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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

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COURT OF APPEALS

VS. NO. 2006-CC-00678

ECO RESOURCES, INC. — APPELLEE

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

BRIEF OF APPELLANT

Oral Argument Not Requested

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOSEPH BLOUNT, in his official capacity as chairman and commissioner of the Mississippi State Tax Commission	**APPELLANT**
VS.	**NO.: 2006-CC-00673**
ECO RESOURCES, INC.	**APPELLEE**

STATEMENT OF THE ISSUE

Whether the chancellor erred in holding that the work that Eco Resources, Inc., performed under contracts with five Mississippi cities from July of 1996 through August of 1999 to repair and maintain water systems and sewer systems were not subject to the 3.5% contractor's tax provided at Mississippi Code Annotated Section 27-65-21 (Rev. 2005) on the basis that water and sewer systems were exempt personal property.

STATEMENT OF THE CASE

This is an appeal on a tax issue brought by the Mississippi State Tax Commission (MSTC) from an adverse ruling issued by the Harrison County Chancery Court, Second Judicial District, involving the application of the contractor's tax codified at Mississippi Code Annotated § 27-65-21. Eco Resources, Inc., (Eco) is a company based in Sugarland, Texas, that contracted with five cities in Mississippi to provide operations, management, repair and maintenance services for water and sewer facilities and systems. In October of 1999, MSTC began a sales tax audit to determine Eco's compliance with the contractor's tax provided for at Mississippi Code Annotated § 27-65-21 (Rev. 2005). The contractor's tax is a 3.5% rate, and it is codified in the chapter of the code under the sales tax provisions, title 27, chapter 65 of the Mississippi Code. The subject of the audit was contract fees received by Eco through its agreement with five Mississippi cities, the same being Biloxi, D'Iberville, Horn Lake, Southaven, and Olive Branch. The period of the audit on all five contracts was July 1, 1996 through August 31, 1999.

MSTC auditor Dorothy Cooper submitted an audit report on Eco determining 70% of the base contract fees were taxable and subject to the 3.5% contractor's tax. R.E. 81-103. As it will be explained subsequently in more detail, when the 70% assessment was issued in June of 2000 on the five projects, this resulted in a tax bill of $407,974.00, including tax, penalty, and interest. Eco appealed the auditor's assessment to the MSTC Board of Review which is an inter-agency intermediate level of review within the MSTC as provided for in Mississippi Code Annotated § 27-65-45 (Rev. 2005) (repealed 2005 and re-codified at Mississippi Code Annotated § 27-77-5 (Rev. 2005)). The Board of Review affirmed the tax as presented by the auditor. Eco then appealed to the full three-member Commission of the MSTC where a hearing was held on March 28, 2001. See *Miss. Code Ann.* § 27-77-5(4)(Rev. 2005)(formerly codified

at § 27-65-45). Approximately six months later on October 3, 2001, the Commission issued its final orders on the five contracts wherein the total tax, penalty, and interest was reduced to $394,972.00. The Commission's final orders reduced the percentage of the contract fees subject to the contractor's tax from 70% to 59%. R.E. 43-52. In October of 2001, Eco paid the tax, penalty and interest in the amount of $394,972.00. Eco waited two years and then sued the Tax Commission in the Harrison County Chancery Court in September of 2003 for a refund of the tax paid as provided in Mississippi Code Annotated § 27-65-47 (repealed 2005 and re-codified at Mississippi Code Annotated § 27-77-7 (Rev. 2005)).

A bench trial was held before the chancellor on Eco's refund action on January 10, 2005. On January 30, 2006, the lower court issued findings of fact and conclusions of law finding that Eco was not subject to the contractor's tax on the basis that the company was contracted to perform services on tax exempt personal property. To like effect, a judgment in Eco's favor followed on March 23, 2006. Aggrieved the decision in the court below, MSTC has now appealed to the state supreme court asserting error in the application of law by the Harrison County Chancery Court.

STATEMENT OF THE FACTS

Some examples of the services provided by Eco under the contracts with the five cities to maintain and operate the water and sewer systems included the following: installed water meters; performed meter disconnects and reconnects; repaired water line breaks; marked water line and sewer line paths; repaired sewer line breaks; inspected and repaired water well pumps; repaired and installed water line valves; and, checked lift stations in the sewer system for proper operation. R.E. 78. Additionally, Eco performed other services not directly related to the actual maintenance and repair of the water and sewer system infrastructure. These other services are not taxable and have never been in dispute with the parties as nontaxable activities.

Examples of these nontaxable other services included customer billings, customer account collections, water sampling for testing purposes, and lawn and grounds maintenance. R.E. 78. MSTC has never contended that these functions were taxable under the statutory directive of the contractor's tax, Mississippi Code Annotated Section 27-65-21.

As for taxable functions under the contractor's tax at Section 27-65-21 for repair and maintenance of water and sewer systems, MSTC's auditor Dorothy Cooper determined early on in the audit process that Eco paid no contractor's tax on any portion of the labor performed by the company under these contracts. Tr. at 138-39; R.E. at 82. In fact, the only tax Eco paid was a nominal amount on the materials used by the company for repair and maintenance. Tr. at 138; R.E. at 82. For all purposes, Eco ignored the labor component of the contracts.

Initially, the auditor calculated that 70% of Eco's employees did work directly related to the construction, repair, or maintenance of the water and sewer systems serviced by Eco. Therefore, her initial approach in the audit was to assess 70% of the base contract fees as subject to the 3.5% contractor's tax. In arriving at the 70% calculation, Ms. Cooper used the number of Eco employees and their corresponding job titles in determining that 70% of the employees performed work related to construction, repair, and maintenance aspects of the water and sewer systems. Tr. at 141-42; R.E. at 82. Additionally, in a prior audit of Eco covering earlier years, Eco was instructed by the Tax Commission to pay contractor's tax on 70% of contract fees. Eco ignored this directive. Tr. at 141; R.E. at 82.

When the 70% amount was presented by Eco, the company rejected this approach. As stated above, this audit involved five contracts covering an audit period from July 1, 1996 through August 31, 1999. When Eco balked at the 70% amount, *Eco proposed and MSTC accepted* Eco's proposal that the representative sample for the audit period should be the work performed on the Biloxi contract for calendar year 1999. R.E. at 18-27. According to Eco, the

company had solid, substantive and complete documentation that accounted for all hours worked on the Biloxi contract for 1999. Tr. at 146-47; R.E. 18-27. The company then provided MSTC's auditor with complete documentation of the hours worked in Biloxi for 1999. Tr. at 146-47; R.E. at 21-27. This additional documentation that Eco supplied for Biloxi in 1999 yielded an accurate, representative sample of the actual labor activity, time worked, and job functions that Eco performed to earn its fees.

