for tax was paid in error. The Department clarifies that monthly ST-1-X forms were filed for the monthly periods within the January 2015 to March 2018 periods. Otherwise, admitted.

20-TT-30 Para. 25. Pursuant to section 17 of the Illinois SOT and section 17 of the SUT, Petitioner filed a claim seeking a refund of \$2,662,613.18 for tax paid in error for the January 2009 to December 2012 period and is currently awaiting a determination from the Department on its claim.

ANSWER: The Department acknowledges the existence, force, and effect of the Illinois Service Occupation Tax Act (35 ILCS 115/1, et. seq.) and the Illinois Service Use Tax Act (35 ILCS 110/1, et. seq.) and states that those laws speak for themselves. The Department denies that \$2,662,613.00 for tax was paid in error. The Department denies that the Petitioner is still awaiting a determination, as Petitioner has addressed the Department's determination by filing a Petition in matter 20-TT-109. Otherwise, admitted.

20-TT-109 Para. 25. Pursuant to section 17 of the Illinois Service Occupation Tax (“SOT”) and section 17 of the Illinois Service Use Tax (“SUT”), Petitioner filed Form EDA-98, Claim for Credit, seeking a refund of \$2,662,613.00 for tax that was paid in error during the January 2009 to December 2012 periods.

ANSWER: The Department acknowledges the existence, force and effect of the Illinois Service Occupation Tax Act (35 ILCS 115/1, et. seq.) and the Illinois Service Use Tax Act (35 ILCS 110/1, et. seq.) and states that those laws speak for themselves. The Department denies that the \$2,662,613.00 for tax was paid in error. Otherwise, admitted.

20-TT-30 Para. 26 and 20-TT-109 Para. 26. The claimed refunds relate to Illinois SOT / SUT that was paid in error on sales of prescription drugs under Medicare Part D prescription drug plans.

ANSWER: The Department denies that any tax was paid in error. Otherwise, the Department states this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 27 and 20-TT-109 Para. 27. The Department issued the Notices denying Petitioner’s claim for refund during the Periods at Issue, and this appeal followed.

ANSWER: Admitted that the protests for the 3 Notices of Tentative Denial of Claim (CNXXX13656276326 for 1/2009-12/2012, CNXXX13X33289440 for 1/2013-12/2014, and CNXXX18794758887 for 1/2015-3/2018) form the bases for the Petitions in case numbers 20-TT-30 and 20-TT-109.

20-TT-109 Para. 28. As described in each of Count I through Count III below, Petitioner is entitled a refund for the full amount of SOT paid in error during the Tax Periods at Issue, *i.e.*, \$2,662,613.00, because (i) imposition of Illinois SOT on prescription drugs provided to end users under Medicare Part D is preempted by federal law; (ii) sales to a government contractor on behalf of an exempt governmental body are not taxable transactions under Illinois SOT and corresponding SUT laws; and (iii) sales to the federal

government through government-contracted managed care providers are not taxable transactions under Illinois SOT and corresponding SUT laws.

ANSWER: The Department states these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. Otherwise, to the extent a further answer may be needed, denied.

COUNT I

ILLINOIS SOT / SUT IS PREEMPTED BY FEDERAL LAW AND MAY NOT BE IMPOSED ON PRESCRIPTION DRUGS PROVIDED UNDER A MEDICARE PART D PLAN

20-TT-30 Para. 28. Petitioner hereby restates and realleges the allegations contained in paragraphs 1 through 27 as if fully set forth herein.

ANSWER: The Department incorporates by reference all of its answers to Paragraphs 1 through 27 for case number 20-TT-30 within this answer.

20-TT-109 Para. 29. Petitioner hereby restates and re-alleges the allegations contained in paragraphs 1 through 28 as if fully set forth herein.

ANSWER: The Department incorporates by reference all of its answers to Paragraphs 1 through 28 for case number 20-TT-109 within this answer.

