

IN THE SUPREME COURT OF MISSISSIPPI

**WALTER D. AKINS, d/b/a/ AKINS
CONSTRUCTION COMPANY**

APPELLANTS

VS.

NO.: 2010-CA-00599

MISSISSIPPI STATE TAX COMMISSION

APPELLEE

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

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT ON ORAL ARGUMENT

The instant appeal involves a jurisdiction issue which is a persistent claim made by taxpayers and which is the subject of several appeals currently pending before the appellate courts. Additionally, the due process claim raised in the instant appeal is a matter of first impression in Mississippi. For the above reasons and in light of the constitutional issues raised in this appeal, *vel non*, oral argument is requested because the Commission believes it will aid the Court in a proper determination of the merits in this matter.

STATEMENT OF THE ISSUES

1. Whether the appeal provisions codified in Miss. Code Ann. § 27-77-1, *et seq.* afford a taxpayer with due process and are therefore constitutional.
2. Whether the trial court had jurisdiction to hear an appeal that was not filed in accordance with the requirements of Miss. Code Ann. § 27-77-7.

STATEMENT OF THE CASE

This matter is an appeal of an order entered by the Hinds County Chancery Court dismissing the complaint filed by Walter D. Akins d/b/a Akins Construction Company (hereinafter “Akins”) against the Mississippi State Tax Commission (hereinafter the “Commission”)¹ for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Mississippi Rules of Civil Procedure. The pertinent facts of this case are simple and few. Subsequent to an audit by Commission staff, Akins was assessed sales tax by the Commission for the tax period of January 1, 2002 through September 30, 2005. Akins appealed the assessment to the Commission’s Board of Review, which after holding a hearing on the appeal, upheld and affirmed the assessment by order dated August 1, 2008. (RE 9)². Feeling further aggrieved by the decision of the Board of Review, a subsequent appeal was filed with the State Tax Commission³, before which a hearing was held on June 3, 2009. (RE 7). On July 14, 2009, the State Tax Commission entered its order affirming the assessment. (RE 7). Said order was

¹ 2009 legislation became effective July 1, 2010, that eliminated the Mississippi State Tax Commission and, in its place, created the Mississippi Department of Revenue and the Mississippi Board of Tax Appeals. In order to avoid confusion in briefing, all references to the Commission will also mean the Department of Revenue.

² For the purposes of this brief, the Commission will use “RE” to cite to the Appellant’s Record Excerpts.

³ Previously referred to as the Full Commission consisting of the Commissioner of the State Tax Commission and two Associate Commissioners who are appointed by the Governor. Now the Board of Tax Appeals. The savings clause of the 2009 amendment renders this change inapplicable to this appeal.

the subject of Akins's complaint filed in Hinds County Chancery Court on August 13, 2009. (RE 1-9). Akins did not post a bond with the court, nor did he pay the amount ordered to be paid by the State Tax Commission. In lieu of an answer, the Commission filed a motion to dismiss Akins' petition. (RE 13-26). Akins filed a response to the dismissal motion. (RE 26-41). The Chancellor held hearings on the motion on October 9, 2009, and January 14, 2010, after which an order was entered on March 9, 2010, dismissing the case for lack of subject matter jurisdiction. (RE 116-19).

STANDARD OF REVIEW

The Commission agrees with Akins' standard of review.

SUMMARY OF THE ARGUMENT

The statutory scheme of administrative review provided in Miss. Code Ann. § 27-77-1, *et seq.*, affords a taxpayer with due process through both predeprivation and postdeprivation processes, and therefore satisfies the due process requirements of both the United States' and Mississippi Constitutions. The taxpayer failed to perfect his appeal pursuant to the requirements of Miss. Code Ann. § 27-77-7, by neither posting a bond nor paying the amount ordered by the State Tax Commission to be paid, prior to filing his appeal petition, depriving the chancery court of jurisdiction over the underlying case. Due to the taxpayer's failure to appeal in accordance with the law, the Order of the State Tax Commission became final and Akins' claims are barred under the doctrines of res judicata and collateral estoppel. Therefore, the Chancellor's order finding that the court did not have jurisdiction and that the case was subject to dismissal should be affirmed.

