

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

5K FARMS, INC.

APPELLANT

VS.

NO.: 2009-CT-01787-SCT

**MISSISSIPPI DEPARTMENT OF
REVENUE F/K/A MISSISSIPPI STATE
TAX COMMISSION**

APPELLEE

**Appeal from the Chancery Court of
Hinds County, Mississippi
First Judicial District**

**APPELLEE'S SUPPLEMENTAL BRIEF TO ADDRESS
CONSTITUTIONAL ISSUE UNDER ARTICLE 6, SECTION
146 OF THE MISSISSIPPI CONSTITUTION OF 1890,
AS ORDERD BY THE MISSISSIPPI SUPREME COURT
AFTER GRANTING CERTIORARI**

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**APPELLEE'S SUPPLEMENTAL BRIEF TO ADDRESS
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THE MISSISSIPPI CONSTITUTION OF 1890, AS ORDERED BY THE
MISSISSIPPI SUPREME COURT AFTER GRANTING CERTIORARI**

COMES NOW, the Mississippi Department of Revenue, formerly known as the Mississippi State Tax Commission¹ (hereinafter referred to as the "Mississippi State Tax Commission" or the "MSTC"²) and files this its Supplement Brief to address the constitutional issue under Article 6, Section 146 of the Mississippi Constitution of 1890 and establish that enactment of Miss. Code Ann. § 27-77-5 and § 27-77-7 (Rev. 2005) and amendment of those statutes in 2010 do not violate the separations of power of the Mississippi Constitution of 1890.³

¹ On July 1, 2010, the Mississippi State Tax Commission was reorganized into the Mississippi Department of Revenue and the Mississippi Board of Tax Appeals. See Laws of Mississippi, 2009, Ch. 492. With this reorganization, the Mississippi Department of Revenue became the successor to the Mississippi State Tax Commission in this appeal.

² The present appeal involves an assessment, administrative appeal and an attempted judicial appeal that all took place before the July 1, 2010 reorganization of the Mississippi State Tax Commission. For this reason all references to the agency that assessed the tax and defend against the present action below shall be to "Mississippi State Tax Commission" or "MSTC" and the term "State Tax Commission" to refer to the three-member appellate body that heard the administrative appeal by 5K Farms, Inc.

³ By order dated November 28, 2011, Mississippi Supreme Court entered an Order in this appeal ordering the parties in this appeal to file supplemental briefs to address whether Mississippi Code Sections 27-77-5 and 27-77-7 (Rev. 2005), as well as Mississippi Code Sections 27-77-5 and 27-77-7 (Rev. 2010) are constitutional under Mississippi Constitution Article 6, Section 146 and whether Legislature violated separation of powers by enacting these laws. This supplemental brief is the Commission's compliance with this Order.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

On March 3, 2008, the MSTC assessed 5K for nonhazardous waste disposal fees in the amount of \$157,096.94 which consisted of \$133,133.00 in fees, \$10,650.64 in interest and \$13,313.30 in penalty. (R. 4, 8). 5K appealed the assessment to the MSTC's Board of Review which upheld and affirmed the assessment. (R.4, 8). Feeling further aggrieved by the decision of the Board of Review, a subsequent appeal was filed with the State Tax Commission, before which a hearing was held on January 21, 2009. (R.7-10). On March 17, 2009, the State Tax Commission entered its order reducing the assessment to \$133,133.00, being the tax amount, and affirmed the assessment as reduced. (R.7-10). This Order of the State Tax Commission also provided that 5K was to pay the amount of \$133,133.00 as affirmed by the Order, "within thirty (30) days from the date of this order, or file a petition in Chancery Court appealing this order." (R. 9). The Order went on to provide that "[e]ven if a petition is filed, Miss. Code Ann. § 27-77-7(3) requires that the petition be accompanied by a surety bond in double the amount in controversy or that 5K Farms, Inc. pay the assessment as affirmed herein under protest prior to the filing of such petition. This order and findings contained herein shall become final if 5K Farms, Inc. does not file within thirty (30) days from the date of this order a petition in Chancery Court in accordance with Miss. Code Ann. § 27-77-7." (R. 9).

On April 16, 2009, 5K filed a Complaint in the Chancery Court of Hinds County, Mississippi, which initiated the present action. (R.1-6, 31). 5K did not post a bond with the court, nor did it pay the tax assessment as affirmed by the State Tax Commission in its order. (R.13-14). Allegedly in lieu of paying the tax or posting the bond, 5K filed a motion for supersedeas on April 16, 2009 seeking an order from the court allowing the appeal without bond. (R.13-14). The MSTC filed a motion to dismiss and objected to 5K's motion for supersedeas.

(R.21-23, 26-28) 5K filed a response to the dismissal motion (R.31-57). After a hearing on this matter, the Chancellor entered an order dismissing the case for lack of subject matter jurisdiction. (R.29-30, 58-60). 5K filed a motion to reconsider and the MSTC filed a response thereto. (R.61-70, 71-14). After a hearing on the motion for reconsideration, said motion was denied and the pending appeal was filed with this Court. (R.77, 78-79, 80-81).

5K appeal filed its Notice of Appeal in this case with the Chancery Clerk on October 29, 2009. This appeal was assigned to the Mississippi Court of Appeals on August 25, 2010. After briefing, oral argument was heard by the Court of Appeals in this case on November 30, 2010. On March 15, 2011, the Court of Appeals entered its opinion affirming the decision of the Chancellor below to dismiss the case for lack of subject matter jurisdiction. 5K filed its Motion for Rehearing by the Court of Appeals on March 29, 2011. On August 9, 2011, the Court of Appeals entered its Order denying 5K's Motion for Rehearing. On August 23, 2011, 5K filed in this appeal Appellant's Petition For Writ Of Certiorari To The Mississippi Supreme Court. On August 30, 2011, the MSTC filed Appellee's Response To Appellant's Petition For Writ of Certiorari To The Mississippi Supreme Court. This Court granted 5K's Petition For Writ of Certiorari To The Mississippi Supreme Court by Order dated November 10, 2011. The MSTC filed on Monday, November 21, 2011, Appellee's Supplemental Brief To Mississippi Supreme Court Upon Granting Of Appellant's Petition For Writ of Certiorari raising primarily the recent decision of *Akins vs. Mississippi Dept. of Revenue*, 70 So.3d 204 (Miss. 2011) wherein this Court found that the administrative and judicial appeal procedure under Miss. Code Ann. § 27-77-5 (Rev. 2005) and Miss. Code Ann. § 27-77-7 (Rev. 2005) meet the requirements of due process and affirmed the chancellor's decision to dismiss the taxpayer's complaint under Miss. Code Ann. § 27-77-7 for lack of jurisdiction due to the failure of the taxpayer to pay the tax or post a bond in double the amount in controversy. *Id.* at 209.

By order dated November 28, 2011, this Court ordered the parties in this appeal to file supplemental briefs to address whether Mississippi Code Sections 27-77-5 and 27-77-7 (Rev. 2005), as well as Mississippi Code Sections 27-77-5 and 27-77-7 (Rev. 2010) are constitutional under Mississippi Constitution Article 6, Section 146 and whether the Legislature violated separation of powers by enacting these laws.

