MERCY MEDICAL, A CORPORATION 3712 DAUPHIN STREET MOBILE, AL 36606-1725,	§ §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 06-755
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Mercy Medical ("Taxpayer") for nursing facilities tax for May 1999 through May 2005 and June 2002 through May 2005. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on March 7, 2007. Robert Gibney represented the Taxpayer. Assistant Counsel Duncan Crow represented the Department.

ISSUES

This case involves the nursing facilities tax levied at Code of Ala. 1975, §40-26B-20, et seq. The tax is based on the number of licensed beds in a nursing facility, and was initially levied on only those nursing facilities that participated in the Alabama Medicaid program. See, Acts 1991, No. 91-126. The tax was amended in 1992 to apply to all nursing facilities in Alabama. See, Acts 1992, No. 92-440.

The disputed issues are:

(1) Is the Taxpayer exempt from the nursing facilities tax pursuant to the exemption provided to Special Health Care Facility Authorities at Code of Ala. 1975, §11-62-18(b);

(2) Is the Taxpayer denied equal protection because as a non-participant in Medicaid, it is not reimbursed by Medicaid for the tax; whereas nursing facilities that are

licensed Medicaid providers are reimbursed by Medicaid for the tax; and,

(3) Should beds used by the Taxpayer exclusively for hospice patients be considered in determining the Taxpayer's total patient occupancy rate for purposes of determining if the tax should be prorated pursuant to Code of Ala. 1975, §40-26B-23(b)?

FACTS

The Taxpayer is a §501(c)(3) charitable organization headquartered in Daphne, Alabama. It operates skilled nursing care/hospice facilities in Daphne and Mobile, Alabama. The Daphne facility had 117 beds during the period in issue. The Mobile facility had 20 beds. Some of the beds in both facilities were reserved exclusively for hospice patients.

The Daphne and Mobile facilities were constructed using money from tax-exempt bonds issued by the Special Care Facilities Financial Authority of the City of Daphne – Villa Mercy (the "Authority"). The Authority was created pursuant to the Municipal Special Health Care Facility Authorities Act, which is codified at Code of Ala. 1975, §11-62-1, et seq. As discussed below, the corporate activities of the Authority are exempt from certain taxes, see Code of Ala. 1975, §11-62-18. The Taxpayer leases the facilities from the Authority, which applies the rent to pay the outstanding bond indebtedness and interest thereon.

The Taxpayer was an authorized Medicaid provider concerning its skilled nursing care activities until the mid-1980's. Medicaid reduced its reimbursement rates at that time. The Taxpayer consequently elected not to renew its contract with Medicaid concerning its skilled nursing care. It was, however, an authorized Medicaid provider during the periods in issue concerning its hospice patients.

The nursing facilities privilege tax is based on the number of beds in each nursing facility. Code of Ala. 1975, §40-26B-21. The Taxpayer has always reported and paid the tax on the 117 beds at the Daphne facility, including the hospice beds. It discovered in the Spring of 2004 that it had not been paying on the 20 beds at the Mobile facility. It thereafter began reporting and paying tax in May 2004 on all of the 137 beds at both facilities.

The Taxpayer also determined in 2004 that as a user of facilities financed by the Authority, it should be exempt from the nursing facilities "bed" tax pursuant to the Authority's tax exemption at §11-62-18(b). It also concluded that it was being denied equal protection because nursing facilities that were authorized Medicaid providers were being reimbursed by Medicaid for the bed tax, but it was not because it was not Medicaid authorized concerning its nursing care. Finally, it determined that if it was not exempt, it had nonetheless overpaid the tax because its skilled nursing patient bed occupancy rate had not reached 85 percent, and consequently, it should have been pro rating the tax pursuant to §40-26B-23(b).