ARGUMENT

I. Due Process

A. Due Process Requirements

Akins contends that Miss. Code Ann. § 27-77-7 violates the Fourteenth Amendment to the United States Constitution “as it is discriminatory by depriving certain petitioners of due process of law, while granting such due process to more affluent petitioner” by requiring that the tax is paid or a bond posted. Akins cannot show that Miss. Code Ann. § 27-77-7 violates equal protection or due process or effects an unlawful taking under either our federal or state constitutions. In bringing this challenge, Akins faces a high hurdle as “state statutes are presumed constitutional.” *Alabama State Federation of Teachers, AFL-CIO v. James*, 656 F.2d 193, 195 (5th Cir. 1981). “The burden required to overturn this presumption is a heavy one: The challenge of a statute on the grounds of unconstitutionality is not sustainable unless the case is so clear as to be free from doubt.” *Moore v. Texas & N.O. R.*, 785 F.2d 386, 389 (5th Cir. 1935); *Moore v. Board of Supervisors of Hinds County*, 658 So.2d 883, 887 (Miss. 1995)(“[T]o state that there is doubt regarding the constitutionality of an act is to essentially declare it constitutionally valid.”) The Mississippi Supreme Court has stated that

[o]ur constitutional scheme contemplates the power of judicial review of legislative enactment. However, that power may be exercised affirmatively only where the legislation under review may be found in palpable conflict with some plain provision of the constitution. Statutes come before us clothed with a heavy presumption of constitutional validity. The party challenging the constitutionality of a statute is burdened with carrying his case beyond a reasonable doubt before this Court has authority to hold the statute, in whole or in part, of no force or effect.

State v. Mississippi Ass'n of Supervisors, Inc., 669 So. 2d 1221, 1223 (Miss. 1997)(internal citations omitted.)

When addressing a due process claim with regard to a tax dispute, the United States Supreme Court has held that,

[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause. The State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State. However, whereas "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest,' " *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. 496 U.S. 18 (1990).

Therefore, in order to satisfy due process requirements, a taxpayer must be provided with either a predeprivation process **or** a postdeprivation process. Miss. Code Ann. § 27-77-1, *et seq.* clearly passes constitutional muster because a taxpayer is provided an opportunity for both a predeprivation **and** a postdeprivation process for appealing a tax matter.

B. Administrative Review Pursuant to Miss. Code Ann. § 27-77-5 Provides a Predeprivation Process Which Satisfies the Requirement for Due Process

The United States Supreme Court has held that the requirement of due process is that "after such notice as may be appropriate the taxpayer have opportunity to be heard as to the amount of the tax by giving him the right to appear for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed." *McGregor v. Hogan*, 263 U.S. 234, 237 (1923)(citing *Turner v. Wade*, 254 U. S. 67 (1920) and *Londoner v. Denver*, 210 U. S. 373, 385 (1908)). Miss. Code Ann. § 27-77-5 provides a predeprivation process whereby a taxpayer has

the opportunity to be heard prior to a tax becoming irrevocably fixed and any collection efforts undertaken; in fact, a taxpayer is given two opportunities to be heard – once before the Board of Review and once before the State Tax Commission. Akins availed himself of both of these opportunities and was heard by both administrative bodies.

Both the United States and Mississippi Constitutions guarantee due process of law before an administrative agency.⁴ Administrative proceedings “must be conducted in a fair and impartial manner, free from any suspicion of prejudice, unfairness, fraud or oppression.” *Mississippi State Bd. of Health v. Johnson*, 19 So. 2d 445, 447 (Miss. 1944). “Due process always stands as a constitutionally grounded procedural safety net in administrative proceedings.” *McGowan v. Mississippi State Oil & Gas Bd.*, 604 So. 2d 312, 318 (Miss. 1992), *cert. denied*, 506 U.S. 1052 (1993).

