

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2006-000334

03/13/2009

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

DESERT WINDS ASSISTED LIVING LP

STEPHEN C NEWMARK

v.

CITY OF PEORIA ARIZONA

MICHAEL WAWRO

ERIC D GERE

UNDER ADVISEMENT RULING

(Plaintiff's Motion For Partial Summary Judgment On The Legal Issue Of Whether DWAL's Income From Charges To Its Residents Receiving Personal and Directed Care Is Exempt From Peoria's TPT Tax, Desert Winds Assisted Living's Motion To Strike and City of Peoria's Motion For Summary Judgment)

The essential facts are not in dispute. Desert Winds is an assisted living center licensed by the state. It bills its residents on a monthly basis for a "basic amenities package," which includes rent, utilities, meals, cleaning, laundry, transportation, and care by nursing and nursing assistant staff. Additional charges are assessed for such activities as bathing, dressing, and toileting.

This matter turns on the interpretation of Peoria City Code Section 12-445(q), which reads, "Charges to a patient receiving 'personal care' or 'directed care' by any licensed assisted living center or licensed assisted nursing home as defined and licensed pursuant to Chapter 4 Title 36 Arizona Revised Statutes and Title 9 of the Arizona Administrative Code are exempt." Its literal language, which does not limit the scope of "charges," would indicate that all charges to a personal or directed care patient are exempt. (It will be noted that the exemption does not apply to any charges to a patient receiving only supervisory care.) The City urges, with reference to other provisions of the Model Tax Code, that "charges" must be given a far narrower interpretation, and in particular does not apply to the provision of food (at least when

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served in a common dining area) and lodging. Section 12-400(d) does not resolve the question: acknowledging that the exemption is limited to the specific activity described does not help to know what activity is described. Section 12-445(c), which exempts certain healthcare facilities but not assisted living centers from TPT on room charges, does not preclude Desert Winds' interpretation of Subsection (q): if all charges at licensed assisted nursing centers are exempt under Subsection (q), there would be no need to separately exempt their charges for rooms in Subsection (c). Ultimately, the Court need not go beyond a fairly narrow issue: are food and lodging included within a fair interpretation of the exempt activity on which the statute focuses, that is, the provision of personal or directed care by a licensed assisted nursing center?

The Court first turns to the Arizona Administrative Code for definitions, recognizing that “[c]harges to a patient receiving personal care or directed care by any licensed assisted living center” must be interpreted so as to be consistent with the state’s determination of what that constitutes. An “assisted living center” is defined at R9-10-101(9) by reference to an “assisted living facility” at paragraph (10), which is “a residential care institution ... that provides or contracts to provide supervisory care services, personal care services or directed care services on a continuing basis.” R9-10-101(44) defines “personal care services” as “assistance with activities of daily living that can be performed by persons without professional skills or professional training and includes the coordination or provision of intermittent nursing services and the administration of medications and treatments by a nurse.” “Directed care services” are defined at paragraph (19) as “programs and services, including personal care services, provided to persons who are incapable of recognizing danger, summoning assistance, expressing need or making basic care decisions.” The general definitional section does not provide a definition of “activities of daily living.” However, Section R9-10-201(2) defines the term for hospitals to include “bathing, dressing, grooming, eating, ambulating, and toileting”; the Court finds that definition equally appropriate here.

A licensed assisted living center is, by definition, an institution in which patients reside and are cared for; a natural corollary is that those patients are charged for their lodging. Under the City’s interpretation, by which the charges peculiar to a residential institution are not exempt, it would be unnecessary to require that the care be given in a residential institution as opposed to a facility in which patients are provided the same care but do not reside. The Court is required to interpret a statute so that every word is meaningful. *Taylor v. Cruikshank*, 214 Ariz. 40, 44 (App. 2006). An interpretation in which the specification of a residential facility is of no consequence violates that fundamental principle of statutory construction. Since the Section 445(q) exemption is expressly limited to residential institutions, charges specific to a residential institution – i.e., room charges – must be exempt. The Court therefore concludes that charges for housing in the assisted living center for persons receiving personal or directed care (though not supervisory care) are exempt.