STATEMENT OF THE FACTS

In regard to this brief, the facts are simple. On March 3, 2008, the MSTC assessed 5K for nonhazardous waste disposal fees in the amount of \$157,096.94.⁴ (R. 4, 8). Pursuant to Miss. Code Ann. § 27-77-5 (1) (Rev. 2005), 5K timely appealed this assessment to the Review Board of the MSTC which, after notice and hearing, affirmed the assessment. (R.4, 8). 5K, pursuant to Miss. Code Ann. § 27-77-5(4) (Rev. 2005), then timely appealed from the decision of the Review Board to the three (3) member State Tax Commission. (R.4, 8) After notice and hearing, the State Tax Commission on March 17, 2009, entered its order reducing the assessment to \$133,133.00, being the tax amount and affirmed the assessment as reduced. (R.7-10). This Order provided for 5K to pay the \$133,133.00 as affirmed by the Order, “within thirty (30) days from the date of this order, or file a petition in Chancery Court appealing this order.” (R. 9). The Order went on to provide that “[e]ven if a petition is filed, Miss. Code Ann. § 27-77-7(3) requires that the petition be accompanied by a surety bond in double the amount in controversy or that 5K Farms, Inc. pay the assessment as affirmed herein under protest prior to the filing of such petition. This order and findings contained herein shall become final if 5K Farms, Inc. does

⁴ The non-hazardous waste disposal fee is levy under Miss. Code Ann. § 17-17-219 and collected by the MSTC at the rate of \$1.00 per ton. Miss. Code Ann. § 17-17-219(4) provides that “[a]ll administrative provisions of the Mississippi Sales Tax Law...shall apply to all persons liable for fee under the provision of this chapter and the Tax Commissioner shall exercise all the power and authority and perform all the duties with respect to taxpayers under this chapter as are provided in the Mississippi Sales Tax Law...” One of the duties exercise by the MSTC under the sales tax law is the assessment of tax when a taxpayer fails to report and pay tax due or underreports the tax due. See Miss. Code Ann. § 27-65-35 and § 27-65-37.

not file within thirty (30) days from the date of this order a petition in Chancery Court in accordance with Miss. Code Ann. § 27-77-7.” (R. 9).

On April 16, 2009, 5K filed a Complaint in the Chancery Court of Hinds County, Mississippi, which initiated the present action. (R.1-6, 31). In the unnumbered introductory paragraph of the Complaint, 5K asserts “COMES NOW 5K Farms, Inc. (“5K”), through counsel and makes their Original Complaint pursuant to Miss. Code Ann. § 27-77-7 against the Mississippi State Tax Commission.” (R. 1). 5K also asserts in paragraph 3 of this Complaint that “This Court is a proper court of jurisdiction and venue of this matter pursuant to Miss. Code Ann. § 27-77-7”. (R. 1) In this Complaint, 5K does not alleged that it has posted the bond required by Miss. Code Ann. § 27-77-7(3) (Rev. 2005) or chose the alternative contained in Miss. Code Ann. § 27-77-7(3) (Rev. 2005) to “pay to the agency, under protest, the amount ordered by the commission to be paid and seek a refund of such taxes, plus interest thereon.” The Motion For Supersedeas filed at the same time as the Complaint clearly indicates that 5K failed to accompany its Complaint with the bond required by Miss. Code Ann. § 27-77-7(3)(Rev. 2005) or to elect the alternative of paying the tax under protest prior to filing the Complaint. (R.13-14). 5K also failed to allege in its Complaint or raise before the Chancery Court below that the administrative and/or judicial appeal procedure under Miss. Code Ann. § 27-77-5 (Rev. 2005) and Miss. Code Ann. § 27-77-7 (Rev. 2005) was unconstitutional for any reason, including as a violation of Article 6, Section 146 of the Mississippi Constitution of 1890 and/or of Article 1, Sections 1 & 2 of the Mississippi Constitution of 1890, being the Separation of Powers Clauses of the Mississippi Constitution. The only constitutional issues raised by 5K in regard to Miss. Code Ann. § 27-77-5 (Rev. 2005) and Miss. Code Ann. § 27-77-7 (Rev. 2005) in its initial briefing in this appeal was an alleged due process violation. See Brief of Appellant, page 10. It was not until 5K’s Petition for Writ of Certiorari that 5K raised the contention that the

requirement of Miss. Code Ann. § 27-77-7(3) to post a bond violates “Article 6, Section 144, of the Mississippi Constitution of 1890.” Petition for Writ of Certiorari, p. 4.

SUMMARY OF ARGUMENT

The MSTC submits that the issue of whether the bond or payment requirement under Miss. Code Ann. § 27-77-7 (Rev. 2005) and Miss. Code Ann. § 27-77-7 (Rev. 2010) violates Article 6, Section 146 of the Mississippi Constitution of 1890 or the Separation of Powers provision found at Article 1, Sections 1 and 2 of the Mississippi Constitution of 1890 is not properly before this Court. There is nothing in the record in this appeal that indicates that such constitutional claims were raised before the Chancery Court below. This Court should not consider this constitutional challenge raised for the first time on appeal. See *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199, 202-203 (Miss. 1999), *Stockstill v. State*, 854 So. 2d 1017, 1023 (Miss. 2003), *In re V.R.*, 725 So. 2d 241, 245 (Miss. 1998) and *Lemon v. Mississippi Transportation Commission*, 735 So. 2d, 1013, 1024 (Miss. 1999).

If however this Court does consider these constitutional claims, it will not find that the posting of the bond or the payment of tax under protest requirement under Miss. Code Ann. § 27-77-7 (Rev. 2005) or under Miss. Code Ann. § 27-77-7 (Rev. 2010) violates either Article 6, Section 146 of the Mississippi Constitution of 1890 or the Separation of Powers provision found at Article 1, Sections 1 and 2 of the Mississippi Constitution of 1890. Rather, it will find the valid exercise of the power of the Legislature to establish the substantive right to appeal from the three (3) member State Tax Commission and from the Mississippi Board of Tax Appeals. The bonding and payment requirement are simply prerequisites to filing suit that the Legislature is entitled to establish. *Wimley v. Reid*, 991 So. 2d 135, 139 (Miss. 2008). It is clear from the language of Miss. Code Ann. § 27-77-7(4) (Rev. 2005) and Miss. Code Ann. § 27-77-7(5) (Rev. 2010) that the Legislature never intended for the Chancery Court to be vested with jurisdiction in

such appeal until the Petition was **properly** file with the accompanying bond or payment of the tax under protest before the filing of the Petition.

This requirement of posting a bond or paying the tax under protest is a valid exercise of the Legislature's authority to establish how taxes are to be administered, reviewed and collected in this State. Such action to insure the collection of taxes ultimately determined to be due is a valid governmental function over which the Legislature has supreme authority. See *Adam v. Kuykendall*, 83 Miss. 571, 35 So. 830, 835 (1904), *Street v. Columbus*, 75 Miss. 822, 23 So. 773, 775 (1898) and *Mississippi State Tax Commission v. Flora Drug Co.*, 167 Miss. 1, 148 So. 373, 377 (Miss. 1933). Even though this Court might have used a different method to insure payment of such taxes, this does not mean that the statutory requirements selected by the Legislature are invalid. *Mississippi State Tax Commission v. Flora Drug Co.*, 167 Miss. 1, 148 So. 373, 377 (Miss. 1933). The statutory requirements in issue do not violate the Article 6, Section 144 or 146 of the Mississippi Constitution of 1890 or the Separation of Powers Provision of the Mississippi Constitution of 1890. The decision of the Chancery Court below should be affirmed.

ARGUMENT

- I. The Constitutional Claim That Miss. Code Ann. § 27-77-5 and Miss. Code Ann. § 27-77-7 Violates Article 6, Clauses 144 And/Or 146 And The Separation of Power Clauses Of The Mississippi Constitution Having Been Raised For The First Time On Appeal Should Not Be Considered By This Court.

The Court of Appeals below correctly concluded in regard to the due process claim raised by 5K for the first time on appeal, it "cannot review matters which were not ruled upon by the lower court"⁵. See ¶ 14 of Court of Appeal Opinion citing *Barnes v. Singing River Hosp. Sys.*,

⁵ It is noted that this constitutional claim that the requirement of Miss. Code Ann. § 27-77-7(3) (Rev. 2005) to post a bond in double the amount in controversy or, in the alternative, to pay the tax under protest and seek a refund violated the taxpayer's due process rights was considered by this Court in *Akins v. Mississippi Dept. of Revenue*, 70 So. 3d 204 (Miss. 2011) and found to meet the requirements of due process. *Id.* at. 208-209.