The Commission’s appellate procedures are crafted by legislative statute contained in Miss. Code Ann. Title 27 Chapter 77. There is a Board of Review composed of qualified employees of the agency appointed to the Board by the Commissioner who hear matters in a quorum of not less than three (3).⁵ From there an appeal is made to the State Tax Commission consisting of the Commissioner and two Associate Commissioners who are appointed with term limits by the Governor and confirmed by the Legislature with their own set of qualifications listed in Miss. Code Ann. Title 27 Chapter 3, specifically sections one, two and three.⁶

⁴ U.S. Const. Amend XIV; Miss. Const. Art. 3, § 4

⁵ Miss. Code Ann. 27-77-3

⁶ As previously noted, the Mississippi Code was amended in 2009 to reorganize the Mississippi State Tax Commission into two separate agencies, the Department of Revenue and the Board of Tax Appeals. The amendment’s effective date was July 1, 2010; however, the savings clause renders these changes inapplicable to this appeal, therefore all citations in the Appellee’s brief are to the prior versions of Miss. Code Ann. § 27-77-7 and Miss. Code Ann. § 27-3-1, et seq. which are applicable to this matter.

The Supreme Court of Mississippi has held that due process is not offended simply because a Board performed both investigative and adjudicative functions. *McGowan*, 604 So. 2d at 315-16; see also *Withrow v. Larkin*, 421 U.S. 35, 56 (1975)(noting “[i]t is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal Petitions instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedures Act, and it does not violate due process of law.”) “[T]here is a presumption that the officers conducted the hearing and the members of the Board behave honestly and fairly in the conduct of the hearings and in the decision making process.” *United Cement v. Safe Air for the Env’t, Inc.* 558 So. 2d 840, 842 (Miss. 1990)(citing *Harrison County School Bd. v. Morreale*, 538 So. 2d 1196, 1202 (Miss. 1989)). “The combination in the same individual of . . . nonadjudicated functions does not violate due process, provided the claimant’s due process rights to a fair hearing before an impartial adjudicator are otherwise protected.” *Freeman v. Public Employees Retirement System of Miss.*, 822 So. 2d 274 (Miss. 2002)(citing *McFadden*, 735 So. 2d at 158). “Absent some showing of personal or financial interest on the part of the hearing officer of evidence of misconduct on the officer’s part, this presumption is not overcome.” *United Cement*, 558 So. 2d at 842-43. There has been no evidence of any showing of partiality on behalf of any of the members of the administrative boards that reviewed this matter.

“[T]he 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 and burdensome, if they are calculated to further governmental purposes.” *Mississippi State Tax Commission v. Flora Drug Co.*, 148 So. 373, 376 (1933). The legitimate government purpose is to protect the revenue stream of the State of Mississippi.

Not only are both of the administrative hearings held before the tax becomes irrevocably fixed, but a taxpayer is not required to pay the tax or post any type of bond in order to avail himself of the administrative appeal process. In fact, Akins availed himself of this process by appealing to both administrative review bodies and having hearings before each. Clearly, Miss. Code Ann. § 27-77-5 provides a predeprivation process which affords due process and any claims made by Akins otherwise are wholly without merit.

C. Requirement of Payment of Tax or Posting of Bond does not Violate Due Process Afforded through the Postdeprivation Process provided in Miss. Code Ann. § 27-77-7

Pursuant to Miss. Code Ann. § 27-77-7, there are two routes to appeal an administrative order of the State Tax Commission to Chancery Court. A taxpayer may either pay the tax or post a bond. Akins had a choice to either pay the tax or post a bond. He chose to do neither.

The statutory requirement of posting a bond or payment of the tax is rationally related to a legitimate state interest of the protection of the revenue stream of the State of Mississippi. There exists a legitimate government purpose for imposing a bond requirement based upon the fact that a bond will be present in the event the Commission is judged correct in its assessments and the taxpayer may have exhausted his funds or some waste of such funds has occurred. The amount of the bond being doubled protects the state as any debt due the state is assessed interest at a rate of 1% per month, giving some assurance to the Commission and the taxpayer that in the time it takes to come to any final judgment it would not exceed the bond. If the taxpayer has paid the amount due and is successful in his appeal, then the Commission must pay the taxpayer interest in the amount of one percent (1%) per month in addition to refunding the taxes paid. Miss. Code Ann. § 27-65-53. A payment of taxes or posting of bond ensures that the revenue due the State of Mississippi either will have been paid or will exist at the end of the litigation.

