

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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JOSEPH BLOUNT, in his official
capacity as chairman and
commissioner of the
Mississippi State Tax Commission

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APPELLANT

VS.

NO.: 2006-CC-00673

ECO RESOURCES, INC.

APPELLEE

APPEAL FROM THE CHANCERY COURT
OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT
CAUSE NO.: 2402-03-0824

REPLY BRIEF OF APPELLANT

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APPELLEE

REPLY BRIEF FOR APPELLANT

I. The Standard of Review

On pages 14 and 15 of the Appellee's brief, Eco has muddled the standard of review for this case by citing an ad valorem tax appeal and claiming that the standard of review is the "clearly erroneous" standard. Appellee's Brief at 15, citing *Mississippi State Tax Commission v. ANR Pipeline Company*, 806 So. 2d 1081, 1084-85 (Miss. 2001). Eco also cites a legal encyclopedia for the proposition that the "clearly erroneous" standard applies. Appellee's Brief at 15.

Although a full evidentiary review in the court below would be common to both an ad valorem appeal as well as an appeal under the sales tax chapter such as the case sub judice, this review is conducted against the arbitrary or capricious standard. *Tenneco v. Barr*, 224 So.2d 208, 214-215 (Miss. 1969). The *Tenneco* standard was recently affirmed by this court in *Mississippi State Tax Commission vs. Murphy Oil USA, Inc.*, 933 So. 2d 285, 291 (Miss. 2006):

The chancery court reviewed this matter in a full evidentiary hearing, complete with a full record. In *Tenneco, Inc. v. Barr*, 224 So.2d 208, 211 (Miss.1969), this Court held that "[i]t is manifest, from the express provisions of [Mississippi Code Annotated 1942] § 9220-31, that the Legislature has made it the public policy of this state to provide a full evidentiary judicial hearing in cases of the character now under consideration." Section 9220-31 is the predecessor to current Miss. Code Ann. §§ 27-7-73 (income tax-judicial review) and 27-13-45 (franchise tax-judicial review). In *Tenneco*, as well as in the present matter, "the chancellor heard evidence and determined the cause as in 'other

cases' as provided by the statute." 224 So.2d at 210. Thus, in accordance with *Tenneco*, the chancellor in this case reviewed evidence and determined the case under the authority of §§ 27-7-73 and 27-13-45. This Court must now ascertain whether the chancery court arrived at the proper determination.

Murphy Oil USA, Inc., 933 So. 2d at 291. See *Tower Loan of Mississippi v. Mississippi State Tax Commission*, 662 So. 2d 1077, 1080-81 (Miss. 1995) ("This Court reviews actions of the State Tax Commission under an arbitrary and capricious standard."); *Mississippi State Tax Commission v. Dyer Investment Company, Inc.*, 507 So. 2d 1287, 1289 (Miss. 1987) (scope of review limited by familiar arbitrary and capricious standard).

However, in the car at bar, the lower court has made an interpretation that as a *matter of law* municipal water systems and municipal sewer systems are exempt personal property. Given the interpretation of Section 27-65-21 by the chancery court, this case presents a pure question of law. Consequently, this appeal under the Mississippi Sales Tax Law presents itself for review in a somewhat different posture than the typical appellate review of a sales tax assessment. Statutory interpretation is a matter of *de novo* review. *Wallace v. Town of Raleigh*, 815 So. 2d 1203, 1206 (Miss. 2002); *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 165 (Miss. 1999). For this reason the Tax Commission proposes that *de novo* review is appropriate for this appeal.

II. Eco's Brief Contains Numerous Mischaracterizations and Incomplete Explanations of Facts and Issues

None is what Eco argues on pages 4-6 of its brief pertains the to Commission's application of the contractor's tax to this taxpayer, and therefore not relevant to the issues on appeal. For example, Eco's goes to great length to criticize the auditor's initial plan to use job descriptions to determine the taxable percentage of the contracts. However, the auditor did not even use job descriptions in computing the tax. The auditor stated in the comments section of

her report that she gave some thought to using job descriptions in the early stages of the audit. However, she explained that she abandoned that approach when Eco's attorney provided her with work task descriptions and the number of hours associated with these tasks for the Biloxi contract for 1999. R.E. at 82. Ultimately, the Commission whittled away several additional inspection hours; several additional overhead hours; and, several additional residential service hours in arriving at its taxable percentage of fees at 59%. All of this was fully explained in Appellant's brief. Yet, Eco argues at length at pages 4-6 of its brief by boldly pronouncing: "At trial, ECO proved that Moore's use of job categories, which the Commission had adopted, was irrational." Appellee's Brief at 6. The relevance of Eco's claim that job categories were irrational escapes all logic since job categories were not used. Equally bizarre is Eco's claim on page 6 of its brief that water sampling should not be taxed. At no time, *ever*, was water sampling captured as taxable. Yet, for reasons not apparent Eco tries to misrepresent the Tax Commission's position to this court by suggesting that the Tax Commission wanted to tax water sampling.