733 So. 2d 199, 202-203 (Miss. 1999). In the case of *Stockstill v. State*, 854 So. 2d 1017 (Miss. 2003), this Court stated in regard to whether it should consider the Appellant's constitutional claim raised for the first time on appeal that the Mississippi Tort Claim Act violates the Equal Protection Clause of the United States and discriminated against individuals in Mississippi, as follows:

In *Marcum, supra*, we reaffirmed the well-established principle that, "[T]his Court has also consistently held that errors raised for the first time on appeal will not be considered, especially where constitutional questions are concerned." 741 So.2d at 238 (quoting *Ellis v. Ellis*, 651 So.2d 1068 (Miss.1995) (citing *Patterson v. State*, 594 So.2d 606, 609 (Miss.1992)). See also *Contreras v. State*, 445 So.2d 543, 544 (Miss.1984); *Smith v. State*, 430 So.2d 406, 408 (Miss.1983)). Therefore, these claims are procedurally barred and are dismissed. (Emphasis Added)

Id. at 1023,

The claim of 5K that the bond or payment requirement under Miss. Code Ann. § 27-77-7(3) (Rev. 2005) violates the Mississippi Constitution of 1890 under Article 6, Section 144 and/or 146 and/or the Separation of Powers provision under Article 1, Clauses 1 & 2 is still a constitutional claim that should not be considered for the first time on appeal. "The mere fact that a separation of powers issue is constitutional in nature does not absolve it from the general rule that objections must be raised at the trial level. *In re V.R.*, 725 So. 2d 241, 245 (Miss. 1998). See also *Lemon v. Mississippi Transportation Commission*, 735 So. 2d, 1013, 1024 (Miss. 1999) where the Court concluded that "[b]ecause Lemon's [the appellant] separation of powers argument was not raised before the trial court, we will not consider it for the first time on appeal."

Even though this Court has requested supplemental briefs on this issue raised by 5K for the first time in its Petition for Writ of Certiorari that the posting or payment requirement in Miss. Code Ann. § 27-77-7(3) violates Article 6, Sections 144 and/or 146 and the separation of powers provisions (Article 1, Sections 1 & 2) of the Mississippi Constitution of 1890, this Court

consideration of an issue not raised before the Chancellor below is clearly in appropriate and should not be considered.

- II. Even If This Court Was To Consider This Constitutional Question, It Will Find That Miss. Code Ann. § 27-77-5 (Rev. 2005), Miss. Code Ann. § 27-77-7 (Rev. 2005), Miss. Code Ann. § 27-77-5 (Rev. 2010) and Miss. Code Ann. § 27-77-7 (Rev. 2010) Represent The Constitutional Exercise Of The Legislature To Set Out Prerequisites For Bringing Suit And Does Not Unconstitutionally Encroach On The Authority Of The Judiciary.

Even if this Court was to address this constitutional claim that the bonding or payment requirement violates Article 6, Section 144 and/or 146 and/or the Separation of Powers provision of Mississippi Constitution of 1890, it will not find a constitutional violation.⁶ Instead, it will find the constitutional exercise by the Legislature to establish prerequisites for seeking a judicial review in the area of taxation that is of the utmost importance to the Legislature and within its purview.

The Order in this appeal requiring supplement briefing required the parties to address the constitutionality of both Miss. Code Ann. § 27-77-5 and § 27-77-7 as originally enacted in 2005 and the subsequent 2009 amendments of these statutes that went into effect for assessments issued on or after July 1, 2010. Copies of these statutes are included in the addendum to this brief. The issue or perceived problem with Miss. Code Ann. § 27-77-5 is not clear since it deals

⁶ In the Order entered in this cause on November 28, 2011, it directed the parties to address the constitutionality of the statutes in question under “Mississippi Constitution Article 6, Section 146 and whether the Legislature violated separation of powers by enacting these laws.” The constitutional provision raised in this Order is not mention in any filing by 5K in this case. In its Petition for Writ of Certiorari, 5K does raise a claim as to Article 6, Section 144. Article 6, Section 144 of the Mississippi Constitution of 1890 is the broad provision that “[t]he judicial power of the State shall vested in a Supreme Court and such other courts as are provided for in this Constitution.” Article 6, Section 146 of the Mississippi Constitution of 1890 provides that “[t]he Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and shall exercise no jurisdiction on matters other than those specifically provided by the Constitution or by general law.” The MSTC submits that the statutory requirements does not violate either provision of the Mississippi Constitution of 1890 and will refer to them together in this brief.

with the administrative appeal procedure and does not establish or even discuss the bonding and payment requirement before seeking a judicial review of the decision of the State Tax Commission prior to July 1, 2010 and decision of the Mississippi Board of Tax Appeals or after July 1, 2010. Since the issue raised by 5K in its Petition for Writ of Certiorari relates to the ability of the Chancery Court to entertain jurisdiction over the attempted appeal it brought under Miss. Code Ann. § 27-77-7 when it failed to either post a bond or pay the tax under protest as provided by Miss. Code Ann. § 27-77-7(3), this brief will address the constitutional questions set out in this Court's November 28, 2011 in regard to these statutory requirements.

In regard to these requirements, Miss. Code Ann. § 27-77-7 (Rev. 2005), as originally enacted in 2005, provided, in part, as follows:

(1) The findings and order of the commission entered under Section 27-77-5 shall be final unless the taxpayer shall, within thirty (30) days from the date of the order, file a petition in the chancery court appealing the order and pay the tax or post the bond as required in this chapter. The petition shall be filed against the State Tax Commission and shall contain a concise statement of the facts as contended by the taxpayer, identify the order from which the appeal is being taken and set out the type of relief sought. If in the action, the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid in protest under subsection (3) of this section, the taxpayer shall allege in the petition that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else.

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(3) A petition filed under subsection (1) of this section that appeals an order of the commission affirming a tax assessment, shall be accompanied by a surety bond approved by the clerk of the court in a sum double the amount in controversy, conditioned to pay the judgment of the court. The clerk shall not approve a bond unless the bond is issued by a surety company qualified to write surety bonds in this state. **As an alternative to the posting of bond, a taxpayer appealing an order of the commission affirming a tax assessment may, prior to the filing of the petition, pay to the agency, under protest, the amount ordered by the commission to be paid and seek a refund of such taxes, plus interest thereon.**

(4) Upon the filing of the petition under subsection (1) of this section, the clerk of the court shall issue a summons to the State Tax Commission requiring the

commission to answer or otherwise respond to the petition within thirty (30) days of service. The summons shall be served on the State Tax Commission by personal service on the commissioner as the chief executive officer of the State Tax Commission. **The chancery court in which a petition under subsection (1) of this section is properly filed shall have jurisdiction to hear and determine said cause or issues joined as in other cases. ... (Emphasis Added)**

The 2009 amendments to Miss. Code Ann. § 27-77-7, which became effective for assessments issued on or after July 1, 2010 and which resulted from the reorganization of the Mississippi State Tax Commission into the Mississippi Department of Revenue and the Mississippi Board of Tax Appeals in the comparable sections, provides, in part, as follows:

(1) The findings and order of the Board of Tax Appeals entered under Section 27-77-5 shall be final unless the agency or the taxpayer shall, within sixty (60) days from the date of the order, file a petition in the chancery court appealing the order. If the petition under this subsection is filed by the taxpayer, the petition shall be filed against the Department of Revenue as respondent. If the petition under this subsection is filed by the agency, the petition shall be filed against the taxpayer as respondent. The petition shall contain a concise statement of the facts as contended by the petitioner, identify the order from which the appeal is being taken and set out the type of relief sought. If in the action, the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid in protest under subsection (3) of this section, the taxpayer shall allege in the petition or in his answer, where the appeal is filed by the agency, that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else. The respondent to the petition has thirty (30) days from the date of service of the petition to file a cross-appeal.