20-TT-30 Para. 29 and 20-TT-109 Para. 30. The Department has erroneously denied Petitioner's claims for refund during the Periods at Issue for Illinois SOT / SUT paid in error.

ANSWER: The Department admits that the Notices attached to the petitions speak for themselves. Further, the Department states that these statements are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. Otherwise, to the extent a further answer may be needed, denied.

20-TT-30 Para. 30 and 20-TT-109 Para. 31. Illinois imposes either SOT or SUT upon all tangible personal property transferred as an incident to the sale of a service. 35 ILCS § 115/3; 35 ILCS § 110/3.

ANSWER: The Department acknowledges the existence, force, and effect of 35 ILCS § 115/3 and 35 ILCS § 110/3, and states that those laws speak for themselves. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 31 and 20-TT-109 Para. 32. Illinois imposes a reduced SOT rate of 1% on the sale of prescription drugs. 35 ILCS § 115/3-10.

ANSWER: The Department acknowledges the existence, force, and effect of 35 ILCS § 115/3 and 35 ILCS § 115/3-10, and states that those laws speak for themselves. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. Finally, the Department notes that the pertinent portion of 35 ILCS § 115/3-10 states: “The tax shall be imposed at the rate of 1% on food for human consumption that is to be consumed off the premises where it is sold... prescription and nonprescription medicines, drugs, medical appliances...”

20-TT-30 Para. 32 and 20-TT-109 Para. 33. Pursuant to Illinois regulations, Petitioner calculates its SOT liability based on the cost price of the prescription drugs transferred incident to its sales of service. 86 Ill. Admin. Code 140.101.

ANSWER: The Department acknowledges the existence, force, and effect of 86 Ill.Admin.Code 140.101, and states that this regulation speaks for itself. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact,

and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 33 and 20-TT-109 Para. 34. The cost price of Petitioner's prescription drugs is greater than 75% of the selling price. Accordingly, and pursuant to Illinois regulation, Petitioner calculates tax based on the greater of 50% of the entire bill or the actual cost price of the drugs. 86 Ill. Admin. Code 140.105(a); 86 Ill. Admin. Code 140.106(a).

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within the first sentence of this paragraph, and requests verifying documentation. Otherwise, the Department acknowledges the existence, force, and effect of 86 Ill.Admin.Code 140.105(a) and 140.106(a), and states that these regulations speak for themselves. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 34 and 20-TT-109 Para. 35. Petitioner calculates its SOT liability based on the actual cost price of pharmaceuticals, and is not required, and in fact does not, separately state the amount of tax charged on bills issued to UHS. 86 Ill. Admin. Code 140.106(e).

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation. Otherwise, the Department acknowledges the existence, force, and effect of 86 Ill.Admin.Code 140.105(e) and states that this regulation speaks for itself. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 35 and 20-TT-109 Para. 36. Through operation of Illinois law under the SOT and SUT, Illinois SUT is included in the price Petitioner charges UHS for prescription drugs. *Id.* (“Service Use Tax must be collected from service customers by a serviceman who incurs SOT on his selling price and must be based upon either the separately stated selling price of the tangible personal property transferred or 50% of the entire customer bill, depending upon how it is billed to the customer.”).

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within the first sentence of this paragraph, and requests verifying documentation. Otherwise, the Department acknowledges the existence, force, and effect of the Service Occupation Tax Act and the Service Use Tax Act, and states that these laws speak for themselves. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 36 and 20-TT-109 Para. 37. Any sales, use, or other tax imposed on items dispensed under Medicare Part D by Petitioner is the responsibility of UHS and CMS, per contract, and as an operation of Illinois law.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation, in particular the referenced contract. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 37 and 20-TT-109 Para. 38. UHS’ cost price of prescription drugs includes the Illinois SUT charged by Petitioner.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 38 and 20-TT-109 Para. 39. The incidence of the SUT imposed on the prescription drugs at issue is borne [and paid by] by CMS through the Medicare Part D Fund.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 39 and 20-TT-109 Para. 40. The Supremacy Clause of the United States Constitution makes federal law the supreme law of the land, and provides that Congress may preempt state law by statute. U.S. Const., Art. VI, Cl. 2.