The task descriptions and associated hours for Biloxi in 1999 were provided by Eco's attorney to MSTC's auditor. Using labor task descriptions provided by Eco that explained the work that was performed as well as the total hours required to perform the tasks, Eco proposed that 8,302 labor hours were subject to the contractor's tax under § 27-65-21. R.E. at 26. The list of tasks and associated task descriptions are contained in Trial Exhibit 40 as an attachment to an April 17, 2000 letter from Mr. James Pettis to Ms. Cooper. Record at 94-103; R.E. at 18-27. Ms. Cooper reviewed the 8,302 hours that Eco itself had labeled as "construction related" and proposed as taxable (R.E. at 25-26), along with almost four additional pages of repair and maintenance work descriptions that Eco supplied (R.E. at 22-25). After reviewing the additional 21,145 labor hours and work descriptions provided by Eco in Exhibit 40 (R.E. at 22-25), Ms. Cooper determined that an additional 14,156 hours were taxable, eliminating 6,989 hours as nontaxable hours. Tr. at 151-53; R.E. 28-30). The additional 14,156 labor hours that Ms. Cooper identified as taxable are contained in Trial Exhibit 21 as part of her work papers. R.E. 28-30. To identity these additional 14,156 labor hours as taxable functions, Ms. Cooper used the work descriptions of the tasks that Eco provided. The descriptions that she captured as taxable included repair, maintenance, and construction related activities. Examples of these additional taxable hours included tasks such as: repaired backflow preventor; cleaned sanitary line; replaced chlorine line; repaired generator; performed preventive maintenance; replaced

meter broken glass; marked utility lines; replaced valve box and lid; flushed blow off valve; reinstalled motor; pulled booster pump for repairs; repaired CL2 detector; installed clean out cap; adjusted meter upright; reinstalled new meter; winterized facility; inspected fire hydrants; painted at lift station; operated press belt; replaced packing in pumps; greased and excised hydrant; set meter box to grade level; and, reset caps on hydrants, to name a few. R.E. at 28-30. Items that were excluded as nontaxable included hours associated with customer account operations that were not germane to repair and maintenance functions. These included water turn on, water turn offs, tagging meters, meter reading, and building inspections. She also excluded hours associated with dye testing, checking for houseline leaks, resetting breaker switches, checking control panels, locating manholes, and cleaning up the work area, to name a few. R.E. at 22-25; 28-30.

In addition to these labor hours documented by specific tasks, Ms. Cooper added as taxable the hours that were devoted to inspection of the water wells and the sewer lift stations by Eco's employees. Tr. at 157-58. The inspection hours totaled 40,468.5 and were provided by Eco. Tr. 157-58; R.E. at 19. The inspection hours consisted of checking the water and sewer system pumps, wells, and lift stations, to ensure their proper operation. Eco also provided Ms. Cooper with documentation that an additional 10,920 hours were devoted to the Biloxi contract by salaried office personnel. R.E. at 27. This reflected office overhead hours required by Eco to fulfill their obligations under the contract. Of the 10,920 overhead hours, Ms. Cooper excluded 4,368 hours as nontaxable for hours submitted on behalf of the office manager and the billing and collection supervisor. However, Ms. Cooper included as taxable 6552 overhead hours reported for the operations manager, contract manager, and safety coordinator since these hours were essential to the performance of taxable repair and maintenance functions under the contract. Tr. at 154-55; R.E. at 31.

As an attachment to Trial Exhibit 1, which is the audit report for the City of Biloxi contract, Ms. Cooper included a calculation worksheet describing her calculation of taxable hours. R.E. at 31. When taxable hours (69,478) are divided by total contract hours both taxable and nontaxable (69,478 + 11,357) this yielded a percentage of almost 86% of the total contract fees subject to the contractor's tax. R.E. at 31.

Since the 86% amount was higher than the amount of tax previously calculated by Ms. Cooper at 70% using job descriptions, Ms. Cooper testified that to accommodate the taxpayer in all interests of fairness, she did not increase the assessment to 86%.[1] Tr. at 160-61. Further, Eco had previously been instructed to pay the tax on 70% of contract fees. Tr. at 141; R.E. at 82. Therefore, she allowed the assessment to remain at 70% of contract fees. As noted in the statement of the case, Eco appealed to MSTC's Board of Review which affirmed Ms. Cooper's 70% assessment. Thereafter, Eco appealed under § 27-65-45[2] to the full three-member State Tax Commission where a hearing on Eco's appeal was held on March 28, 2001. Following the full Commission hearing, the MSTC amended its assessment of tax as submitted by Ms. Cooper by reducing the taxable percentage of the contracts from 70% to 59%. R.E. at 43-52.

At the trial of this matter held on January 10, 2005, MSTC's Director of its Sales and Use Tax Division, Ms. Meg Bartlett, testified about the reduction explaining the steps that the Commission took to reduce the assessment. The contractor's tax imposed by § 27-65-21 exempts from taxation compensation received for construction or repairs to any building or

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[1] The trial court deemed it significant for reasons not apparent that Ms. Cooper, "utilizing solely the information provided to her by Eco . . . and conducting no other independent inquiry, determined that the correct taxable percentage was 86%." R.E. at 11. The trial court's use of "solely" and "no other independent inquiry" is somewhat bizarre. When a tax auditor audits a taxpayer, judicial notice could be taken that the information the auditor uses for an assessment would primarily and oftentimes exclusively come from the taxpayer itself. Later in the same paragraph the trial court dwells on the fact that Ms. Cooper included some of the inspection hours that could have been attributed to Eco services that ultimately benefited residential customers. Why the trial court selected this language for emphasis is not apparent or explained since it is not factually relevant based on the amendments that the full commission made to the assessments when the percentage was reduced to 59%.

[2] Repealed, and re-codified at *Miss. Code Ann.* § 27-77-5 (Rev. 2005).

structure used primarily in connection with a residence or dwelling place for human beings. *Miss. Code Ann.* § 27-65-21(1)(b)(ii) (Rev. 2005). In an attempt to apply this exclusion for the maximum benefit of Eco, the Commission began the process of eliminating from taxable hours the repair, maintenance, and construction hours that *could have related* to points of service associated with residential buildings. Tr. at 250-53. Pursuant to Tax Commission policy, if a repair or maintenance activity occurred between a meter box and a residential dwelling, such activity would be considered residential and therefore exempt from the contractor's tax. Repair and maintenance activity occurring from the meter back to the main water lines, pumps, valves, wells, etc., would be considered part of the water system infrastructure and therefore taxable under § 27-65-21. Tr. at 250-53. It also follows that repair and maintenance work that occurred between a meter box and a building used for commercial or business purposes would not be entitled to the residential exclusion. Section 27-65-21 provides no comparable exclusion for work related to commercial/business purposes.

According to Eco, the commercial to residential customer account mix in Biloxi was 80% residential and 20% commercial. Tr. 251-52. Therefore, Ms. Bartlett testified that using the descriptions of tasks and hours worked as provided by Eco, she reviewed the work papers[3] prepared by Ms. Cooper and identified repairs and maintenance that could have occurred between a meter and a building. Tr. at 251. For the work descriptions that could have related to specific metered accounts, the Commission eliminated 80% of these as nontaxable hours. Examples of these hours included items such as, "reinstalled new meter," "set meter box to level grade," "replaced meter," "moved meter," or, "checked meter for correct operation." Tr. at 250-53. R.E. at 32-33. The net effect of eliminating the hours that could have related to

[3] Trial Exhibit 21; R.E. at 28-30.

residential purposes was a reduction in repair and maintenance hours by 692 hours, from 14,156 down to 13,464.

The Commission also cut the inspection hours that Eco provided to Ms. Cooper. Specifically, the Commission eliminated inspection hours that did *not* directly result in the need for a repair or maintenance activity. Conversely, only the inspection hours that led to a repair job were captured as taxable. Tr. at 257-60. This resulted in a substantial reduction of 18,615.5 hours, from 40,468.5 hours down to 21,853 taxable hours. R.E. at 34. As Ms. Bartlett explained in her testimony, she calculated that 54% of inspections led to repair and maintenance work. Fifty-four percent was the result of dividing all repair and maintenance hours (21,765.5) by total inspection hours (40,468.5), thus reducing the taxable inspection hours to 21,853. Tr. at 257-58; R.E. at 34.