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(3) A petition filed by a taxpayer under subsection (1) of this section that appeals an order of the Board of Tax Appeals affirming a tax assessment shall be accompanied by a surety bond approved by the clerk of the court in a sum half the amount in controversy, conditioned to pay the judgment of the court. The clerk shall not approve a bond unless the bond is issued by a surety company qualified to write surety bonds in this state. Notwithstanding the above bond requirement, the chancellor retains jurisdiction, after motion, notice and hearing, to reduce the amount of the bond provided herein or to forego the bond in its entirety if he finds that the interest of the state to obtain payment of the taxes, penalties and interest in issue in the appeal are otherwise protected. As an alternative to the posting of bond, a taxpayer appealing an order of the Board of Tax Appeals affirming a tax

assessment may, prior to the filing of the petition, pay to the agency, under protest, the amount ordered by the Board of Tax Appeals to be paid and seek a refund of such taxes, plus interest thereon, in the appeal. ...

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(5) Upon the filing of the petition under subsection (1) of this section, the clerk of the court shall issue a summons to the respondent requiring the respondent to answer or otherwise respond to the petition within thirty (30) days of service. Where the agency is the respondent, the summons shall be served on the agency by personal service on the commissioner as the chief executive officer of the agency. **The chancery court in which a petition under subsection (1) of this section is properly filed shall have jurisdiction to hear and determine the cause or issues joined as in other cases. ... (Emphasis Added)**

Contrary to the assertion of 5K and the Dissent of the Court of Appeals below, the requirement contained in the above statutes to provide a bond based on the amount in controversy or, in the alternative, to pay the tax and seek a refund of same is not procedural, but substantive. The sole authority of 5K to appeal from the decision of the three (3) member State Tax Commission or of any taxpayer assessed with a tax on or after January 1, 2010 to appeal from the Mississippi Board of Tax Appeal lies in Miss. Code Ann. § 27-77-7. Even the Dissent in the Court of Appeals below acknowledges this principle when in quoting from *Jones v. City of Ridgeland*, 48 So. 3d 530 (Miss. 2010) states:

Further, we have consistently held that a litigant's right to an appeal is statutory and 'not based on any inherent common law or constitutional right.' *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So. 2d 586, 590 (Miss. 1990); *Fleming v. State*, 553 So. 2d 506 (Miss. 1989) (citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312-13, 77 L.Ed.2d 987 (1983)).

¶ 19 of Court of Appeal citing to *Jones v. City of Ridgeland*, 48 So. 3d 530, 536 (Miss. 2010).

The requirement contained in Miss. Code Ann. § 27-77-7 to post a bond or in the alternative to pay the tax under protest is not an encroachment of the power of the judiciary, but a requirement that the Legislature placed in the law that a taxpayer must comply with in order to

the Petition. See Miss. Code Ann. § 27-77-7(3) (Rev. 2005) and Miss. Code Ann. § 27-77-7(4) (Rev. 2010)⁷. For this Court to invalidate a clear requirement for bringing an appeal, which is within the authority of the Legislature to establish, would actually be an unconstitutional encroachment of this Court on the authority of the Legislature.

Even one of the cases cited by 5K in its Petition for Writ of Certiorari and by the Dissent in the Court of Appeals Opinion below supports the conclusion that such statutory prerequisites for appealing to Court are constitutional. See citation of *Wimley v. Reid*, 991 So. 2d 135 (Miss. 2008) in Petition for Writ of Certiorari, p. 1 and Court of Appeals Opinion, ¶¶ 17, 18 (Footnote No. 2), 19 (quotation from *Jones v. City of Ridgeland*, 48 So. 3d 530 (Miss. 2010)) and 20. In *Wimley v. Reid*, 991 So. 2d 135 (Miss. 2008), this Court found “[a]s stated, pre-suit requirements are clearly within the purview of the Legislature, and do not encroach upon this Court’s rule-making responsibility. Indeed, we consistently have held that the Legislature has authority to establish presuit requirement as a condition precedent to filing particular kinds of lawsuits.” *Id.* at 139. The posting of a bond or the prepayment of the tax under protest on or before the filing of a Petition under Miss. Code Ann. § 27-77-7 is a pre-suit requirement that does not violate the rule making authority of this Court.

Another point that must be made is that the requirements in issue, the posting of a bond or the payment of the tax in order to appeal from the three (3) member State Tax Commission or

⁷ It is noted that the bonding requirement is slightly different from the 2005 enactment of Miss. Code Ann. § 27-77-7 and the 2009 amendment. In the 2005 version, the amount of the bond is “double the amount in controversy” while the 2009 amendment only required a bond in “half the amount in controversy”. See Miss. Code Ann. § 27-77-7(3) (Rev. 2005) and Miss. Code Ann. § 27-77-7(3) (Rev. 2010). After obtaining jurisdiction over the action, the 2009 amendment also allowed the Chancellor to reduce the bond amount or to forego the bond in its entirety. See Miss. Code Ann. § 27-77-7(3) (Rev. 2010). These differences would not however lead to a different result under the question currently being considered. Even under the 2009 amendment, the Legislature still consider the bond jurisdictional unless and until the Chancellor, “after motion, notice and hearing” determined “to forego the bond in its entirety if he finds that the interest of the state to obtain payment of the taxes, penalties and interest in issue in the appeal are otherwise protected.” See Miss. Code Ann. § 27-77-7(3) (Rev. 2010).

from the Mississippi Board of Tax Appeals is in regard to a tax assessment. This is not a matter of procedure after a suit is filed, but how taxes are to be administered in this State and when and how a taxpayer can obtain a judicial review of such taxes. The authority of the Legislature in the area of taxation is paramount. "The Legislature has plenary power to deal with the entire subject of taxation. Its power is supreme in devising the machinery for assessing the taxable property, imposing taxes thereon, and collecting and disbursing the same." *Adam v. Kuykendall*, 83 Miss. 571, 35 So. 830, 835 (1904). "Within constitutional limits, the power of the legislature in matters of taxation is supreme, and beyond the control of the judiciary." *Street v. Columbus*, 75 Miss. 822, 23 So. 773, 775 (1898). "The mode of enforcing the payment of taxes is entirely within the control of the Legislature." *Mississippi State Tax Commission v. Flora Drug Co.*, 167 Miss. 1, 148 So. 373, 377 (Miss. 1933).

The MSTC submits that there is no question that the purpose of requiring the bond or payment of the tax under protest is to insure collection of the taxes ultimately determined to be due from the taxpayer in the appeal. "[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need." *Bull v. U.S.*, 295 U.S. 247, 259, 55 S.Ct. 695, 699, 79 L.Ed. 1421 (1935). The statutory requirement of the posting of a bond or the payment of tax under protest is in furtherance a valid governmental interest to insure collection of taxes by a method that is within the power of the Legislature to establish.

It appears that the much of the Dissent's concern in the Court of Appeals below is based on the Dissent's conclusion that the bond or payment requirement was an unreasonable barrier to judicial review and a violation of due process. See ¶¶ 16, 18 & 20 of the Court of Appeals Opinion. Even though the MSTC contends and agrees with the majority of the Court of Appeals that the issue of Due Process is not properly before the Court in this appeal, it is noted that this Court has recently found in *Akins v. Mississippi Dept. of Revenue*, 70 So. 3d 204 (Miss. 2011),

that the bond or payment requirement in Miss. Code Ann. § 27-77-7(3) (Rev. 2005) did not violate the taxpayer's due process rights. *Id.* at. 208-209. As to the reasonableness of the "double the amount in controversy" to insure collection of the taxes in issue. Even though 5K would want no bond requirement and the Dissent possibly a lesser amount, such determination would not invalidate this statutory requirement. "If a statute has a reasonable relation to a governmental purpose, and is calculated to carry out some governmental design, the courts cannot strike it down as being arbitrary, although members of such courts might think the system was inconvenient and that a better system could be devised. Statutes cannot be declared void merely because they are inconvenient or burdensome, if they are calculated to further governmental purposes." *Mississippi State Tax Commission v. Flora Drug Co.*, 167 Miss. 1, 148 So. 373, 376 (Miss. 1933). "[C]ourts cannot substitute their judgment for that of the Legislature and strike down an act, because, in the opinion of the court, it is unwise or oppressive." *Id.* at 377. Due to the complexity of some tax cases, the MSTC would submit that it would not be unreasonable for the Legislature to conclude that a bond in double the amount in controversy would be needed to insure collection of the taxes, penalties, interest and cost ultimately determined to be due.