ANSWER: This paragraph contains a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 40 and 20-TT-109 Para. 41. The preemption provided for in Medicare Part D preempts state taxes on premium payments to Medicare Part D plans as well as all other non-premium payments made from CMS to Medicare Part D plans (e.g., direct subsidy, reinsurance payments, and risk corridor payments. *See e.g.*, 42 C.F.R. 422.404(b) (“No premium tax, fee, or other similar assessment may be imposed by any State . . . for any payment [CMS] makes on behalf of Part D plan enrollees under this part (including the direct subsidy, reinsurance payments, and risk corridor payments) [i.e. non-premium payments from CMS]; or for any payment made to Part D plans by a beneficiary or by a third party on behalf of a beneficiary [e.g., premium payments].” (emphasis added)).

ANSWER: The Department acknowledges the existence, force, and effect of 42 C.F.R. 422.404(b), and states that this law speaks for itself. The Department notes that, on information and belief, much of the cited language is not contained within 42 C.F.R. 422.404(b), and requests clarification. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 41 and 20-TT-109 Para. 42. The reference to direct subsidies, reinsurance payments, and risk corridor payments addressed in 42 C.F.R. 422.404(b)(1) indicate that federal preemption of state and local taxes under Medicare Part D is not limited to taxes imposed on premiums. *Id.*

ANSWER: The Department acknowledges the existence, force, and effect of 42 C.F.R. 422.404(b), and states that this law speaks for itself. The Department notes, on information and belief, that there is no subsection 42 C.F.R. 422.404(b)(1). The Department notes that, on information and belief, much of the cited language is not contained within 42 C.F.R. 422.404(b), and requests clarification. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 42 and 20-TT-109 Para. 43. The controlling Medicare Part D federal statute expressly incorporates, references, and provides that the preemption provisions provided for in Medicare Part C shall also apply in the context of Medicare Part D. 42 U.S.C. § 1395w-112(g).

ANSWER: The Department acknowledges the existence, force, and effect of 42 U.S.C. § 1395w-112(g) and states that this law speaks for itself. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 43 and 20-TT-109 Para. 44. The Medicare Part C preemption provides that “No State may impose a premium tax or similar tax with respect to payments to Medicare + Choice [i.e. Medicare Advantage] organizations under section 1395w-23 of this title or premiums paid to such organizations under this part.” 42 U.S.C. § 1395w-24(g) (emphasis added).

ANSWER: The Department acknowledges the existence, force, and effect of 42 U.S.C. § 1395w-24(g) and states that this law speaks for itself. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 44 and 20-TT-109 Para. 45. The preemption in Medicare Part C, and incorporated by reference in Medicare Part D, indicates that state taxation of both premium and non-premium payment streams are preempted by Medicare Part C and under Medicare Part D.

ANSWER: The Department states that these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. Otherwise, to the extent a further answer may be needed, denied.

20-TT-30 Para. 45 and 20-TT-109 Para. 46. The Federal Employee Health Benefits Act (“FEHBA”) preempts state taxation of *any* payment made from the Federal Employee Health Benefits Fund, including payments made for prescription drugs. 5 U.S.C. §§ 8909(f)(1) & (2); *see also HealthPartners, Inc. v. Commissioner of Revenue*, 199 Minn. Tax LEXIS 6 (Minn. T.C. 1999) (a Minnesota tax on a provider’s or hospital’s gross revenues was preempted by FEHBA); United State Office of Personnel Management, OPM Letter No. 1998-54 (FEHBA preempts state tax imposed on hospitals in Kentucky); United State Office of Personnel Management, OPM Carrier Letter No. 2003-17 (Missouri taxes on licensed retail pharmacies were preempted by FEHBA); *and Shalala v. Guernsey Memorial Hospital*, 84 U.S. 87 (1995)

(courts must defer to OPM interpretation of FEHBA, unless plainly erroneous or inconsistent with the language of the Act.).