The Commission took further steps to ensure that its percentage of taxable contract fees was not inflated to the detriment of the taxpayer. The Commission also cut the salaried, overhead hours that Ms. Cooper used in her computations. Taking the hours for the operations manager, the contract manager, and the safety coordinator as provided by Eco's attorney to Ms. Cooper, the Commission allocated only a portion of these hours as taxable and exclude the rest. Tr. at 256-57. This allocation was achieved by apportioning the overhead hours related to taxable repair/maintenance hours and taxable inspection hours in relation to total hours worked by hourly employees.[4] Tr. 256-57. This yielded an apportionment of 62% of overhead hours related to the repair/maintenance and inspection functions of the contract while excluding 38% of the overhead hours. R.E. at 34. This resulted in reducing taxable overhead hours to 1363

[4]The allocation is computed by dividing taxable repair and maintenance hours and taxable inspection hours (8301.5 + 13,464 + 21,853 = 43,618.5) by the total of all hours worked by hourly employees as per Eco (69,915), yielding a 62% allocation from overhead to the taxable tasks performed under the contract. R.E. at 34.

each for the operations, contract, and safety managers, a total reduction of 2463 overhead hours. R.E. at 34.

After the Commission reduced the repair and maintenance hours that could have been related to residential tasks (692); reduced the inspection hours to only those that resulted in the need for a repair or maintenance (18,615.5); and, reduced the allocation of overhead hours that could be apportioned to only the taxable functions under the contract (2463); this amounted to a reduction of 21,770.5 hours making taxable contract hours 47,707.5. R.E. at 34. As Ms. Bartlett explained in her testimony, these cuts in the taxable hours resulted in a reduced taxable percentage of 59% of base contract fees to apply against the 3.5% contractor's tax rate. Tr. at 264; R.E. at 34.

The Commission's position is that their approach in determining the taxable liability represented a fair, reasonable, and judicious approach to extend to the taxpayer its full measure of accommodation and to capture no more tax than that which is due. As noted in the statement of the case, when the rate of 3.5% was applied to the base contract fees earned by Eco, the tax, interest and penalty was $394,972 on the five contracts. This is the amount that Eco paid and subsequently filed this refund action seeking a return of the same.

SUMMARY OF ARGUMENT

This is a *de novo* appeal from chancery court where the lower court clearly erred in its application of law. The court below ignored and failed to consider bedrock principles of statutory construction in determining taxability under Section 27-65-21 for the work that Eco performed. First, the plain language of Section 27-65-21 taxes, on its face, repair and maintenance work that is performed on water systems and sewer systems. This is clearly expressed, and one needs to look no further than the plain language of 27-65-21 to determine statutory intent. Additionally, it was error for the lower court to ignore the directive in 27-65-

21 that the tax applies to water **systems** and sewer **systems**. As such, the lower court committed error in its application of law by accepting Eco's suggestion to break apart the water and sewer systems into bits, pieces, and component parts in direct contradiction to the language in Section 27-65-21.

The lower court likewise erred by failing to consider other settled principles of statutory construction. In considering tax statutes, an exemption is never presumed, and the one claiming the exemption must demonstrate that the right to the exemption is clearly established. *Mississippi State Tax Commission vs. Medical Devices, Inc.*, 624 So.2d 987, 990 (Miss. 1990). Eco is precluded from showing a clearly established exemption in the face of statutory language that specifically states that repair functions on water and sewer systems are taxable. Another rule of construction that the court ignored is that specific language controls over general language; and, the judiciary gives deference to an agency's application of its own rules and statutes so long as the same is a reasonable interpretation. *Mississippi Gaming Comm'n v. Imperial Palace of Mississippi, Inc.*, 751 So. 2d 1025, 1029 (Miss. 1999); *Lenoir v. Madison County*, 641 So. 2d 1124, 1128-30 (Miss. 1994).

Even if the court is inclined to accept Eco's invitation to make the realty/personalty analysis to determine taxability, municipal water systems and municipal sewer systems are clearly realty--not personal property or trade fixtures. There is undeniable permanence associated with municipal water and sewer systems as evidenced by the fact that such systems must be permanently affixed to assure the continuance of a civilized society. And, it matters not that certain parts or components may be repaired, replaced or upgraded over time. Permanence does not demand perpetuity of a particular part or piece. The relevant consideration is the permanent intent and permanent need for these systems. The intent of permanence for a municipal water system and sewer system and the manner in which these

systems are integrated within the realty itself completely belies any suggestion that the same could be considered articles of personal property.

The State Tax Commission undertook a reasonable, sound approach in arriving at its assessment of tax at 59% of contract fees. In doing so, the Commission relied upon substantive work documentation that Eco itself provided to the auditor. Moreover, the Commission went to great lengths to ensure that Eco was not overtaxed. The Commission excluded and carved away various activities wherever it could to reduce the tax liability on Eco. All of these steps that the Commission employed reflect a methodical, judicious approach in the treatment of this taxpayer. Eco presented nothing at trial to suggest that the Commission's approach to the determination of tax liability was arbitrary, capricious, unreasonable, or not supported by substantial evidence. For the reasons, this case must be reversed and a judgment rendered in favor of the MSTC upholding their orders of assessment of the contractor's tax in this case.

ARGUMENT

I. The Standard of Review for This Court to Apply to This Appeal Involving a Question of Law Is *de novo* Review.

This central issue for this appeal that the court must resolve is a question of statutory construction on a question of law—specifically, the application of Mississippi Code Annotated Section 27-65-21 to the work that Eco performed under the five contracts that were the subject of this audit. Since this appeal presents a pure question of law, it is well settled that the standard of review is *de novo*. *Mississippi Comm'n On Judicial Performance vs. Cole*, 932 So. 2d 9, 18 (Miss. 2006); *Wallace vs. Town of Raleigh*, 815 So. 2d 1203, 1206 (Miss. 2002); *Donald vs. Amoco Prod. Co.*, 735 So. 2d 161, 165 (Miss. 1999).

II. The Plain, Undeniable Language of Section 27-65-21 on Its Face Taxes the Functions That Eco Performed under These Contracts.

Mississippi Code Annotated Section 27-65-21 provides that upon every person engaging or continuing in this state in the business of contracting or performing a contract for certain listed activities or similar activities, a tax of 3.5 percent shall be levied to the total contract price or compensation received. Specific activities are listed in the statute, and in pertinent part, that portion of the statute is reproduced below:

(1)(a)(i) Upon every person engaging or continuing in this state in the business of contracting or performing a contract or engaging in any of the activities, or similar activities, listed below for a price, commission, fee or wage, there is hereby levied, assessed and shall be collected a tax equal to three and one-half percent (3-1/2%) of the total contract price or compensation received, including all charges related to the contract such as finance charges and late charges, from constructing, building, erecting, **repairing**, grading, excavating, drilling, exploring, testing or adding to any building, highway, street, sidewalk, bridge, culvert, ***sewer***, irrigation or ***water system***, drainage or dredging system, levee or levee system or any part thereof, railway, reservoir, dam, power plant, electrical system, air conditioning system, heating system, transmission line, pipeline, tower, dock, storage tank, wharf, excavation, grading, water well, any other improvement or structure or any part thereof when the compensation received exceeds Ten Thousand Dollars ($10,000.00). Such activities shall not include constructing, repairing or adding to property which retains its identity as personal property. The tax imposed in this section is levied upon the prime contractor and shall be paid by him.