CONCLUSION

The MSTC submits that the issue of whether the posting of a bond or payment under protest requirement contained in Miss. Code Ann. § 27-77-7(3) (Rev. 2005) and in Miss. Code Ann. § 27-77-7(3) (Rev. 2010) violates Article 6, Section 144 or 146 or the Separation of Powers provision, being Article 1, Section 1 & 2, of the Mississippi Constitution of 1890 is not properly before this Court since these issues were not raised before Chancery Court below. See *Stockstill v. State*, 854 So. 2d 1017, 1023 (Miss. 2003) and *Lemon v. Mississippi Transportation Commission*, 735 So. 2d, 1013, 1024 (Miss. 1999). If however this Court does consider these

issues, it will find that the statutory requirement to post a bond or pay the tax under protest does not unconstitutionally encroach of the power of the judiciary, but represent statutory prerequisites for appealing to Court that were established by the Legislature in the exercise of its plenary authority in the area of taxation and in furtherance of the governmental function of insuring that taxes which are the lifeblood of this State are paid when it is determined that they are due. Miss. Code Ann. § 27-77-7(3) (Rev. 2005) and Miss. Code Ann. § 27-77-7(3) (Rev. 2010) with their bonding or payment requirement do not violate Article 6, Section 144 or 146 or the Separation of Powers provision, being Article 1, Section 1 & 2, of the Mississippi Constitution of 1890. The MSTC submits that the Chancery Court's decision below should be affirmed.

Respectfully Submitted:
Mississippi Department of Revenue
f/k/a Mississippi State Tax Commission

By: 

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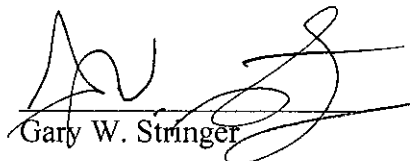
CERTIFICATE OF SERVICE

I, Gary W. Stringer, one of the attorneys for the Mississippi Department of Revenue, hereby certify that I have served the above and foregoing APPELLEE'S SUPPLEMENTAL BRIEF TO ADDRESS CONSTITUTIONAL ISSUE UNDER ARTICLE 6, SECTION 146 OF THE MISSISSIPPI CONSTITUTION OF 1890, AS ORDERD BY THE MISSISSIPPI SUPREME COURT AFTER GRANTING CERTIORARI by mailing, this day, by First Class Mail, postage prepaid, a true and correct copy of same to the following:

Michael A. Heilman, Esquire
Christopher T. Graham, Esquire
Heilman Law Group, P.A.
Post Office Drawer 24417
Jackson, MS 39225-4417

Honorable William H. Singletary
Hinds County Chancery Court Judge
P.O. Box 686
Jackson, MS 39205

THUS DONE, this the 12th day of January, 2012.


Gary W. Stringer

ADDENDUM

Applicable To Assessments Issued Before July 1, 2010West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 77. Appellate Review for Taxpayers Aggrieved by Certain Actions of the State Tax Commission

→ § 27-77-5. Tax appeals procedure

<Section effective until July 1, 2010. See, also, Section effective July 1, 2010>

(1) Any taxpayer aggrieved by an assessment of tax by the agency, by the agency's denial of a refund claim, or by the denial of a waiver of tag penalty, and who wishes to contest the action of the agency shall, within thirty (30) days from the date of the action, file an appeal in writing with the board of review requesting a hearing and correction of the contested action specifying in detail the relief requested and any other information that might be required by regulation.

(2) Upon receipt of a timely written appeal from a tax assessment, refund claim denial or denial of waiver of a tag penalty, a hearing shall be scheduled before the board of review unless it is determined that the relief requested in the written appeal should be granted without a hearing. A notice of the hearing shall be mailed to the taxpayer advising the taxpayer of the date, time and location of the hearing. The taxpayer or his designated representative shall attend the hearing unless a request is made to, and granted by, the board of review to allow the taxpayer to submit his position in writing or by electronic transmission in lieu of attendance. Failure of the taxpayer or his designated representative to attend a hearing or to submit his position in writing or by electronic transmission by the date specified by the board of review or by the hearing date, if no date was specified, shall constitute a withdrawal of the appeal.

(3) At a hearing before the board of review on a tax assessment, denial of refund claim, or denial of waiver of a tag penalty, the board of review shall try the issues presented, according to law and the facts and within the guidelines established by regulation. The hearing before the board of review shall be informal and no official transcript will be made of the hearing. At the earliest practical date after the hearing, the members of the board of review that heard the appeal shall make a determination on the matter presented and notify the taxpayer of its findings by mailing a copy of its order to the taxpayer. If the order involves the appeal of a denial of a waiver of tag penalty, a copy of the order shall also be mailed to the tax collector that imposed the penalty. If in the order the board of review orders the taxpayer to pay a tax assessment, the taxpayer shall, within thirty (30) days from the date of the order, pay the amount ordered to be paid or appeal the order of the board of review to the commission. After the thirty-day period, if the tax determined by the board of review to be due is not paid and an appeal from the order of the board of review is not made to the commission, the agency shall proceed to collect the tax assessment as determined by the board of review.

(4) Any taxpayer aggrieved by an order of the board of review affirming a tax assessment, the denial of a refund claim, or the denial of a waiver of tag penalty, and who wishes to contest the order shall, within thirty (30) days from the date of the order of the board of review being contested, file an appeal to the commission. The appeal shall be in writing and shall request a hearing and reversal or modification of the order of the board of review, specify in detail the relief requested and contain any other information that might be required by regulation, and be filed with the commission secretary. Failure to timely file a written appeal with the commission secretary within the thirty-day period shall make the order of the board of review final and not subject to further review by the commission or a court, other than as to the issue of whether a written appeal from the order of the board of review was timely filed with the commission secretary.

(5) Upon receipt of a written appeal from an order of the board of review affirming a tax assessment, refund claim denial or denial of waiver of a tag penalty, the commission secretary shall schedule a hearing before the commission on the appeal. A notice of this hearing shall be mailed to the taxpayer advising the taxpayer of the date, time and location of hearing. The taxpayer or his designated representative shall attend the hearing unless a request is made to and granted by the commission to allow the taxpayer to submit his position in writing or by electronic transmission in lieu of attendance. Failure of the taxpayer or his designated representative to attend a hearing or to submit his position in writing or by electronic transmission by the date specified by the commission or by the hearing date, if no date was specified, shall constitute a withdrawal of the appeal.

(6) At any hearing before the commission on an appeal of an order of the board of review affirming a tax assessment, refund claim denial or denial of waiver of a tag penalty, two (2) members of the commission shall constitute a quorum. At the hearing, the commission shall try the issues presented, according to the law and the facts and pursuant to any guidelines established by regulation. The rules of evidence shall be relaxed at the hearing. Any appeal to chancery court from an order of the commission resulting from this type of hearing shall include a full evidentiary judicial hearing on the issues presented. No official transcript shall be made of this hearing before the commission. After reaching a decision on the issues presented, the commission shall enter its order setting forth its findings and decision on the appeal. A copy of the order of the commission shall be mailed to the taxpayer. If the order involves an appeal of a denial of a waiver of tag penalty, a copy of the order shall also be mailed to the tax collector that imposed the penalty.

(7) If in its order the commission orders a taxpayer to pay a tax assessment, the taxpayer shall, within thirty (30) days from the date of the order, pay the amount ordered to be paid or properly appeal said order of the commission to chancery court as provided in Section 27-77-7. After the thirty-day period, if the tax determined by the commission to be due is not paid and an appeal from the commission order has not been properly filed, the agency shall proceed to collect the tax assessment as affirmed by the commission. If in its order the commission determines that the taxpayer has overpaid his taxes, the agency shall refund or credit to the taxpayer, as provided by law, the amount of overpayment as determined and set out in the order.