The United States Supreme Court found in *McKesson* that,

[w]hen a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's postdeprivation procedure to provide a "clear and certain remedy," *O'Connor*, 223 U.S., at 285, 32 S.Ct., at 217, for the deprivation of tax moneys in an unconstitutional manner. In this case, Florida may satisfy this obligation through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period. The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.

Id. at 51. The postdeprivation process afforded to taxpayers by Miss. Code Ann. § 27-77-7 is both clear and certain; and Akins has not argued otherwise. Not only has the State of Mississippi afforded the taxpayer due process through the predeprivation appellate procedures outlined in Miss. Code Ann. § 27-77-1, *et seq.*, the state has gone above and beyond the minimal requirements pronounced by the United States Supreme Court by also providing a postdeprivation process. There is no question that the appeal procedures established by Miss. Code Ann. § 27-77-1, *et seq.* provided due process and Akins' claim to the contrary is without merit.

This Court has previously held that there was no denial of due process in proceedings for the assessment or collection of a tax when the appellant was given an opportunity to be heard before the commissioner. *Anderson Bros. Corp. v. Stone*, 85 So. 2d 767 (Miss. 1956). Although the Court in *Anderson Bros.* did not address the requirement for posting a bond or paying the tax to perfect an appeal, the Court did establish a standard for reviewing these types of questions. Citing 51 Am.Jur. p. 673, Taxation, par. 732, the Court held that,

In matters of taxation, due process requires that after such notice as may be appropriate, the taxpayer has opportunity to be heard as to the validity of the tax

and the amount thereof, but it does not demand opportunity for judicial review prior to the inauguration of efforts to collect a tax, or an opportunity for hearing upon each successive step in the tax proceedings. The due process requirement is satisfied if there is opportunity to question the validity or amount of a tax either before the amount is determined or in subsequent proceedings for its collection and enforcement....Notice of the assessment and opportunity to contest it, therefore, need not be given in advance of the assessment; nor is it essential that the taxpayer have an opportunity to be present before the tribunal by which the tax against him was assessed at the time that the assessment was made, if he has an opportunity to be heard before it has become conclusively established against him. Due process of law may be satisfied if the taxpayer has the right to recover in an action at law any portion of a tax which he thinks has been illegally collected....

Id. at 776.

Other states have declared their bond requirement a valid government interest. See *Dansby v. State Dept. of Revenue*, 560 So.2d 1066, 1067 (Ala. Civ. App. 1990); *Moore v. State, Dept. of Revenue*, 447 So.2d 744, 746 (Ala. Civ. App. 1983); *J.L. Muscarelle, Inc. v. Saddle Brook Tp.*, 15 N.J.Tax 164, 166-67 (N.J.Super.A.D.1994). Although a case of first impression in this Court, several states have reviewed similar statutes wherein payment of the tax and/or posting of bonds was required for appeal of tax matters from administrative agencies to court.

Our sister state of Alabama has addressed this issue and found that dismissal of a taxpayer's appeal for failure to give cost bond as required by statute did not deny the taxpayer due process. The specific statutory provision in question afforded the taxpayer an opportunity for hearing, yet that taxpayer failed to comply with the mandate of the statute and dismissal of his appeal was appropriate. *Dansby v. State Dept. of Revenue*, 560 So. 2d 1066, 1067 (Ala. Civ. App. 1990). As in this case, the Alabama court found that the filing of a cost bond was a condition precedent to perfecting an appeal under the applicable statute. *Id.* at 1067. The Alabama court has also held that "the right of appeal, as well as the procedure used to perfect such appeal in tax proceedings, is purely statutory, a matter of legislative discretion, and involves

no inherent right of the [t]axpayer.” *Moore v. State, Dept. of Revenue*, 447 So.2d 744, 746 (Ala. Civ. App. 1983) (citing *Valentine v. State*, 403 So. 2d 2370 (Ala. Civ. App. 1981) and *McLendon v. State Department of Revenue*, 395 So. 2d 71 (Ala. Civ. App. 1980), *cert. denied*, 395 So. 2d 73 (Ala. 1981)).