Miss. Code Ann. § 27-65-21 (Rev. 2005)(emphasis added).[5]

The statute clearly states in unqualified, unambiguous terms that repairs to water and sewer systems are subject to the contractor's tax. The Mississippi sales tax code defines maintenance and repair as the same taxable activity. Therefore, maintenance activities are likewise taxable in the same manner as repairs. "Repair, repairs, or maintenance" defined by statute mean, "the restoring of property in some measure to its original condition, which may involve the use of either personal property or labor or both, but, for the purposes of this chapter,

[5] Since at least 1987 and the years covered by this audit, including the current language, the above quoted provision in the contractor's tax statute has remained the same. Subsequent amendments to the contractor's tax statute from 1996 to present have impacted unrelated subsections only. See 1987 Miss. Gen. Laws, ch. 432.

the total charge for the service shall constitute gross income taxable in the class in which it falls." *Miss. Code Ann.* § 27-65-11 (Rev. 2005).

At the trial of this matter held on January 10, 2005, Eco presented no evidence whatsoever that the Commission's assessment of tax at 59% of the base contract fees was in any way unreasonable, arbitrary, capricious, or not supported by substantial evidence. Instead, Eco placed all of its eggs in one basket by alleging that water and sewer systems retained their identity as personal property or as trade fixtures. As such, Eco claimed that municipal water and sewer systems were exempt from tax by the provision in § 27-65-21 that excludes application of the tax to property that retains its identity as personal property. For the reasons discussed below, Eco's theory and the lower court's acceptance of the same, is a flawed, unsound argument that this Court should reject.

III. The Fundamental Rule of Statutory Construction Is the Plain Language Rule.

The most fundamental rule of statutory construction is the plain meaning rule, which the lower court completely ignored. Simply stated, if the statute is not ambiguous then the court must apply the statute according to its terms. *State ex. rel Hood, et al vs. Madison County, Mississippi, et al*, 873 So.2d 85, 90 (Miss. 2004); *Allred vs. Yarbrough*, 843 So.2d 727, 729 (Miss. 2003); *City of Natchez v. Sullivan*, 612 So.2d 1087, 1089 (Miss. 1992).
If the statute is plain and unambiguous, there is no room for construction. *Balouch v. State*, No. 2003-CT-00386-SCT, ___ So. 2d ___, 2006 WL 2829827 (Miss. October 5, 2006); *Mississippi State Tax Commission v. Trailways Lines, Inc.,* 567 So. 2d 228, 232 (Miss. 1990).

> It is a well recognized principle of law in this State that ambiguity must exist in the language used by the Legislature in a statute before resort will be had to any rules of statutory construction or interpretation. Without ambiguity, the controlling law of this State requires the Court look no further than the clear language of the statute and apply it.

Mississippi State Tax Comm'n, 567 So. 2d at 232, citing *Forman v. Carter*, 269 So. 2d 865, 868 (Miss. 1972). The ultimate goal of the court in applying a statute is to give effect to legislative intent. *Allred*, 843 So.2d at 729. In doing so, the court is to interpret the statute as written and not to add language. *Singing River Hospital System v. Biloxi Regional Medical Center*, 928 So. 2d 810, 813 n.7 (Miss. 2006). The court must presume that the words are intended to convey their usual, literal meaning as used in the statute where the language is plain and unambiguous. *Balouch v. State*, No. 2003-CT-00386-SCT, ___ So. 2d ___, 2006 WL 2829827 (Miss. October 5, 2006).

In the case at bar, the task for the court on statutory construction is easy. This is so because **on its face--by the plain, unambiguous language of § 27-65-21, the legislature specifically stated that repair work to water and sewer systems is subject to the contractor's tax**. There is no ambiguity. A review of the statue can lead to no other interpretation or result, and any attempt to hold otherwise would be erroneous.

The plain language of § 27-65-21(1)(a)(i) levies the tax on the total contract price or compensation received from constructing, building, repairing, etc., to any sewer system or water system. In the lower court opinion, the chancellor opined that the main water lines and main sewer lines were "protected realty" and inferred that work performed on the main lines would be subject to the tax. But this is not what Section 27-65-21 states nor is it a term that the legislature used. The legislature did not solely tax water *lines* or sewer *lines* in Section 27-65-21; the legislature expressed clear intent to tax water **systems** and sewer **systems,** which by its plain meaning included all of the necessary components of a water and sewer system and not solely its main lines. A common and ordinary understanding of a "system" as well as its dictionary definition of a system is, "a complex unit formed of many often diverse parts subject to a common plan or serving a common purpose." *Webster's New International* (3rd ed. 1986).

The dictionary definition is an apt description for a municipal water and sewer system, not a primary water line.

There is another compelling reason why Eco's theory of a personal property exemption fails. Paragraph (b)(iii) of the of contractor's tax statute provides as follows:

> (b) The following shall be excluded from the tax levied by this section:
>
> [. . . .]
>
> (iii) The contract price or compensation received to restore, repair or replace a utility distribution or transmission system that has been damaged due to ice storm, hurricane, flood, tornado, wind, earthquake or other natural disaster if such restoration, repair or replacement is performed by the entity providing the service at its cost.

Miss. Code Ann. § 27-65-21(1)(b)(iii) (Rev. 2005).

Paragraph (b)(iii) grants a special exemption from the contractor's tax for utility distribution systems (i.e. water and sewer systems) for repair, restoration and replacement necessitated by damage caused by act of nature occurrences and performed at cost by the provider. It is a special break from the contractor's tax conferred by legislative grace that a contractor such as Eco would be eligible to take advantage of if any of its work met the criteria for claiming this. This specific exclusion for work performed at cost due to natural disasters is a clear indication that under normal circumstances (repairs and maintenance not necessitated by natural disaster) contract fees received for repair, restoration, or replacement to a utility distribution or transmission system **are taxable**. Otherwise, there would have been no need to express the exemption for act of nature occurrence repairs performed at cost. Obviously, the water/sewer systems operated by the five municipalities are utility distribution/transmission systems. It should be noted that the legislature used the terms distribution and transmission ***systems*** to express the exemption rather than distribution lines or transmission lines. Again, the he use of the word "systems" is an expression of legislative intent that it was identifying all of

the necessary components of a distribution or transmission system and not just the primary lines.

IV. Taxation Is the Rule and Exemptions Must Be Clearly Established.

In addition to the plain language rule of statutory construction, there are other well-settled rules of statutory construction for tax statutes that belie Eco's claim that it is entitled to a personal property exemption under the contractor's tax statute. With regard to the application of tax statutes specifically, there are certain bedrock principles of statutory interpretation that Mississippi courts have consistently followed.