(8) At any time after the filing of an appeal to the board of review or from the board of review to the commission under this section, an appeal can be withdrawn. Such a withdrawal of an appeal may be made voluntarily by the taxpayer or may occur involuntarily as a result the taxpayer failing to appear at a scheduled hearing, failing to make a written submission or electronic transmission in lieu of attendance at a hearing by the date specified or by the hearing date, if no date was specified, or by any other act or failure that the board of review or the commission determines represents a failure on the part of the taxpayer to prosecute his appeal. Any voluntary withdrawal shall be in writing or by electronic transmission and sent by the taxpayer or his designated representative to the chairman of the board of review, if the appeal being withdrawn is to the board of review, or to the commission secretary, if the appeal being withdrawn is to the commission. If the withdrawal of appeal is involuntary, the administrative appeal body from whom the appeal is being withdrawn shall note on its minutes the involuntary withdrawal of the appeal and the basis for the withdrawal. Once an appeal is withdrawn, whether voluntary or involuntary, the action from which the appeal was taken, whether a tax assessment, a denial of refund claim, a denial of waiver of tax penalty, or an order of the board of review, shall become final and not subject to further review by the board of review, the commission or a court. The agency shall then proceed in accordance with law based on such final action.

(9) Nothing in this section shall bar a taxpayer from timely applying to the commissioner as otherwise provided by law for a tax refund or for a revision in tax.

CREDIT(S)

Laws 2005, Ch. 499, § 3, eff. July 1, 2005.

Miss. Code Ann. § 27-77-5, MS ST § 27-77-5

Current through the 2010 Regular and 1st Extraordinary Sessions

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Applicable To Appeals Involving Assessments Issued Before July 1, 2010



West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 77. Appellate Review for Taxpayers Aggrieved by Certain Actions of the State Tax Commission

→ § 27-77-7. Judicial review

<Section effective until July 1, 2010. See, also, Section effective July 1, 2010>

(1) The findings and order of the commission entered under Section 27-77-5 shall be final unless the taxpayer shall, within thirty (30) days from the date of the order, file a petition in the chancery court appealing the order and pay the tax or post the bond as required in this chapter. The petition shall be filed against the State Tax Commission and shall contain a concise statement of the facts as contended by the taxpayer, identify the order from which the appeal is being taken and set out the type of relief sought. If in the action, the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid in protest under subsection (3) of this section, the taxpayer shall allege in the petition that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else.

(2) A petition under subsection (1) of this section shall be filed in the chancery court of the county or judicial district in which the taxpayer has a place of business or in the Chancery Court of the First Judicial District of Hinds County, Mississippi; however, a resident taxpayer may file the petition in the chancery court of the county or judicial district in which he is a resident.

(3) A petition filed under subsection (1) of this section that appeals an order of the commission affirming a tax assessment, shall be accompanied by a surety bond approved by the clerk of the court in a sum double the amount in controversy, conditioned to pay the judgment of the court. The clerk shall not approve a bond unless the bond is issued by a surety company qualified to write surety bonds in this state. As an alternative to the posting of bond, a taxpayer appealing an order of the commission affirming a tax assessment may, prior to the filing of the petition, pay to the agency, under protest, the amount ordered by the commission to be paid and seek a refund of such taxes, plus interest thereon.

(4) Upon the filing of the petition under subsection (1) of this section, the clerk of the court shall issue a summons to the State Tax Commission requiring the commission to answer or otherwise respond to the petition within thirty (30) days of service. The summons shall be served on the State Tax Commission by personal service on the commissioner as the chief executive officer of the State Tax Commission. The chancery court in which a petition under subsection (1) of this section is properly filed shall have jurisdiction to hear and determine said cause or issues joined as in other cases. In any petition in which the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid under protest under subsection (3) of this section, the taxpayer shall prove by a preponderance of the evidence that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else. At trial of any action brought under this section, the chancery court shall give deference to the decision and interpretation of law and regulations by the commission as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised. Based on the evidence presented at the hearing, the chancery court shall determine whether the taxpayer has proven, by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested. The chancery court shall decide all questions presented, including those as to legality and the amount of tax or refund due, and if it finds that the tax assessment or denial of refund claim in issue is incorrect or invalid, in whole or in part, it shall determine the amount of tax or refund due, including interest and, if applicable, penalty to date, and enter such order or judgment as it deems proper. Interest and penalty included in this determination shall be computed by the court based on the methods for computing penalty and interest as specified by law for the type of tax in issue. Either the State Tax Commission or the taxpayer, or both, shall have the right to appeal

from the order of the chancery court to the Supreme Court as in other cases. If an appeal is taken from the order of the chancery court, the bond provided for in subsection (3) of this section shall continue to remain in place until a final decision is rendered in the case.

CREDIT(S)

Laws 2005, Ch. 499, § 4, eff. July 1, 2005.

Miss. Code Ann. § 27-77-7, MS ST § 27-77-7

Current through the 2010 Regular and 1st Extraordinary Sessions

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Title 27. Taxation and Finance

Chapter 77. Appellate Review for Taxpayers Aggrieved by Certain Actions of the State Tax Commission

→ § 27-77-5. Tax appeals procedure

<Section effective on July 1, 2010. See, also, Section effective until July 1, 2010>

(1) Any taxpayer aggrieved by an assessment of tax by the agency, by the agency's denial of a refund claim, or by the denial of a waiver of tag penalty, and who wishes to contest the action of the agency shall, within sixty (60) days from the date of the action, file an appeal in writing with the board of review requesting a hearing and correction of the contested action specifying in detail the relief requested and any other information that might be required by regulation. Even after an appeal is filed with the board of review, the agency retains the authority to change the assessment, the denial of refund claim or the denial of tag penalty being appealed.

(2) Upon receipt of a timely written appeal from a tax assessment, refund claim denial or denial of waiver of a tag penalty, a hearing shall be scheduled before the board of review unless it is determined that the relief requested in the written appeal should be granted without a hearing. A notice of the hearing shall be mailed to the taxpayer advising the taxpayer of the date, time and location of the hearing. The taxpayer or his designated representative shall attend the hearing unless a request is made to, and granted by, the board of review to allow the taxpayer to submit his position in writing or by electronic transmission in lieu of attendance. Failure of the taxpayer or his designated representative to attend a hearing or to submit his position in writing or by electronic transmission by the date specified by the board of review or by the hearing date, if no date was specified, shall constitute a withdrawal of the appeal.

(3) At a hearing before the board of review on a tax assessment, denial of refund claim, or denial of waiver of a tag penalty, the board of review shall try the issues presented, according to law and the facts and within the guidelines established by regulation. The hearing before the board of review shall be informal and no official transcript will be made of the hearing. At the earliest practical date after the hearing, the members of the board of review that heard the appeal shall make a determination on the matter presented and notify the taxpayer of its findings by mailing a copy of its order to the taxpayer. If the order involves the appeal of a denial of a waiver of tag penalty, a copy of the order shall also be mailed to the tax collector that imposed the penalty. If in the order the board of review orders the taxpayer to pay a tax assessment, the taxpayer shall, within sixty (60) days from the date of the order, pay the amount ordered to be paid or appeal the order of the board of review to the Board of Tax Appeals. After the sixty-day period, if an appeal is not filed by the taxpayer with the Executive Director of the Board of Tax Appeals and the tax determined by the board of review is not paid, the agency shall proceed to collect the tax assessment as determined by the board of review.

(4) Any taxpayer aggrieved by an order of the board of review affirming a tax assessment, the denial of a refund claim, or the denial of a waiver of tag penalty, and who wishes to contest the order shall, within sixty (60) days from the date of the order of the board of review being contested, file an appeal to the Board of Tax Appeals. The appeal shall be in writing and shall request a hearing and reversal or modification of the order of the board of review, specify in detail the relief requested and contain any other information that might be required by regulation, and be filed with the executive director. At the time of filing his appeal with the executive director, the taxpayer shall also file a copy of his written appeal with the board of review. Even after an appeal is filed with the Executive Director of the Board of Tax Appeals, the board of review retains the authority to amend and/or correct the order being appealed at any time prior to a de-

cision by the Board of Tax Appeals on the appeal. Failure to timely file a written appeal with the executive director within the sixty-day period shall make the order of the board of review final and not subject to further review by the Board of Tax Appeals or a court, other than as to the issue of whether a written appeal from the order of the board of review was timely filed with the executive director.

