N.D.A.G. Letter to Carroll (Dec. 1, 1992)

December 1, 1992

Jack A. Carroll, Ph.D.
Executive Director
Medical Center Rehabilitation
Hospital and Clinics
University of North Dakota
Box 8202 University Station
Grand Forks, ND 58202

Dear Dr. Carroll:

Thank you for your September 1, 1992, letter in which you request an opinion regarding the constitutionality of the Minnesota Health Right Act as it applies to the Medical Center Rehabilitation Hospital (MCRH) in Grand Forks, North Dakota.

Effective January 1, 1993, nonresident hospitals as defined in the Minnesota Health Right Act will be subject to a two percent tax on gross revenues received from providing services to Minnesota residents. 1992 Minn. Laws ch. 549 Art. 9, Sec. 7. "Hospital" is defined in the Act to mean those licensed in Minnesota as well as those "providing inpatient or outpatient services licensed by any other state or province or territory of Canada." 1992 Minn. Laws ch. 549, Art. 9, Sec. 5, subd. 7. "Gross revenues" are defined by the Act to mean money received by "a nonresident hospital for inpatient or outpatient services . . . provided to patients domiciled in Minnesota." 1992 Minn. Laws ch. 549, Art. 9, Sec. 5, sub 3(a)(2). The statute provides that a hospital is transacting business in Minnesota and subject to the tax, if it:

1. Maintains an office in Minnesota;
2. Has employees, representatives, or independent contractors conducting business in Minnesota;
3. Regularly sells covered services to customers that receive the covered services in Minnesota;
4. Regularly solicits business from potential customers in Minnesota;
5. Regularly performs services outside Minnesota the benefits of which are consumed in Minnesota;
6. Owns or leases tangible personal or real property physically located in Minnesota; or

7. Receives medical assistance payments from the state of Minnesota.

1992 Minn. Laws ch. 549, Art. 9, Sec. 6, subd. 1.

Because the statute is written in the disjunctive, it is clear that Minnesota would consider a North Dakota hospital to be doing business in Minnesota if it meets only one of these conditions. The statute also provides that "[a] hospital or health care provider is presumed to regularly solicit business within Minnesota if it receives gross receipts for covered services from 20 or more patients domiciled in Minnesota in a calendar year." 1992 Minn. Laws ch. 549, Art. 9, Sec. 6, subd. 2.

I understand that MCRH offers post surgical fittings for mastectomy patients at a Minnesota hospital one-half day per week. The gross revenues from this service provided in Minnesota would be taxable under the statute.

I am advised that MCRH has no other activities in Minnesota. However, it does do the following:

A. Advertise in North Dakota newspapers which happen to be circulated in Minnesota. It has been stated that this advertising is not specifically directed to Minnesota residents.

B. Mail bills to the Minnesota Health Department for payment from Minnesota funds.

C. Receive payment of bills by Minnesota healthcare insurers for the services performed to insureds.

D. Send a questionnaire for evaluation of services provided within thirty days of a patient's release from care.

Based on these presumed facts, an assertion of taxing jurisdiction over MCRH for services other than those provided in Minnesota for mastectomy patients could be attempted only under subdivisions (4), (5), and (7) of section 6 of Art. 9 of 1992 Minn. laws ch. 549.

Minnesota's assertion of taxing jurisdiction based on the regular solicitation by MCRH of potential customers in Minnesota conflicts with the U.S. Supreme Court's decision in <u>Quill Corp. vs. North Dakota</u>, 112 S.Ct. 1904 (1992). The court found that Quill's purposefully directing its activities at North Dakota residents by sending catalogs and flyers to North Dakota satisfied the "minimum contacts" requirement of the due process clause, but found this activity insufficient to satisfy the "substantial nexus" requirement of the commerce clause. Because MCRH does not appear to purposefully solicit the Minnesota residents to the extent of Quill's solicitation, i.e., the hospital's advertising is not directed toward Minnesota residents, it is unlikely that the nexus requirements of either the due process clause or the commerce clause would be satisfied. <u>See also</u> <u>Miller Bros. Co. v. State of Maryland</u>, 74 S.Ct. 535 (1954) (the incidental effects of general advertising found insufficient to impose a use tax collection obligation on sales consummated out-of-state absent an invasion or exploitation of the consumer market in the taxing state.) Even if the presumption contained in Minnesota's statute that a hospital regularly solicits business in Minnesota if it receives gross receipts from services provided to 20 or more Minnesota domiciliaries within a calendar year would be held to satisfy the due process clause, it would still be insufficient to meet commerce clause requirements under Quill.

The assertion of taxing jurisdiction based on the consumption in Minnesota of benefits received from services performed in North Dakota by MCRH may also violate the due process and commerce clauses. There are no U.S. Supreme Court cases dealing directly with the issue presented here. Hellerstein & Hellerstein, State Taxation Vol. II, par 18.06, pp 18-37 (1992). However, Miller Bros. Co. v. State of Maryland, 74 S.Ct. 535 (1954) is analogous. In Miller Bros., Maryland attempted to impose on a Delaware vendor a use tax collection duty for sales the vendor made in Delaware to Maryland residents. The purchases were then transported into Maryland by the customer. The Delaware vendor's only activities in Maryland were general advertising, the mailing of an occasional sales circular to Maryland customers and the occasional delivery after the sale of merchandise into the state. The court, finding the imposition of a use tax collection duty on the Delaware vendor for sales of merchandise delivered to the customer in Delaware prohibited by the due process clause, stated:

> [A]t the time of the sale, no one is liable for a Maryland use tax. That liability arises only upon importation of the merchandise to the taxing state, an event which occurs after the sale is complete and one as to which the vendor may have no control or even knowledge, at least as to merchandise carried away by the customer.

Id. at 538 (Emphasis added.)

The court then stated that under the due process clause "the burden of collecting or paying [the] tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here." Id. at 540. Like the Delaware vendor, the service provided by MCRH is completed in North Dakota. It is difficult to conceive how the service is not complete or "consumed" in North Dakota. Merely being alive and in good health does not appear to be the "consumption" of anything. Like the Delaware vendor, MCRH does not have further contact with Minnesota residents or activity in Minnesota other than sending a follow-up questionnaire to evaluate services and advertising in the general trade area. The imposition of a tax based on the consumption in Minnesota of services performed in North Dakota as applied to MCRH is constitutionally suspect. In Miller Bros., the U.S. Supreme Court said:

> If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition." Id. at 537.

The Minnesota Health Right Act seeks to tax gross revenues from the provision of services out of state in the same fashion such services are taxed in Minnesota. This appears clearly to burden commerce between the states and to contravene the U.S. Constitution art. 1, § 8.

The third alternative on which Minnesota might assert taxing jurisdiction over MCRH is the hospitals' receipt of medical assistance payments from the state of Minnesota. Analogous situations exist when imposing an income tax on nonresidents. A state may tax the income of a nonresident to the extent that the income is "fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers." International Harvester Co. v. Wisc. Dep't of Taxation, 64 S.Ct. 1060, 1064 (1944). The receipt of monies, absent the ownership of property in Minnesota and absent any events or transactions occurring in Minnesota which are subject to regulation or protection by the state, is not a sufficient jurisdictional basis on which to impose a tax.

It is therefore my opinion that a court would hold the Minnesota Health Right Act, to the extent it may seek to tax any revenues of MCRH for serving Minnesota residents other than those activities conducted in Minnesota through the post surgery mastectomy program, contravenes the due process and interstate commerce provisions of the United States Constitution.

Sincerely,

Nicholas J. Spaeth

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