In applying tax statutes, the Mississippi Supreme Court follows the principle that taxation is considered the rule, and exemption is the exception. *Mississippi State Tax Commission vs. Medical Devices, Inc.*, 624 So.2d 987, 990 (Miss. 1990). Since exemptions from tax are not favored, the rule is that an exemption is never presumed. On the contrary, in all cases having doubt as to legislative intent or the inclusion of a particular property within the terms of a tax statute, the presumption is in favor of the taxing power, and the burden is on the claimant to prove or clearly establish his right to exemption. *Medical Devices, Inc.*, 624 So.2d at 990. The Mississippi Supreme Court in *Medical Devices* went further, recalling its application of tax statutes in prior cases:

> In *Better Living Services, Inc. v. Bolivar County*, 587 So.2d 914, 916-17 (Miss. 1991), this Court stated 'that the law exempting property will be strictly construed against the exemption and in construing the statute the rule *ejusdem generis* applies.' 'The language of the statute must be construed most favorably to the taxing power, and the claimant has the burden of showing clearly his right to an exemption.' *Fuel Services, Inc. v. Rhoden*, 245 So.2d 600, 602 (Miss. 1971).
>
> [. . . .]
>
> In *Monaghan*, the Court stated and applied the following rules of construction:
>
> When the statute purports to grant an exemption from taxation, the universal rule of construction is that the tax exemption provision is to be construed strictly against

the one who asserts the claim of exemption, in the absence of expressed legislative intent that the exemption is to be construed otherwise.

> 'The rule is universal that he who claims exemption (from taxation) must show affirmatively an exemption expressly declared, and that the claimant is clearly embraced within the terms of the exemption.' . . . One claiming exemption from taxation assumes the burden of showing that he is entitled to it; and that statutes of exemption from taxation must be strictly construed . . . The Court again held that persons or corporations seeking an exemption from taxation must bring themselves within the letter of the statute. All reasonable doubts are resolved against the exemption.

Medical Devices, Inc., 624 So.2d at 990-91, quoting, *Monaghan v. Jackson Casket Company*, 242 Miss. 840, 136 So.2d 603, 606 (1962). As the Court explained in *Medical Devices*, exemptions from taxation are matters of legislative grace. *Medical Devices, Inc.*, 624 So.2d at 990. For that reason they must be construed against the taxpayer. Additionally, this court in *Medical Devices* recognized that some courts have gone so far as to say that one claiming the exemption has the burden of establishing it beyond a reasonable doubt. *Medical Devices, Inc.*, 624 So.2d at 991, citing 68 Am. Jur. 2d *Sales and Use Tax* § 123 (1993). In the case before the court, not only could Eco not meet the standard of proving an exemption under the standard articulated in *Medical Devices*, but Eco is proposing that the court read an exemption into the statute's four corners that simply does not exist.

V. Specific Language always Controls over General Language & Courts Must Defer to an Agency's Reasonable Interpretation of a Statute that it Administers.

As discussed above, Section 27-65-21 contains an express, specific directive that contracts for repair work to water systems and to sewer systems are to be taxed at a rate of 3.5% of the total contract price or compensation received. *Miss. Code Ann.* § 27-65-21(1)(a)(i) (Rev. 2005). This language is followed by a general provision that states the tax does not apply to constructing or repairing property that retains its identity as personal property. *Id.* The specific mention of water and sewer systems is another example of statutory intent that the

repair and maintenance services that Eco provided are taxable. This argument is supported because specific language in a statute governs and controls over general language. *State ex rel. Hood v. Madison County* 873 So. 2d 85, 91 (Miss. 2004); *Yarbrough v. Camphor*, 645 So. 2d 867, 872 (Miss. 1994); *Lenoir v. Madison County*, 641 So. 2d 1124, 1128-30 (Miss. 1994). Moreover, statutory construction rules dictate deference to the agency charged with enforcing the statute as long as the agency's interpretation of the statute is reasonable and not repugnant to the plain meaning of the statute. *Mississippi Gaming Comm'n v. Imperial Palace of Mississippi, Inc.*, 751 So. 2d 1025, 1029 (Miss. 1999). The court need not conclude that the agency's interpretation was the only permissible interpretation for it to adopt or that the agency's interpretation would have been the same interpretation the court would have made if initially presented to the court. Instead, the court is duty bound to give deference to the agency's interpretation unless that interpretation is repugnant to the plain meaning of the statute. *Mississippi Gaming Comm'n,* 751 So. 2d at 1029. See *Bynum v. Mississippi Dep't of Education*, 906 So. 2d 81, 106 (Miss. Ct. App. 2004)(court defers to agency's interpretation of its own rules and statutes unless interpretation contravenes statutory language); *Gill v. Mississippi Dep't of Wildlife Conservation*, 574 So. 2d 586, 593 (Miss. 1990).

VI. Even if the Court is Inclined the Make the Realty Versus Personal Property Distinction to Resolve the Taxability of Eco's Activities, the Chancellor Erred in Concluding Water Systems and Sewer Systems Are Personal Property under Mississippi Law. Water Systems and Sewer Systems Are Clearly Realty under Mississippi Law.

Notwithstanding the fact that the plain language of Section 27-65-21 taxes the activities of Eco, even if the court is inclined to accept Eco's invitation to make the realty/personalty analysis to determine taxability, municipal water systems and municipal sewer systems are clearly realty--not personal property or trade fixtures. To this end, the chancery court erred not

only by ignoring the settled rules of statutory construction, but as a matter of law the chancellor erred in determining that municipal water systems and municipal sewer systems were items of personal property.

In Mississippi jurisprudence the status of property as realty or personalty focuses on the intent of the party who annexes the property to the real estate. *Bondafoam, Inc., et al vs. Cook Construction Co., Inc.*, 529 So.2d 655, 658 (Miss. 1988); *Mississippi Butane Gas System Co., Inc. v. Glisson, et al.*, 194 Miss. 457, 466, 10 So.2d 358, 360 (1942); *Motorola Communications and Electronics, Inc. vs. Dale*, 665 F.2d 771, 773 (5th Cir. 1982). The inquiry of intent is whether the party annexing the property to the real estate intends the annexation to be a temporary attachment or a permanent accession to the realty. *Potters II, a Mississippi General Partnership, et al. vs. State Highway Commission of Mississippi*, 608 So.2d 1227, 1237 n.12 (Miss. 1992); *Frederick v. Smith*, 147 Miss. 437, 444, 111 So. 847, 848 (1927); *Fidelity-Phenix Fire Ins. Co. v. Redmond*, 144 Miss. 749, 764, 111 So. 366, 368 (1926); *Motorola Communications and Electronics, Inc. vs. Dale*, 665 F.2d 771, 773 (5th Cir. 1982)(quoting *Weathersby v. Sleeper*, 42 Miss. 732, 741-42 (1869)). In determining whether the intent of annexation was temporary or permanent, the court should consider: (1.) the nature of the property itself; (2.) the mode of attachment; (3.) the purpose for which it is used; (4.) the relation of the party making the annexation; and, (5.) other attending circumstances indicating the intention to make it a temporary attachment or a permanent accession to the realty. *Potters II*, 608 So.2d at 1237 n.12; *Frederick*, 111 So. at 848; *Fidelity-Phenix Fire Ins. Co.*, 111 So. at 368; *Motorola Communications and Electronics, Inc.*, 665 F.2d at 773. In considering the permanency of the property, permanence does not have to mean perpetually. Rather, it means fixed or intended to be fixed. 36A Corpus Juris Secundum *Fixtures* § 11 (2003). Further, to be fixed or intended to be fixed, it is sufficient if the item is intended to remain where it is affixed

until it is worn out, until the purpose that it is devoted to is accomplished, or until it is upgraded or superseded by another item more suitable for the purpose. *Id.*