(5) Upon receipt of a written appeal from an order of the board of review affirming a tax assessment, refund claim denial or denial of waiver of a tag penalty, the executive director shall schedule a hearing before the Board of Tax Appeals on the appeal. A notice of this hearing shall be mailed to the taxpayer and the agency advising them of the date, time and location of hearing. The taxpayer or his designated representative shall attend the hearing unless a request is made to and granted by the Executive Director of the Board of Tax Appeals to allow the taxpayer to submit his position in writing or by electronic transmission in lieu of attendance. Failure of the taxpayer or his designated representative to attend a hearing or to submit his position in writing or by electronic transmission by the date specified by the executive director or by the hearing date, if no date was specified, shall constitute a withdrawal of the appeal.

(6) At any hearing before the Board of Tax Appeals on an appeal of an order of the board of review affirming a tax assessment, refund claim denial or denial of waiver of a tag penalty, two (2) members of the Board of Tax Appeals shall constitute a quorum. At the hearing, the Board of Tax Appeals shall try the issues presented, according to the law and the facts and pursuant to any guidelines established by regulation. The rules of evidence shall be relaxed at the hearing. Any appeal to chancery court from an order of the Board of Tax Appeals resulting from this type of hearing shall include a full evidentiary judicial hearing on the issues presented. No official transcript shall be made of this hearing before the Board of Tax Appeals. After reaching a decision on the issues presented, the Board of Tax Appeals shall enter its order setting forth its findings and decision on the appeal. A copy of the order of the Board of Tax Appeals shall be mailed to the taxpayer and the agency. If the order involves an appeal of a denial of a waiver of tag penalty, a copy of the order shall also be mailed to the tax collector that imposed the penalty.

(7) If in its order the Board of Tax Appeals orders a taxpayer to pay a tax assessment, the taxpayer shall, within sixty (60) days from the date of the order, pay the amount ordered to be paid or properly appeal the order of the Board of Tax Appeals to chancery court as provided in Section 27-77-7. After the sixty-day period, if the tax determined by the Board of Tax Appeals to be due is not paid and an appeal from the Board of Tax Appeals order has not been properly filed, the agency shall proceed to collect the tax assessment as affirmed by the Board of Tax Appeals. If in its order the Board of Tax Appeals determines that the taxpayer has overpaid his taxes and an appeal from the board of tax appeals order has not been properly filed in chancery court, the agency shall refund or credit to the taxpayer, as provided by law, the amount of overpayment as determined and set out in the order.

(8) At any time after the filing of an appeal to the board of review or from the board of review to the Board of Tax Appeals under this section, an appeal can be withdrawn. Such a withdrawal of an appeal may be made voluntarily by the taxpayer or may occur involuntarily as a result of the taxpayer failing to appear at a scheduled hearing, failing to make a written submission or electronic transmission in lieu of attendance at a hearing by the date specified or by the hearing date, if no date was specified, or by any other act or failure that the board of review or the Board of Tax Appeals determines represents a failure on the part of the taxpayer to prosecute his appeal. Any voluntary withdrawal shall be in writing or by electronic transmission and sent by the taxpayer or his designated representative to the chairman of the board of review, if the appeal being withdrawn is to the board of review, or to the executive director, if the appeal being withdrawn is to the Board of Tax Appeals. If the withdrawal of appeal is involuntary, the administrative appeal body from whom the appeal is being withdrawn shall note on its minutes the involuntary withdrawal of the appeal and the basis for the withdrawal. Once an appeal is withdrawn, whether voluntary or involuntary, the action from which the appeal was taken, whether a tax assessment, a denial of refund claim, a denial of waiver of tax penalty, or an order of the board of review, shall become final and not subject to further review by the board of review, the Board of Tax Appeals or a court. The agency shall then proceed in accordance with law based on such final action.

(9) Nothing in this section shall bar a taxpayer from timely applying to the commissioner as otherwise provided by law for a tax refund or for a revision in tax.

CREDIT(S)

Laws 2005, Ch. 499, § 3, eff. July 1, 2005; Laws 2009, Ch. 492, § 114, eff. July 1, 2010.

EFFECTIVE DATE

<Laws 2009, Ch. 492, § 114, amended this section. Section 146 of that 2009 legislation provides: "Section 145 of this act shall take effect and be in force from and after July 1, 2009, and the remainder of this act shall take effect and be in force from and after July 1, 2010.">

HISTORICAL AND STATUTORY NOTES

Section 37 of Laws 2005, Ch. 499 (§ 3 of which enacted this section) provides:

"Nothing in this act shall affect or defeat any assessment, refund claim, request for waiver of a tax penalty or the suspension, revocation, surrender, seizure or denial of permit, tag or title or the administrative appeal or judicial appeal thereof where the initial date of said assessment, refund claim, tag penalty, denial, notice of the intent to suspend, notice of the intent to revoke, request for surrender or order for seizure is before the date on which this act becomes effective. The provisions of the laws relating to the administrative appeal or judicial review of such actions which were in effect prior to the effective date of this act are expressly continued in full force, effect and operation for the purpose of providing an administrative appeal and/or judicial review of any assessment, refund claim, request for waiver of a tag penalty or the suspension, revocation, surrender, seizure or denial of a permit, tag or title where the initial date of said assessment, refund claim, tag penalty, denial, notice of the intent to suspend, notice of the intent to revoke, request for surrender or order for seizure is before the date on which this act becomes effective."

Laws 2005, Ch. 499 became effective July 1, 2005.

Laws 2009, Ch. 492 reorganized the State Tax Commission by placing its administrative functions in a Department of Revenue and its authority over administrative appeals in an independent Board of Tax Appeals, and made conforming amendments and repeals as necessary to accomplish the same. Section 144 of this 2009 legislation provides:

"Nothing in this act shall affect or defeat any assessment, refund claim, request for waiver of a tax penalty, the suspension, revocation, surrender, seizure or denial of permit, tag or title, the suspension, revocation or denial of a permit, approved manager status, qualified resort area or forfeiture under the Local Option Alcoholic Beverage Control Law, Section 67-1-1 et seq., the administrative appeal or judicial appeal of any of the foregoing acts or any other action taken by the Mississippi State Tax Commission or by the Chairman of the Mississippi State Tax Commission prior to the effective date of this act. The provisions of the laws relating to the administrative appeal or judicial review of such actions which were in effect prior to the effective date of this act are expressly continued in full force, effect and operation for the purpose of providing an administrative appeal and/or judicial review, where previously provided, of such actions, except to the extent that any matter is pending on an administrative appeal before the three (3) member Mississippi State Tax Commission on the effective date will after the effective date of this act be heard and decided by the Board of Tax Appeals as the successor of the Mississippi State Tax Commission in regard to administrative appeals."

LIBRARY REFERENCES

Taxation ☞ 2666 to 2679, 3547, 3694.
Westlaw Topic No. 371.

C.J.S. Taxation §§ 631, 681, 701 to 709, 714 to 719, 725 to 726, 1765 to 1769, 2046 to 2047.

RESEARCH REFERENCES

Treatises and Practice Aids

Mississippi Civil Procedure § 17:16, from State Tax Commission.