On page 3 of Appellee's brief, Eco claims that the Commission's auditor, Ms. Dorothy Cooper, testified that an above ground transmission line would be personal property although the work on it would still be taxed. Because this isolated comment is taken out of context, it is a mischaracterization of her testimony. Ms. Cooper was explaining in her testimony that even though a gas transmission line can be an above ground pipeline and perhaps not considered real property for that reason, work on a transmission line would still be taxable since the statute itself clearly states that work on a transmission line is taxable. Tr. at 231-32. See Miss. Code Ann. § 27-65-21 (Rev. 2005).

There are other illogical and misrepresented ideas presented in the Appellee's brief. Under Eco's contorted reading of Section 27-65-21, a water system and a sewer system are

“activities”. See Appellee’s Brief at 9-10. Actually, repair is the activity, and repairs to water systems and sewer systems are specifically listed in the statute as being subject to the tax. Likewise, there is no credence to Eco’s claim in footnote three that the Tax Commission is attempting to expand the definition of repair to include maintenance. Repair **and** maintenance are defined by the legislature, not the Tax Commission, as “restoring of property in some measure to its original condition” *Miss. Code Ann.* § 27-65-11(i) (Rev. 2005). Other inconsistencies abound in Eco’s positions. Eco argues on one hand that it is not subject to the contractor’s tax, period. Yet, on the other hand it wages an adamant argument that it should be taxed on eight percent (8%) of contract revenues. Appellee’s Brief at 2, 6. Additionally, on page 17 of Appellee’s brief, Eco proposes the following:

The Commission’s argument concerning the definition of personal property is, like Tax Commission positions in the past, ‘fraught with inconsistency.’ *Mississippi State Tax Commission v. Lady Forest Farms, Inc.*, 701 So.2d 294, 296 (Miss. 1997).

Appellee’s Brief at 17. Here, Eco apparently makes a “clever” attempt to discredit the agency’s position by citing an unrelated case from ten years earlier. Eco’s attempt falls on its face when placed under scrutiny. Interestingly, the phrase, “fraught with inconsistency” appears nowhere in this case—not on page 296, or elsewhere.

III. Personal Property & Component Materials

According to Eco, the Tax Commission “wrongly argues” that a water system means the entire water system and that the Tax Commission does not address what it refers to as the “critical personal property language” in the contractor’s tax statute. Appellee’s Brief at 12. Here, Eco is referring to the repair of personal property retaining its identity as personal property associated with the taxable activities addressed in Section 27-65-21. Any municipal water or sewer system if it is to operate and function at all must utilize service trucks, dump trucks, digging and trenching equipment, pumps, computers, office equipment, office furniture,

radio communication equipment, water quality testing equipment and other necessary tools of the trade. Exhibits 16, 17, & 18. This is precisely the type of personal property that must be serviced and repaired from time to time and required for the operation and maintenance of a municipal water or sewer system. At no time did the Tax Commission attempt to capture any of the repair or maintenance work on this property as taxable.

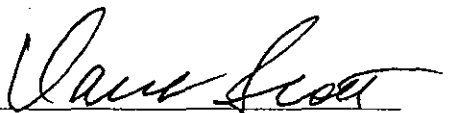
The Tax Commission's internal memo, Ex. 38, R.E. 104-05, addresses six subjects in a page and a half of text. The third subject is component materials. Item 3 addresses only when component materials become attached to realty as to become realty itself and when component materials retain identity as personal property. That was the scope of the 1999 memo, nothing more, nothing less. It is preposterous for Eco to suggest as it has at pages 7 and 8 of its brief that the agency's internal memo would supplant Regulation 41 or a state statute that taxes, on its face, repair activities on water and sewer systems at 3 ½% of contract fees. See Miss. Code Ann. § 27-65-21 (Rev. 2005). The memo does not exist in a vacuum, divorced from Section 27-65-21. Equally absurd is Eco's attempt to spin to this honorable court that the memo is inconsistent with the Tax Commission's position in its brief wherein case law and arguments are presented demonstrating that water systems and sewer systems are real property, not personal property or component materials. As the memo states, component materials that are considered realty include **built-in** furniture, fixtures, appliances and similar property to the extent that the materials become part of the real property itself. (emphasis added). R.E. at 104. This is completely consistent with the points raised in the Appellant's brief at pages 19-25 regarding what should be considered real property versus personal property. There has been absolutely no "switch in definitional horses" as proposed by Eco.

Conclusion

The Tax Commission submits that the chancery court erred by holding that water systems and sewer systems are items of personal property. For the reasons submitted in the Appellant's brief and reply brief, such a holding is illogical and cannot withstand scrutiny by a reviewing court. Eco's response to the Tax Commission's appellate brief is to string one mischaracterization of the Tax Commission's position with another, and another, and so on. This court must reverse the judgment in the court below and render a judgment in favor of the Tax Commission upholding the five orders of tax assessment that the Commission entered on October 3, 2001. R.E. 43-52.

RESPECTFULLY SUBMITTED:

MISSISSIPPI STATE TAX COMMISSION
JOSEPH L. BLOUNT,
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CERTIFICATE OF SERVICE

I, Dave Scott, attorney for the Mississippi State Tax Commission, hereby certify that I have served the above and foregoing Reply Brief of Appellant by mailing this day, by First Class U.S. Mail, postage prepaid, a true and correct copy of same to the following:

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THUS DONE on this the 2nd day of March, 2007.


Dave Scott