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The City does not appear to dispute that the exemption applies to assistance with activities of daily living (ADL), which is part of the regulatory definition of personal care and thus of directed care. Eating is included in the definition of an ADL, so the exemption applies to assistance with eating. By the City's interpretation, which exempts only the service, the activity of a nurse's aide "feeding" a patient with an empty spoon would be fully exempt, while if there is food in the spoon it would be at most partially exempt. It is artificial to separate assistance with eating from actual eating, i.e., the consumption of food, and just as artificial to separate the amounts charged for each. The feeding assistive services of the aide and the food served form a logical whole.

The City's attempt to fit Section 445(q) into Section 455 is unpersuasive. The latter section applies to a "bar, cocktail lounge, restaurant, or similar establishment." It is hard to discern any significant similarity between the dining room of an assisted living facility, where residents are fed meals by nursing and ancillary staff, and a restaurant, to say nothing of a bar or a cocktail lounge. In addition, it is possible that some patients, unable to eat in the dining room, must be fed in their rooms. The facility's food service bears no similarity at all to a restaurant. The analogy with the facilities taxed by Section 455 does not apply.

Contrary to the City's assertion, the MTC provisions, either alone or in tandem, do not exempt hospitals, community health centers, and health care organizations from TPT on food. Section 455(c) exempts from tax sales by restaurants or caterers to qualifying hospitals, etc., not the provision of food *by* the hospitals, etc. to their patients. Section 445(c) and (p) exempt charges by hospitals and certain other healthcare facilities for use of rooms and other real property, but the section does not address sales of personal property like food. The Court therefore finds no reason not to prefer the natural interpretation that the statutory exemption includes food as part of assistance in the ADL of eating.

The record does not indicate what percentage of Desert Winds' personal or directed care residents actually require assistance to eat. This number may well vary from day to day, and need not correlate with the number eating in the dining room rather than in individual rooms: a person might be able to sit at a table and still require help with the fine motor functions necessary to feed oneself, or conversely be bedridden but still able to eat. The impracticality of arriving at a percentage argues against a statutory interpretation that would necessitate a percentage, and thus against making the exemption dependent on how many individual residents receive assistance specifically in the ADL of eating. The Court concludes that the exemption of Section 445(q), in conjunction with the administrative definitions, extends to all charges connected with assistance in activities of daily living for residents receiving personal or directed care, regardless of whether a particular resident requires assistance in a particular ADL. The policy of Desert Winds is that charges for assistance in most ADLs (bathing, dressing, and toileting – grooming may be included in one or more of these) are separate from the basic package charges. The

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ADLs of eating and ambulating (which the City has not attempted to tax) appear to be the only ones for which no advanced-level charge is assessed. In effect, every patient is charged for assistance in the ADL of eating whether assistance is needed or not. Whatever the rationale behind this pricing structure, the qualifying residents are being charged for a personal care service, so the charge is exempt. Again, the Court does not address whether charges for other services provided to personal or directed care residents may also be exempt.

The City's waiver argument is unpersuasive. There appears to be no dispute that Desert Winds has consistently identified itself as an assisted living center and asserted exemption under Section 445(q). The City and its auditor have just as consistently taken the position that charges for food and lodging are not exempted by Section 445(q), and they have imposed a tax on estimated food and lodging revenue based on that interpretation. Thus, Desert Winds is not claiming an exemption based on new evidence not previously considered by the City.

The Court observes that implementation of the ordinance may involve complications in a facility that provides care at three levels. While charges to a resident receiving personal or directed care are exempt, the ordinance does not extend the exemption to charges to a resident receiving only supervisory care. The exemption cannot be construed to apply to any charges to a resident not receiving personal or directed care. Where the same service, qualifying as exempt for personal and directed care residents, is provided to all three classes, some sort of apportionment will likely be necessary. The Court suggests that the parties consider how this can most efficiently be done with respect to the taxes at issue in this appeal.

Therefore, IT IS ORDERED:

1. Desert Winds Assisted Living's Motion For Partial Summary Judgment On The Legal Issue Of Whether DWAL's Income From Charges To Its Residents Receiving Personal and Directed Care Is Exempt From Peoria's TPT Tax is granted consistent with this minute entry ruling.
2. City of Peoria's Motion For Summary Judgment is denied.