Miss. Code Ann. § 27-77-5, MS ST § 27-77-5

Current through the 2010 Regular and 1st Extraordinary Sessions

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END OF DOCUMENT

Applicable To Appeals Involving Assessments Issued On Or After July 1, 2010West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 77. Appellate Review for Taxpayers Aggrieved by Certain Actions of the State Tax Commission

→ § 27-77-7. Judicial review

<Section effective on July 1, 2010. See, also, Section effective until July 1, 2010>

(1) The findings and order of the Board of Tax Appeals entered under Section 27-77-5 shall be final unless the agency or the taxpayer shall, within sixty (60) days from the date of the order, file a petition in the chancery court appealing the order. If the petition under this subsection is filed by the taxpayer, the petition shall be filed against the Department of Revenue as respondent. If the petition under this subsection is filed by the agency, the petition shall be filed against the taxpayer as respondent. The petition shall contain a concise statement of the facts as contended by the petitioner, identify the order from which the appeal is being taken and set out the type of relief sought. If in the action, the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid in protest under subsection (3) of this section, the taxpayer shall allege in the petition or in his answer, where the appeal is filed by the agency, that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else. The respondent to the petition has thirty (30) days from the date of service of the petition to file a cross-appeal.

(2) A petition under subsection (1) of this section shall be filed in the chancery court of the county or judicial district in which the taxpayer has a place of business or in the Chancery Court of the First Judicial District of Hinds County, Mississippi; however, a resident taxpayer may file the petition in the chancery court of the county or judicial district in which he is a resident. If both the agency and the taxpayer file a petition under subsection (1) of this section, the appeals shall be consolidated and the chancery court where the taxpayer filed his petition shall have jurisdiction over the consolidated appeal.

(3) A petition filed by a taxpayer under subsection (1) of this section that appeals an order of the Board of Tax Appeals affirming a tax assessment shall be accompanied by a surety bond approved by the clerk of the court in a sum half the amount in controversy, conditioned to pay the judgment of the court. The clerk shall not approve a bond unless the bond is issued by a surety company qualified to write surety bonds in this state. Notwithstanding the above bond requirement, the chancellor retains jurisdiction, after motion, notice and hearing, to reduce the amount of the bond provided herein or to forego the bond in its entirety if he finds that the interest of the state to obtain payment of the taxes, penalties and interest in issue in the appeal are otherwise protected. As an alternative to the posting of bond, a taxpayer appealing an order of the Board of Tax Appeals affirming a tax assessment may, prior to the filing of the petition, pay to the agency, under protest, the amount ordered by the Board of Tax Appeals to be paid and seek a refund of such taxes, plus interest thereon, in the appeal. The taxpayer shall pay to the agency any tax included in the assessment which he is not contesting. If the petition initiating the appeal is filed by the taxpayer, the payment of the uncontested tax shall be made prior to the expiration of the sixty-day time period for filing a petition under subsection (1) of this section. If the petition initiating the appeal is filed by the agency, the payment of the uncontested tax shall be made prior to the expiration of the sixty-day time period for the filing of the petition. Failure of the taxpayer to timely pay the uncontested tax shall bar the taxpayer from obtaining a reduction, abatement and/or refund of any contested tax in the appeal and shall result in the taxpayer's appeal or cross-appeal being dismissed with prejudice and with judgment being entered granting the agency the relief it requested.

(4) In an action under this section resulting from an order of the Board of Tax Appeals involving a refund claim denial, the agency shall refund or credit to the taxpayer, as provided by law, the amount of any overpayment included in the refund claim which the agency does not contest. If the petition initiating the appeal is filed by the agency, the uncontested overpayment shall be paid or credited to the taxpayer prior to the expiration of the sixty-day time period for filing a petition under subsection (1) of this section. If the petition initiating the appeal is filed by the taxpayer, such uncontested overpayment shall be paid or credited to the taxpayer prior to the expiration of the thirty-day time period for the filing of an answer or other response to the petition as provided in subsection (5) of this section. Failure of the agency to timely pay or credit the uncontested overpayment to the taxpayer shall bar the agency from obtaining an affirmation, in whole or in part, of the refund claim denial in issue and shall result in the agency's appeal or cross-appeal being dismissed with prejudice and judgment being entered granting the taxpayer the relief he requested, excluding however any request for the awarding of attorney fees.

(5) Upon the filing of the petition under subsection (1) of this section, the clerk of the court shall issue a summons to the respondent requiring the respondent to answer or otherwise respond to the petition within thirty (30) days of service. Where the agency is the respondent, the summons shall be served on the agency by personal service on the commissioner as the chief executive officer of the agency. The chancery court in which a petition under subsection (1) of this section is properly filed shall have jurisdiction to hear and determine the cause or issues joined as in other cases. In any petition, cross-appeal or answer in which the taxpayer is seeking a refund or credit for an alleged overpayment of tax or for taxes paid under protest under subsection (3) of this section, the taxpayer shall prove by a preponderance of the evidence that he alone bore the burden of the tax sought to be refunded or credited and did not directly or indirectly collect the tax from anyone else. At trial of any action brought under this section, the chancery court shall give deference to the decision and interpretation of law and regulations by the Department of Revenue as it does with the decisions and interpretation of any administrative agency, but it shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised. Based on the evidence presented at trial, the chancery court shall determine whether the party bringing the appeal has proven by a preponderance of the evidence or a higher standard if required by the issues raised, that he is entitled to any or all of the relief he has requested. The chancery court shall decide all questions presented, including those as to legality and the amount of tax or refund due, and if it finds that the tax assessment or denial of refund claim in issue is incorrect or invalid, in whole or in part, it shall determine the amount of tax or refund due, including interest and, if applicable, penalty to date, and enter such order or judgment as it deems proper. Interest and penalty included in this determination shall be computed by the court based on the methods for computing penalty and interest as specified by law for the type of tax in issue. When the chancery court determines that an overpayment exists, the determination as to whether such overpayment shall be refunded to the taxpayer or credited against the taxpayer's future taxes shall be made by the chancery court based on the method for handling overpayments as specified by the law for the type of tax in issue. Either the agency or the taxpayer, or both, shall have the right to appeal from the order of the chancery court to the Supreme Court as in other cases. If an appeal is taken from the order of the chancery court, the bond provided for in subsection (3) of this section shall continue to remain in place until a final decision is rendered in the case.

CREDIT(S)

Added by Laws 2005, Ch. 499, § 4, eff. July 1, 2005; Laws 2009, Ch. 492, § 115, eff. July 1, 2010.

EFFECTIVE DATE

<Laws 2009, Ch. 492, § 115, amended this section. Section 146 of that 2009 legislation provides: "Section 145 of this act shall take effect and be in force from and after July 1, 2009, and the remainder of this act shall take effect and be in force from and after July 1, 2010.">

HISTORICAL AND STATUTORY NOTES

Section 37 of Laws 2005, Ch. 499 (§ 4 of which enacted this section) provides:

“Nothing in this act shall affect or defeat any assessment, refund claim, request for waiver of a tax penalty or the suspension, revocation, surrender, seizure or denial of permit, tag or title or the administrative appeal or judicial appeal thereof where the initial date of said assessment, refund claim, tag penalty, denial, notice of the intent to suspend, notice of the intent to revoke, request for surrender or order for seizure is before the date on which this act becomes effective. The provisions of the laws relating to the administrative appeal or judicial review of such actions which were in effect prior to the effective date of this act are expressly continued in full force, effect and operation for the purpose of providing an administrative appeal and/or judicial review of any assessment, refund claim, request for waiver of a tag penalty or the suspension, revocation, surrender, seizure or denial of a permit, tag or title where the initial date of said assessment, refund claim, tag penalty, denial, notice of the intent to suspend, notice of the intent to revoke, request for surrender or order for seizure is before the date on which this act becomes effective.”

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LIBRARY REFERENCES

Taxation ¶¶ 2691, 3548, 3695.

Westlaw Topic No. 371.

C.J.S. Taxation §§ 729 to 735, 737 to 744, 748 to 751, 1770 to 1776, 2048 to 2054.

RESEARCH REFERENCES

Encyclopedias

Encyclopedia of Mississippi Law § 13:183, Summary Judgment in Chancery Court.

Treatises and Practice Aids

Mississippi Civil Procedure § 17:16, from State Tax Commission.

JUDICIAL DECISIONS