The nature of the property itself, the first factor, is that these are municipal water *systems* and municipal sewer *systems*. While the systems are composed of water mains, water lines, pumps, wells, valves, holding towers, lift stations, electrical circuit stations, treatment plants, reservoirs, and the like, it is incumbent upon the court not to isolate and focus upon individual components of either system. Section 27-65-21 taxes repair and maintenance to water *systems* and sewer *systems*. Furthermore, Eco did not contract to operate, manage and maintain the various bits and pieces such as wells, circuit boards, gauges, meters, pumps, valves, pipelines, etc. Eco contracted to operate, manage, and maintain water and wastewater facilities and water treatment and distribution *systems* and wastewater collection *systems*.[6]

As to the second factor, mode of attachment, while individual pieces and components such as electrical switching stations may be located above ground, the bones and flesh of water systems and sewer systems with its network of pipes, valves, wells, etc, are buried well beneath the ground. Any removal of the same would cause significant damage to the real estate. This obvious characteristic of permanence was recognized by a New York court in holding that a sewer system was realty. See *In the Matter of the County of Nassau*, 40 Misc. 384, 243 N.Y.S.2d 223, 226 (Cty. Ct. of Nassau, N.Y. 1963). "It would be ridiculous to assume that . . . intended to remove the sewer line when it conveyed the land. This court therefore finds, that the sewer system, having been imbedded into the land, thus becoming affixed to the realty, improving the same and not being removable without substantial damage to the realty and virtual destruction of the sewer network, are fixtures and thus real property." *In the Matter of the County of Nassau*, 243 N.Y.S.2d at 226.

The third factor, the purpose for which the property is to be used, is one of the strongest indicators of permanence for municipal water and sewer systems. As long as there will be a civilized City of Biloxi, there will always be a need on a permanent basis for a water collection/delivery system to provide safe, potable water to Biloxi homes and businesses. The inverse is likewise true. As long as there will be a civilized City of Biloxi, there will always be a need to move and flush waste out of Biloxi homes and businesses. Suffice it to say that a temporary plan or fix for providing potable water to Biloxi homes and business and to remove sewer waste from the same would be ill-suited to meet Biloxi's needs. Even back in 1925, the South Carolina Supreme Court recognized this when the court held that the water system for Greenville, South Carolina, was realty and not personal property. "It does not seem reasonable that a populous city would expect or intend that its water system should be torn out or interfered with, and there are good reasons of public policy in connection with the health and welfare of the community for regarding such improvements as permanent." *Paris Mountain Water Company v. Woodside, County Treasurer and Foster, County Treasurer*, 133 S.C. 383, 395, 131 S.E. 37, 40 (S.C. 1925)(adopting lower court opinion). This is just as true today as it was over seventy-five years ago. Further, the fact that pumps, valves, circuit boards and other components are replaced and upgraded over time lends no force whatsoever to Eco's assertion that water and sewer systems are personal property or trade fixtures. The central inquiry for permanence is whether the system itself is intended to be fixed. Permanence does not demand perpetuity of a particular piece or component property. 36A Corpus Juris Secundum *Fixtures* § 11 (2003). Permanence is the touchstone--not perpetuity; and, things fall apart. Therefore, a machine is no less a fixture because it might have a limited life or need to be replaced,

[6] See Exhibits 16-20 (Eco agreements with cities of Biloxi, Southaven, D'Iberville, Olive Branch, and Horn Lake on the scope of services); R.E. at 53-80 (Eco agreement with City of Biloxi).

upgraded or overhauled. *Cleveland Electric Illuminating Company v. Continental Express, et al.*, 106 Ohio Misc.2d 19, 733 N.E.2d 328, 333 (Ct. Common Pl., Cuyahoga County 1999).

Finally, the relation of the party making the annexation is to be considered. The annexation of the water and sewer systems was made by city forefathers with the intent and purpose of it being permanent and to serve the city with basic subsistence for health and sanitation needs for its citizens. The systems were not placed into existence for any private purpose that might have a temporal quality or need.

Furthermore, Eco's argument that the component parts, bits and pieces of water systems and sewer systems are trade fixtures entitled to status as personal property completely fails Mississippi's definition of trade fixtures. Trade fixtures regarded as personal property must be buildings or fixtures placed into commercial trade or manufacturing purposes. *Simmons v. Bank of Mississippi*, 593 So.2d 40, 42 (Miss. 1992). The issue of trade fixtures is associated with improvements made by tenants during a leasehold period that can unjustly enrich the landlord at the expiration of the lease. *Simmons*, 593 So.2d at 42, citing *Anderson-Tully Co. v. United States*, 189 F.2d 192, 196 (5th Cir. 1951). The Mississippi definition of trade fixtures is consistent with the majority position. 36A Corpus Juris Secundum *Fixtures* § 34 (2003). Trade fixtures are articles of personal property brought on the leasehold by a tenant necessary to conduct a trade or business to which the premises will be devoted. The intent of a trade fixture is to benefit the business, not the land itself. 36A Corpus Juris Secundum *Fixtures* § 34 (2003). Eco's relationship with the contracting entities is not one of landlord-tenant, nor is the operation of the water and sewer system one for commercial or manufacturing purposes. Eco is operating a necessary governmental function. It is not operating a private manufacturing venture or pursuing commercial interests on behalf of the city. For these reasons, Eco fails in its attempt to associate municipal water and sewer systems with any aspects of a trade fixture.

Moreover, other courts have looked to clear distinctions between improvements that are annexed and integrated with the land for its permanent benefit regardless of future use, compared to machinery and structures which could only be used in a particular business or industry. *Zangerie v. Standard Oil Co. of Ohio*, 144 Ohio St. 506, 516, 60 N.E.2d 52, 57 (1945). Those of the first type are realty, while those of the second category are personal property in the nature of trade fixtures. This was the reasoning employed by the Ohio Supreme Court in determining that water systems and sewer systems were real estate. *Zangerie*, 60 N.E.2d at 57. Stated differently, there is a distinction between property integrated with a business (personalty), and property that is integrated with the realty upon which the business is located (realty). *General Motors Corp. v. Linden*, 150 N.J. 522, 532, 696 A.2d 683, 688 (1997). In explaining this distinction, the Ohio Supreme Court stated as follows:

> For the purposes of classification of annexed property as realty or personalty, the Ohio cases, herein cited, have clearly drawn a fundamental distinction between annexations which would be integrated with and of permanent benefit to the land regardless of its future use, such as a heating furnace, motive-power machinery, **water systems**, drainage and **sewer systems**, accessory to the land and not to the business carried on; and annexations of special-purpose, manufacturing or processing machinery and structures which could be used only in a particular business or industry and not in any normal use to which the land might be devoted, and hence accessory to the business in which they function and not accessory to the land. The decisive test of appropriation is whether the chattel under consideration in any case is devoted primarily to the business conducted on the premises, or whether it is devoted primarily to the use of the land upon which the business is conducted.

Zangerie v. Standard Oil Co. of Ohio, 144 Ohio St. 506, 515-16, 60 N.E.2d 52, 57 (1945)(emphasis added). This distinction emphasized by the Ohio Supreme Court is an appropriate one to apply to the water and sewer systems that Eco maintained. The water system and sewer system are permanent improvements to the realty that benefit all subsequent occupiers of the land. Such systems do not qualify as personal property because water systems and wastewater systems benefit all--with no commercial or private, special interest purpose.