ANSWER: The Department acknowledges the existence, force, and effect of 5 U.S.C. §§ 8909(f)(1) & (2) and the cases and letter cited and states that these speak for themselves. To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 46 and 20-TT-109 Para. 47. Specifically, the FEHBA preemption statute provides that “(1) 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, . . . or other governmental authority thereof, with respect to any payment made from the Fund. 5 U.S.C. § 8909(f) (emphasis added).

ANSWER: The Department acknowledges the existence, force, and effect of 5 U.S.C. §§ 8909(f), and states that this law speaks for itself. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 47 and 20-TT-109 Para. 48. The only state taxes permitted under FEHBA are state taxes measured by net income. 5 U.S.C. § 8909(f)(1).

ANSWER: The Department acknowledges the existence, force, and effect of 5 U.S.C. §§ 8909(f)(1), and states that this law speaks for itself. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 48 and 20-TT-109 Para. 49. FEHBA and its related regulations have been interpreted repeatedly to preempt state taxes, fees, and any other monetary payment from impacting the Federal Employees Health Benefits Fund, directly or indirectly. *See e.g., Travelers Insurance Co. v. Cuomo*, 14 F.3d 708 (2nd Cir. 1993), *rev'd on other grounds*; *Health Maintenance Org. of New Jersey Inc. v. Whitman*, 72 F.3d 1123 (3rd Cir. 1995); *Group Health Cooperative v. Wash. Dep't of Rev.*, 438 P.3d 158 (App. Div. 1 2019); *Group Health Cooperative v. City of Seattle*, 189 P.3d 216 (2008).

ANSWER: The Department acknowledges the existence, force, and effect of the cited cases and states that these cases speak for themselves. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 49 and 20-TT-109 Para. 50. The intent of Congress in creating preemption of state taxes in Medicare Advantage and Medicare Part D was to replicate the preemption provided under FEHBA. 63 FR 3498, 35014 (“[t]he current law on federal pre-emption of state premium taxes or fees on Federal payments from the FEHBP to health plans will be extended to Federal payments to Medicare + C [Medicare Advantage] plans and other health plans receiving capitated payments from Medicare Trust Funds.”).

ANSWER: The Department acknowledges the existence, force, and effect of the Federal Register cited and states that it speaks for itself, and believes it is meant to be cited as 63 FR 34968. The Department notes that the quotation is merely an excerpt of what is stated in full. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent a further answer may be deemed required, denied.

20-TT-30 Para. 50 and 20-TT-109 Para. 51. The language of the FEHBA preemption incorporated in Medicare Part C, and specifically incorporated by reference in Medicare Part D, preempts any state tax imposed on premium or non-premium payments, other than a state tax that is measured on net income. 5 U.S.C. § 8909(f)(1); 42 U.S.C. § 1395w-112(g); 42 C.F.R. 422.404(b)(1).

ANSWER: The Department acknowledges the existence, force, and effect of the laws cited and states that these laws speak for themselves. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent a further answer may be deemed required, denied.

20-TT-30 Para. 51 and 20-TT-109 Para. 52. The only state taxes permitted under Medicare Advantage and Medicare Part D are taxes on net income or profit. 42 C.F.R. 422.404(b) (“Nothing in this section shall be construed to exempt any [Medicare Advantage] organization from taxes, fees, or other monetary assessments related to 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); 42 C.F.R. 422.440(b)(2) (“Nothing in this section shall be construed to exempt any Part D Plan sponsor from taxes, fees, or other monetary assessments related to 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).

ANSWER: The Department acknowledges the existence, force, and effect of the laws cited and states that these laws speak for themselves. Further, the Department cannot locate the language cited as contained within 42 C.F.R. 422.440(b)(2), and requests clarification. To the extent a further answer may be required, this is a legal conclusion, not a material

allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent a further answer may be deemed required, denied.