The Taxpayer petitioned the Department for an exemption from the nursing facilities tax in June 2004. It also petitioned for a refund of the tax it had previously paid. The Department responded by auditing the Taxpayer's Daphne and Mobile facilities. It subsequently denied the Taxpayer's exemption and refund claims, and entered the final assessments in issue in June 2006.[1]

[1] The Department entered separate final assessments concerning the Daphne and Mobile facilities because the Department assigns each nursing facility a separate account number, even if the facilities are owned and operated by the same entity.

Other relevant facts are stated in the below analysis of the issues.

ANALYSIS

Issue (1). Is the Taxpayer Exempt?

The Taxpayer argues that it is exempt from the nursing facilities tax based on the exemption granted Special Health Care Facility Authorities at §11-62-18(b). That exemption reads in pertinent part – "No income, excise or license tax shall be levied upon or collected in the state with respect to any corporate activities of an authority or any of its revenues, income or profit."

The Taxpayer argues that the Legislature created Special Health Care Facility Authorities to finance and assist in the construction and operation of special health care facilities. It contends that it is exempt under the Authority's exemption at §11-62-18(b) because relieving it of the burden of the nursing facilities tax would further the purpose of the Authority, i.e., it would financially assist the Taxpayer in the operation of its facilities.

The Department argues that the §11-62-18(b) exemption does not apply because the nursing facilities tax is a privilege tax, and the exemption only applies to income, excise, and license taxes. The Taxpayer counters that a license tax and a privilege tax are synonymous, and that the license tax exemption at §11-62-18(b) should also apply to the nursing facilities privilege tax.

I agree that the Legislature intended that Special Health Care Facility Authorities would promote the construction and operation of special care medical facilities in Alabama. I also agree that a license tax is in substance synonymous with a privilege tax. It does not follow, however, that the Authority's exemption at §11-62-18(b) also applies to the Taxpayer. Rather, the §11-62-18(b) exemption applies only to "any corporate activities of

an authority. . . ." The plain language of the statute must control. *State v. American Brass, Inc.*, 628 So.2d 920 (1993). Consequently, the exemption cannot be construed as also applying to the corporate or business activities of the Taxpayer. The Authority financed the construction of and owns the facilities operated by the Taxpayer, but that does not cause the Authority's exemption to extend to the Taxpayer.

The Taxpayer is a "user" for purposes of the Special Health Care Facility Authorities statute, see Code of Ala. 1975, §11-62-1(a)(12). Section 11-62-18(d) provides a sales tax exemption for tangible property used in constructing or equipping a special needs facility financed by an authority. Paragraph (d) specifies that the exemption applies regardless of whether the property is purchased by an authority or a user. The Taxpayer in this case is thus exempt from sales tax relating to any tangible property it may purchase to enlarge and/or operate its healthcare facilities. See, *State of Alabama v. Mercy Medical*, S. 91-148 (Admin. Law Div. 8/25/1993).

By specifying in paragraph (d) that both an authority and a user are exempt from sales tax on tangible property used to construct and/or operate a facility, the Legislature clearly recognized that an exemption granted to an authority also did not automatically apply to a user. It follows that if the Legislature had intended for the exemption in §11-62-18(b) to also apply to users, it would have so stated. The Legislature could have easily provided that the paragraph (b) exemption applied to "any corporate activities of an authority or user. . . ." It did not do so. "It is not proper for a court to read into a statute something which the legislature did not include although it could have easily done so." *City of Pinson, et al. v Utilities Board of the City of Oneonta*, 2007 Ala. Lexis 138, July 20, 2007, quoting *Noonen v. East-West Beltline, Inc.*, 487 So.2d 237, 239 (Ala. 1986).

Also, the Special Health Care Facility Authorities statute was enacted in 1979. The nursing facilities tax was enacted in 1991. It must be presumed that when the Legislature enacted the tax in 1991, it was aware that various nursing facilities had been financed by Special Health Care Facility Authorities. Consequently, if the Legislature had intended for the operators, i.e., users, of those facilities to be exempt from the nursing facilities tax, it could have so specified. Again, it did not do so. The Taxpayer is not exempt from the tax.