In the lower court's opinion wherein the chancellor concludes that water systems and sewer systems are personal property, it is stated, "[T]he Court finds that SCT Rule 41 and its own memorandum to its auditors in evidence as Exhibit 38 are instructive and consistent with this interpretation." State Tax Commission Sales and Use Tax Regulation No. 41[7] is attached as an addendum for the Court's review. Rule 41 does nothing more and nothing less than re-state the provisions contained in the contractor's tax at Section 27-65-21. Like Section 27-65-21, Rule 41 lists taxable functions and activities that are subject to the 3.5% rate including in its list, "irrigation or water system, " "sewer" along with other functions such as "pipeline" "power plant" "water well" "electrical system" "railway" "transmission line" and others. Following the specific listing of these functions as taxable in a separate section under "Component Materials", the rule states that when considering whether component materials are realty and therefore taxable, one should look to whether the materials are permanently attached, with examples that follow.

There is nothing instructive *per se* about Rule 41 as it relates to any claim of a tax exemption by Eco. Contrary to what the lower court opinion implies, Rule 41 provides no substance for any credible analysis claiming a tax exemption. Rule 41 specifically lists water and sewer as **taxable**. As for determining personal property exemptions for component materials, the language contained in Rule 41 is nothing other that an expression of settled common law in Mississippi regarding the realty/personal property analysis. These are the same considerations discussed herein. See *Potters II, a Mississippi General Partnership, et al. vs. State Highway Commission of Mississippi*, 608 So.2d 1227, 1237 n.12 (Miss. 1992)(nature of property; mode of attachment; temporary attachment or permanent accession to the realty, etc.); *Frederick v. Smith*, 147 Miss. 437, 444, 111 So. 847, 848 (1927)(same). The same applies to

[7] Now codified at Title 35, Part IV, Subpart 10, Chapter 01, Mississippi Administrative Code.

Trial Exhibit No. 38 which was nothing other than a 1999 internal memo at the Tax Commission that condensed and summarized the relevant portions of Rule 41. R.E. at 104-05.

CONCLUSION

For the reasons stated herein, the lower court erred in its application of law. Further, Eco presented no evidence that the Commission's determination of tax at 59% of the contract fees was anything other that a reasonable, considered, and judicious approach to ensure that the taxpayer was not overtaxed--yet paid it lawful obligation of tax as required by Section 27-65-21. Therefore, this Court must reverse the judgment of the Harrison County Chancery Court, Second Judicial District, and render a judgment in favor of MSTC upholding and affirming the five orders of tax assessment that Commission entered on October 3, 2001. R.E. 43-52.

RESPECTFULLY SUBMITTED:

MISSISSIPPPI STATE TAX COMMISSION
JOSEPH L. BLOUNT,
CHAIRMAN AND COMMISSIONER
IN HIS OFFICIAL CAPACITY

By: 

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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 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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This the 8th day of November, 2006.

Dave Scott

Addendum

RULE 41. CONSTRUCTION CONTRACTORS .

Prime Contractor For purposes of this regulation the terms "contractor and "prime contractor" are construed to mean a person entering into an agreement, either verbal or written, with the owner of a project to perform such work as is described in the following paragraphs. A person may not contract with himself or a partnership in which he is a partner.

Subcontractor A subcontractor is construed to mean a person entering into an agreement with a prime contractor or other subcontractor to perform work required under the prime contract.

Management Contracts A person entering into an agreement on a fee basis is not considered a prime contractor when such person acts as a liaison between the owner of the project and the various contractors who are hired and paid directly by the owner.

Qualification and Payment of Tax A contractor, other than an oil or a gas well driller, taxable under Section 27-65-21 on a specified contract exceeding $10,000, shall make application to the Commissioner for a Material Purchase Certificate to identify the specific contract before work is begun. (See "Material Purchase Certificates and Component Materials".) Contracts for residential construction are not taxable under Section 27-65-21. (See "Residential Construction".)

The contractor's tax, together with any use tax due, must be paid before work is begun on any contract exceeding $75,000 unless a surety bond is filed with the State Tax Commission for these taxes. Bond forms are made available on request. (See "Bond Requirements".)

On taxable contracts of $75,000 or less, or when a bond is filed, the tax must be paid on a monthly basis as compensation is received. Any use tax due on equipment shall be payable on or before the 20th day of the month following the month in which the property is brought into Mississippi.

Persons or firms without a permanent place of business within Mississippi, are required to qualify and pay any use tax and the 3½% contractor's tax due on the total contract amount before work is begun unless a surety bond is filed as provided by Section 27-65-27 in an amount sufficient to cover these taxes.

Subcontractors who perform work on a qualified prime contract owe no tax on the subcontract price or gross income. However, the subcontractor is liable for the contractor's tax on that portion of the work sublet to him should the prime contractor fail to qualify the contract and pay the amount of tax due..

The 2% taxpayer discount is not allowed on sales tax imposed and levied by Section 27-65-21 (contractor's tax).

Activities Taxed and Application of Rates A tax of 3½% is levied on the total contract amount or compensation received from all contracts, except residential construction, that exceed $10,000 when the work to be performed is constructing, building, erecting, repairing, grading, excavating, drilling, exploring, testing or adding to any of the following:

air conditioning system	heating system	Sidewalk
bridge	highway	storage tank
building	irrigation or water system	Street
culvert	levee or levee system or any part	Tower
dam	oil or gas well (See Rule 56.)	Transmission line
dock	Pipeline	water well
drainage or dredging system	power plant	wiring for communication or information systems
electrical system	Railway	Wharf
excavation	Reservoir	
grading	Sewer	

any other improvement or structure or any part thereof (fences, etc.)

The tax is levied upon the prime contractor and includes contracts with the United States Government, the State of Mississippi or any political subdivision or any other exempt agency without any deduction whatever for amounts paid to subcontractors, architects, engineers, landscapers or for any other costs or

expenses (including the 3½% contractor's tax) incurred by the contractor. Liquidating damages that are withheld by the owner are not to be included in taxable contract receipts. The portion of the total contract price attributable to design or engineering services may be excluded from the contractor's tax for contracts entered into on or after July 1, 1987, where the total contract price for the project exceeds $100,000,000.

A person taxable under Section 27-65-23 who performs any of the above activities as a prime contractor for compensation in excess of $10,000 shall qualify and pay tax as a contractor in lieu of the tax levied by Section 27-65-23. Persons or businesses so taxed under Section 27-65-23 are:

Air conditioning installation or repairs;
Electrical work, wiring, all repairs or installations of electrical equipment;
Elevator or escalator installation or repairs;
Grading, excavating, ditching, dredging or landscaping;
Insulating services or repairs;
Plumbing or pipe fitting;
Tin and sheet metal work;
Welding, etc.

Persons performing any of the above services for contracts of $10,000 or less owe the regular retail sales tax on gross income. Persons performing contracts of $10,000 or less which do not include Section 27-65-23 services owe no tax on gross income but are required to pay the regular retail sales or use tax on all taxable purchases.