20-TT-30 Para. 52. Through operation of Illinois law, Illinois SUT is improperly imposed on Petitioner and ultimately UHS, an insurance carrier, in direct violation of the preemption provisions provided under Medicare Part D, Part C and FEHBA.

ANSWER: The Department states that this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent a further answer may be deemed required, denied.

20-TT-109 Para. 53. Through operation of Illinois law, Illinois SOT is improperly imposed on Petitioner and ultimately UHS, an insurance carrier, in direct violation of the preemption provisions provided under Medicare Part D, Part C and FEHBA.

ANSWER: The Department states that this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent a further answer may be deemed required, denied.

20-TT-30 Para. 53 and 20-TT-109 Para. 54. UHS is currently reporting Illinois SUT that it pays on purchases of prescription drugs to CMS for reimbursement purposes.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 54 and 20-TT-109 Para. 55. Imposition of SOT on Petitioner and SUT on UHS directly results in increased reimbursements from CMS in the form of reinsurance payments and risk corridor payments to UHS, or provides decreased net payments otherwise due to CMS, in order to reimburse Petitioner for the tax.

ANSWER: The Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

20-TT-30 Para. 55 and 20-TT-109 Para. 56. These increased payments result in imposition of Illinois SUT on the CMS Medicare Part D Fund, which is expressly preempted by federal law.

ANSWER: The Department states that this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent a further answer may be deemed required, the Department does not have sufficient information or documentation to either admit or deny the factual allegations contained within this paragraph, and requests verifying documentation.

COUNT II

SALES OF PRESCRIPTION PHARMACEUTICALS UNDER MEDICARE PART D PLANS ARE EXEMPT AS SALES TO A GOVERNMENT CONTRACTOR ON BEHALF OF AN EXEMPT GOVERNMENTAL BODY

20-TT-30 Para. 56. Petitioner hereby restates and realleges the allegations contained in paragraphs 1 through 55 as if fully set forth herein.

ANSWER: The Department incorporates by reference all of its answers to Paragraphs 1 through 55 for case number 20-TT-30 within this answer.

20-TT-109 Para. 57. Petitioner hereby restates and re-alleges the allegations contained in paragraphs 1 through 56 as if fully set forth herein.

ANSWER: The Department incorporates by reference all of its answers to Paragraphs 1 through 56 for case number 20-TT-109 within this answer.

20-TT-30 Para. 57 and 20-TT-109 Para. 58. The Department has not provided any binding guidance with respect to the taxation of payments made to sellers of prescription drugs when payments are made through

the Medicare Part D program.

ANSWER: The Department objects to this Paragraph based on vagueness, specifically related to the term “binding guidance.” Otherwise, the Department states that this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 58 and 20-TT-109 Para. 59. Contractors in Illinois are deemed to be the users of tangible personal property that they purchase for incorporation into real estate. Persons making sales of tangible personal property to construction contractors incur Retailers’ Occupation Tax (“ROT”) on such sales. 86 Ill. Admin. Code 130.2075(a).

ANSWER: The Department acknowledges the existence, force, and effect of 86 Ill.Admin.Code 130.2075(a), and states that this regulation speaks for itself. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 59 and 20-TT-109 Para. 60. Contractors purchasing tangible personal property for incorporation into real estate owned by tax exempt entities, such as governmental bodies, is exempt from ROT. 86 Ill. Admin. Code 130.2075(d).

ANSWER: The Department acknowledges the existence, force, and effect of 86 Ill.Admin.Code 130.2075(d), and states that this regulation speaks for itself. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 60 and 20-TT-109 Para. 61. Sales made directly or indirectly to governmental bodies through a government contractor are exempt from tax in Illinois. *See e.g.*, 86 Ill. Admin. Code 130.2075(d); *and Adrian Nava v. Sears, Roebuck & Co.*, 2013 I. App. (1st) 122063 (An Illinois appellate court ruled that a department store improperly charged sales tax on the full price of an analog-to-digital converter box that was subsidized by a \$40 voucher supplied by the federal government); *and* 86 Ill. Admin. Code 130.2076 (Purchase of tangible personal property by a government contractor on behalf of the government are exempt from Illinois sales tax as a sale for resale to a governmental unit).