The above conclusion is supported by the rule of statutory construction that an exemption must be strictly construed for the State and against the exemption. *Bean Dredging Corp. v. State of Alabama*, 454 So.2d 1009 (Ala. 1984).

Issue (2). The Equal Protection Issue.

The Taxpayer argues that it is being denied equal protection because as a non-participant in Medicaid, it is not reimbursed by Medicaid for the tax, whereas nursing facilities that participate in Medicaid are reimbursed. I disagree.

The tax applies equally to all nursing facilities in Alabama, both those licensed as Medicaid providers and those that are not. The disparity occurs only because the Taxpayer and various other nursing facilities in Alabama elected not to participate in the Alabama Medicaid program. Equal protection is not violated if the disparate treatment results from a decision or method of doing business freely chosen by the one claiming a violation.

Issue (3). The Occupancy Rate/Proration Issue.

Section 40-26B-23(b) provides that if a nursing facility has a monthly total occupancy rate of less than 85 percent, the monthly tax due shall be prorated; provided, proration shall cease and the full tax shall be paid in the first month that the occupancy rate equals or exceeds 85 percent, and all months thereafter.

The Department argues that the tax cannot be prorated for the months in issue because the Taxpayer's occupancy rate, including the beds dedicated to hospice care, exceeded 85 percent. The Taxpayer concedes that if the hospice beds are considered, its occupancy rate exceeded 85 percent. It argues, however, that the hospice beds should not be considered in determining its occupancy rate. The Department concedes that if the hospice beds are not considered, the occupancy rate was less than 85 percent and the tax should be prorated.

Section 40-26B-23(b) provides that the tax shall be prorated if "any nursing facility . . . has a monthly total (bed) occupancy rate of less than 85 percent." "Bed" is defined as "[a]ny bed that is licensed . . . to provide nursing care which is in a nursing facility." Code of Ala. 1975, §40-26B-20(1). "Nursing facility" is defined as "[a]n institution which is licensed under the laws of the State of Alabama as a skilled nursing facility or an intermediate nursing facility." Code of Ala. 1975, §40-26B-20(5).

The Taxpayer argues that the beds dedicated for hospice patients should not be considered in computing the ratio because "[h]ospice care is not 'nursing home care' but rather is a specialized and medically intense level of care. Licensed providers of hospice care are reimbursed both by the Medicaid and Medicare programs in an amount in excess of nursing home care." Taxpayer's Brief at 19.

The Taxpayer's argument is at first blush compelling. The beds dedicated to the hospice patients are used exclusively for that purpose. As indicated, however, "bed" is defined as any bed licensed to provide nursing care in a nursing facility. The hospice beds, although used for hospice purposes and not nursing purposes, are so licensed. The Taxpayer is also a licensed "nursing facility," as defined at §40-26B-20(5), although it

provides both nursing care and hospice care within the facility.

And while the Taxpayer argues that the hospice beds should not be considered in determining the occupancy rate, it concedes that the hospice beds are subject to the nursing facilities tax. It has always paid the tax on the hospice beds in Daphne, and on the hospice beds in Mobile since May 2004. If the hospice beds are subject to the tax, logic dictates that they should also be considered in computing the occupancy rate for purposes of determining if the tax should be prorated.

In summary, the Taxpayer is not exempt from the nursing facility tax, nor does requiring it to pay the tax (without reimbursement by Medicaid) deny it equal protection of the law. The tax also should not have been prorated during the months in issue.

The tax and interest as assessed by the Department is affirmed. The penalty included in the Mobile assessment is waived for cause. Code of Ala. 1975, §40-2A-11(h). Judgment is entered against the Taxpayer for $196,634.08 and $71,143.17. Additional interest is also due from the date the final assessments were entered, June 29, 2006.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered August 22, 2007.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Duncan R. Crow, Esq.
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