Continuous contracts on a project embracing activities taxable under Section 27-65-21 for a definite period of time and a definite amount will be qualified and taxed at 3½% . Otherwise, the determination of a taxable contract will be from purchase orders, work orders or invoices. Purchase orders, work orders or invoices that are a continuation of prior purchase orders, work orders or invoices will be considered one project. Generally a project is in the same, adjacent or adjoining area. Transmission lines (gas, water, sewage, power, telephone, etc.) are considered a project. Amounts included which embrace non-taxable activities (grass cutting, tree trimming, etc.) may be excluded from the taxable amount of the contract. Section 27-65-21 provides for that portion of the contract price or compensation received representing the sale and installation of manufacturing or processing machinery for a manufacturer or a custom processor to be taxed at the special rate of 1½% in lieu of the 3½% rate specified above. (Manufacturing machinery is defined in Rule 47).

Individual contracts for construction of several buildings, streets, etc., or parts thereof may be qualifiable as a prime contract despite the fact that the compensation for separate parts of the project is less than $10,000. In order to determine whether such contracts are qualifiable, consideration must be given to the activities involved.

Contracts for the performance of work upon personal property, such as shipbuilding or ship repairing, or activities which consist of demolishing or razing old property or clearing land are not subject to the provisions of Section 27-65-21. However, where land clearing or building razing are incidental activities to the primary purpose of the contract, such as highway or building construction, the total contract is taxable. No separation of incidental activity will be allowed even though it may be subcontracted.

As of March 27, 1997, contractor's tax will not apply to the contract price or compensation received to restore, repair, or replace a utility distribution or transmission system (electric, gas, water, sewage, telephone, etc.) damaged by an ice storm, hurricane, flood, tornado, wind, earthquake or other natural disaster if the entity performing the restoration, repair or replacement is reimbursed for its cost only.

Floating Structures Effective July 1, 1996, a 3½% tax will be levied on the gross proceeds or gross receipts from the sale of any tangible personal property that becomes a component part of the structure or the performance of any construction activity upon any floating structure (not limited to casinos) . These floating structures are normally moored and not normally engaged in the business of transporting people or property. These structures are located within the waters of the State of Mississippi. This tax does not apply to tangible personal property that does not become a component part of the structure. If one contractor is doing both the land based and floating structure construction, this tax may be paid by the contractor, otherwise, the owner of floating structure is responsible for the tax. The owner of a floating structure, subject to the 3½% tax, will be issued a distinctive number similar to an MPC Number.

The owner will provide this number to the prime contractors and sub-contractors. This will allow the purchase of component materials and parts for use in the construction activities exempt from further sales tax.

The owner of a floating structure will also be issued a direct pay number. (Refer to Rule #8 for Direct Pay Number treatment) With the use of the MPC number and this direct pay number, tax is accrued on the owner's use tax return and not paid to vendors.

The contractor will be allowed to qualify those contracts involving both land based and water based structures that cannot be easily separated, as long as the land based portion of the contract is in excess of $10,000.

Material Purchase Certificates and Component Materials A contractor's Material Purchase Certificate (MPC number) will be issued to a qualified contractor for each contract. The MPC number allows the contractor and his subcontractors to make tax-free purchases of materials and services that become a component part of the structure covered by the MPC number. The MPC number expires upon completion of the contract.

The contractor and his subcontractors shall provide their suppliers with the MPC number when purchasing component materials. The supplier shall list the MPC number on each sales invoice as a prerequisite to claiming the exemption.

Component materials are considered all materials that become an integral part of the structure being erected. For personal property to be considered real property, it must be permanently attached to real property. To be considered permanently attached, one or more of the following criteria must be met:

1. The property or equipment must be attached to building walls, floors, and/or ceiling in such way as to require design or structural alterations to the real property to which it is being attached, or
2. The property could not be removed intact or its removal would result in the alteration or destruction of the structure or property, or
3. The property must become an independent structure, itself (real property)

And the property must lose its identity as personal property.

Component materials may include built-in furniture, fixtures, appliances and similar personal property. Free-standing furniture, fixtures, appliances and similar personal property are not considered component materials. The purchase or sales price of such non-component materials is taxed at the regular retail rate and may be excluded from the measure of the contractor's tax.

Free-standing personal property sold under a contract with either the United States Government, the State of Mississippi or any political subdivision or any other exempt agency, that has been qualified, can be purchased tax free. The contractor must apply to the Tax Commission for a letter granting the authority to purchase free-standing personal property tax free.

When records and invoices are not kept in compliance with this regulation, sales made to the contractor or subcontractor will be considered retail sales, taxable at the regular retail rate. (Also see "Equipment and Supplies").

Bond Requirement. A surety bond must be filed on taxable contracts exceeding $75,000.00 performed in this State unless the tax is prepaid. Persons or firms without a permanent place of business within Mississippi, must file a surety bond on any taxable contract in excess of $10,000, unless the tax is prepaid.

Such bonds shall be either (a) "job bonds" which guarantee the payment of taxes resulting from performance of a specified job or activity regardless of date of completion; or (b)"blanket bonds" which guarantee the payment of taxes resulting from performance of all jobs or activities taxable under Section 27-65-21 begun during a specified period, regardless of the date of completion. The bond must be sufficient to cover the liability for sales, use, income, withholding and motor fuel taxes and must be approved by the Commissioner.

In the case of prepayment of sales tax where a use, income, withholding or motor fuel tax bond is required, the contractor will be notified after an application for a Material Purchase Certificate has been received.

When a contractor defaults in the execution of his contract and the bonding company acting as surety for the performance of the contract assumes completion of the contract, the bonding company becomes liable for the payment of the sales, use, income, withholding and motor fuel tax accruing as a result of its activities.

Owner Construction. A person constructing buildings on property which he owns is not a contractor and is liable for the retail sales or use tax on all materials or services purchased even though the person may enter into a contract to sell the building and lot (real property) before construction is completed.

Residential Construction. The contract price or compensation received for constructing, building, erecting, repairing, or adding to any building, electrical system, heating system or any other improvement or structure which is used for or primarily in connection with a residence or dwelling place for human beings is excluded from the 3½% contractor's tax provided by Section 27-65-21. Sales of materials and services for use in such construction activities are taxed at the regular retail rate of tax provided by Sections 27-65-17, 27-65-23 and 27-65-5. Such residences shall include homes, apartment buildings, condominiums, mobile homes, summer cottages, fishing and hunting camp buildings and similar buildings, but shall not include hotels, motels, hospitals, nursing or retirement homes, tourist cottages, military barracks, school dormitories, sorority and fraternity houses, or other commercial establishments. A nursing home is any complex that provides any type of assisted living. The caregiver can be either medical or non-medical personnel.

Equipment and Supplies. Purchases by contractors and subcontractors of work equipment, tools, building forms, repair parts for work equipment and similar tangible personal property that do not become a component part of the structure being erected are taxed at the regular retail rate of sales or use tax. When property of this type has been previously used in another state and is imported into this State for use, the use tax is due on the fair market value of the property at the time of importation. At no time shall the value be less than 20% of original cost. Credit for sales or use tax paid to another state in which the property was acquired or used may be taken in computing the amount of use tax due this State. The credit must be computed by applying the rate of sales or use tax paid to another state to the value of the property at the time it enters Mississippi.

Owners or other persons receiving benefit from use of tangible property in this State are liable for use tax on such property.

Rental or lease of equipment and other tangible personal property is taxed at the same rates as sales of the same property.

Persons or firms domiciled outside the State who perform contracts in Mississippi are construed to be doing business within the State and are subject to the various provisions of the Sales and Use Tax Laws, the Income and Withholding Tax Laws, the Franchise Tax Laws and the Motor Fuel Tax Laws in the same manner as are resident taxpayers.

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