ANSWER: The Department acknowledges the existence, force, and effect of the cited caselaw and regulations, and states that they speak for themselves To the extent a further answer may be required, these are legal conclusions, not material allegations of fact, and therefore do not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 61 and 20-TT-109 Para. 62. Sales of prescription drugs to Medicare Part D beneficiaries are sales directly or indirectly to the federal government and are therefore exempt from tax in Illinois. 86 Ill. Admin. Code 130.2075(d); *and Adrian Nava v. Sears, Roebuck & Co.*, 2013 IL App. (1st) 122063 *and* 86 Ill. Admin. Code 130.2076(a).

ANSWER: The Department acknowledges the existence, force, and effect of the cited caselaw and regulations, and states that they speak for themselves To the extent a further answer may be required, this is a legal conclusion, not a material allegations of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent a further answer may be deemed required, denied.

COUNT III

SALES OF PRESCRIPTION PHARMACEUTICALS UNDER MEDICARE PART D PLANS ARE EXEMPT AS SALES TO GOVERNMENTAL BODIES

20-TT-30 Para. 62. Petitioner hereby restates and realleges the allegations contained in paragraphs 1 through 61 as if fully set forth herein.

ANSWER: The Department incorporates by reference all of its answers to Paragraphs 1 through 61 for case number 20-TT-30 within this answer.

20-TT-109 Para. 63. Petitioner hereby restates and re-alleges the allegations contained in paragraphs 1 through 62 as if fully set forth herein.

ANSWER: The Department incorporates by reference all of its answers to Paragraphs 1 through 62 for case number 20-TT-109 within this answer.

20-TT-30 Para. 63 and 20-TT-109 Para. 64. The Illinois Administrative Code imposes sales tax on persons engaged in Illinois in the business of selling tangible personal property to purchasers for use or consumption. 86 Ill. Admin. Code 130.101.

ANSWER: The Department acknowledges the existence, force, and effect of 86 Ill.Admin.Code 130.101, and states that this regulation speaks for itself. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 64 and 20-TT-109 Para. 65. Sales tax does not apply to “receipts from sales . . . (i) that are made to any governmental body.” 86 Ill. Admin. Code 130.120(i).

ANSWER: The Department acknowledges the existence, force, and effect of 86 Ill.Admin.Code 130.120(i), and states that this regulation speaks for itself. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact,

and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 65 and 20-TT-109 Para. 66. Sales of tangible personal property made to a governmental body, including the federal government, are exempt. 86 Ill. Admin. Code 130.120(i); *and* 86 Ill. Admin. Code 130.2080(a).

ANSWER: The Department acknowledges the existence, force, and effect of the cited regulations, and states that these regulations speak for themselves. To the extent a further answer may be required, this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations.

20-TT-30 Para. 66 and 20-TT-109 Para. 67. The Department erred in treating Petitioner's sales to the federal government through government-contracted managed care providers as taxable sales.

ANSWER: The Department states that this is a legal conclusion, not a material allegation of fact, and therefore does not require an answer under Section 310(b)(2) of the Tax Tribunal Regulations. To the extent a further answer may be deemed required, denied.

ILLINOIS INDEPENDENT TAX TRIBUNAL

OPTUMRX, INC.

Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE

Respondent.

Judge Brian F. Barov

Case Nos. 20-TT-30 and 20-TT-109

**AFFIDAVIT OF CHARLES SCHOEN
PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)**

STATE OF ILLINOIS

COUNTY OF MCHENRY

Under penalties as provided by Section 1-109 of the Code of Civil Procedure, *735 ILCS 5/1-109*, I, Charles Schoen, being first duly sworn on oath, depose and state as follows:

1. I am currently employed by the Illinois Department of Revenue.
2. My current title is Revenue Auditor Supervisor. During the audit at issue, I was a Revenue Auditor III.
3. I was the auditor involved with the issuance of the two Notices of Tentative Audit Denial of Claim which are subject of Taxpayer's Petition in case 20-TT-30, and am familiar with the findings related to those Notices.
4. I lack the documentation or information to have the personal knowledge required to either admit or deny some or all of the allegations contained in the following petition paragraphs:
 - 20-TT-30 Para. 1
 - 20-TT-30 Para. 2
 - 20-TT-30 Para. 11
 - 20-TT-30 Para. 12
 - 20-TT-30 Para. 13
 - 20-TT-30 Para. 14
 - 20-TT-30 Para. 15
 - 20-TT-30 Para. 16
 - 20-TT-30 Para. 17
 - 20-TT-30 Para. 18
 - 20-TT-30 Para. 19
 - 20-TT-30 Para. 20
 - 20-TT-30 Para. 21

- 20-TT-30 Para. 22
- 20-TT-30 Para. 33
- 20-TT-30 Para. 34
- 20-TT-30 Para. 35
- 20-TT-30 Para. 36
- 20-TT-30 Para. 37
- 20-TT-30 Para. 38
- 20-TT-30 Para. 53
- 20-TT-30 Para. 54
- 20-TT-30 Para. 55

5. I am an adult resident of the State of Illinois and can truthfully and competently testify as to the matters contained herein based upon my own personal knowledge.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I hereby certify that the statements set forth in this Affidavit are true and correct to the best of my knowledge and belief.



12/8/20

Charles Schoen
Revenue Auditor Supervisor

Date

ILLINOIS INDEPENDENT TAX TRIBUNAL

OPTUMRX, INC.

Petitioner,

vs.

ILLINOIS DEPARTMENT OF REVENUE

Respondent.

Judge Brian F. Barov

Case Nos. 20-TT-30 and 20-TT-109

**AFFIDAVIT OF EMAD ROSTOM
PURSUANT TO TRIBUNAL RULE 5000.310(b)(3)**

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Under penalties as provided by Section 1-109 of the Code of Civil Procedure, *735 ILCS 5/1-109*, I, Emad Rostom, being first duly sworn on oath, depose and state as follows:

1. I am currently employed by the Illinois Department of Revenue.
2. My current title is Revenue Auditor III.
3. I was the auditor involved with the issuance of the Notice of Tentative Audit Denial of Claim which is subject of Taxpayer's Petition in case 20-TT-109, and am familiar with the findings related to that Notice.
4. I lack the documentation or information to have the personal knowledge required to either admit or deny some or all of the allegations contained in the following petition paragraphs:
 - 20-TT-109 Para. 1
 - 20-TT-109 Para. 2
 - 20-TT-109 Para. 13
 - 20-TT-109 Para. 14
 - 20-TT-109 Para. 15
 - 20-TT-109 Para. 16
 - 20-TT-109 Para. 17
 - 20-TT-109 Para. 18
 - 20-TT-109 Para. 19
 - 20-TT-109 Para. 20
 - 20-TT-109 Para. 21
 - 20-TT-109 Para. 22
 - 20-TT-109 Para. 23
 - 20-TT-109 Para. 24

- 20-TT-109 Para. 34
- 20-TT-109 Para. 35
- 20-TT-109 Para. 36
- 20-TT-109 Para. 37
- 20-TT-109 Para. 38
- 20-TT-109 Para. 39
- 20-TT-109 Para. 54
- 20-TT-109 Para. 55
- 20-TT-109 Para. 56

5. I am an adult resident of the State of California and can truthfully and competently testify as to the matters contained herein based upon my own personal knowledge.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I hereby certify that the statements set forth in this Affidavit are true and correct to the best of my knowledge and belief.



Emad Rostom
Revenue Auditor III

12/08/2020

Date