Further, the Superior Court of New Jersey has held that in the challenges of property taxes that their strict reading of their statutory scheme requiring payment of the tax in full is a prerequisite to maintaining a tax appeal does not violate the due process of the United States Constitution. *J.L. Muscarelle, Inc. v. Saddle Brook Tp.*, 15 N.J.Tax 164, 166-67 (N.J.Super.A.D.1994). The court went on to state that “[t]he meaning of the statute cannot be legitimately challenged. The language is clear and unambiguous. The word “shall” exhibits a clear legislative purpose that payment of taxes is a prerequisite to maintaining a tax appeal. To rule otherwise would be judicial legislating, a clear violation of the separation of powers doctrine.” *Id.* at 166.

The Iowa tax scheme in *Schroeder v. Iowa*, 458 N.W.2d 602 (1990), as referenced by the Appellant, is not relevant to the current case. The Iowa Supreme Court rejected a constitutional challenge to the lack of predeprivation hearing finding that it constituted a government basis but took issue with the lack of postdeprivation hearing in the absence of bond. Iowa did not provide for any predeprivation or postdeprivation hearing at an administrative level absence a bond. There existed in Iowa a statutory requirement that in order to dispute an assessment, a taxpayer must pay all assessments before an administrative law judge could hear the dispute or post a bond not in excess of tax, penalty and interest assessed.

Unlike Iowa, Mississippi provides for two predeprivation hearings, one before the Board of Review and then if a taxpayer is not satisfied, they can then appeal to the next level at which time the State Tax Commission will hear their case. No barrier to administrative review exists in

either requiring the posting of a bond nor payment of the tax at issue before an opportunity to be heard can exist. It is only after the administrative levels have been exhausted does Mississippi's statutory scheme require either the payment of the tax as listed in the order or the posting of a bond in double the amount in controversy in order to protect the revenue stream of the state in that waste may occur if such bond or payment is not posted.

In the case of *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), the U.S. Supreme Court held that an Illinois refund procedure whereby the taxpayer was required to pay or post a bond was a "plain, speedy and efficient remedy" within the language of the Tax Injunction Act thereby barring federal jurisdiction to grant injunctive relief. The Court held that certain minimum procedural requirements must be met such as providing the taxpayer "with a full hearing and judicial determination" during which she might raise any and all constitutional objections to the taxes and review was authorized in the higher Illinois courts and ultimately could be obtained in the Supreme Court. There were no procedural defects other than delay. The fact that Illinois did not pay interest on refunds did not make the remedy not "plain, speedy and efficient." Any federal right Rosewell might have to receive interest could be asserted in the state-court legal proceeding. The Court specifically stated that "the reasons supporting federal noninterference with state tax administration – such as the dependency of state budgets on the receipt of local tax revenues and the havoc that would be caused if federal injunctive relief against collection of state or local taxes were widely available—are just as compelling today at there were in 1937 when the Tax Injunction Act was passed." *Id.* at 1236-37.

The United States Supreme Court took up the matter of a statutory double bond requirement in the case of *Lindsey v. Normet*, 405 U.S. 56 (1972), where a class action was filed in a landlord-tenant case. The appellants were month to month tenants who sought to withhold rent until repairs were made to the premises. They brought suit in federal district court under 42

U.S.C. § 1983 seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful detainer statute was unconstitutional on its face.

The statute required that a landlord bring action for possession whenever a tenant failed to pay rent within ten days of its due date. The suit could be tried to either a judge or jury and the only issue would be whether the allegations were true. The statute provided that “[t]he only reward that a plaintiff may recover is restitution of possession. s 105.155. A defendant who loses such suit may appeal only if he obtains two sureties who will provide security for the payment to the plaintiff, if the defendant ultimately loses on appeal, of twice the rental value of the property from the time of commencement of the action to final judgment.” *Id.* at 63-64.

The United States Supreme Court found that the double bond requirement did violate the equal protection clause stating that “[i]n the event the judgment is affirmed, the landlord is automatically entitled to twice the rents accruing during the appeal without proof of actual damages in that amount.” *Id.* at 76. The Court went further to explain that the general appeal bond statute, ORS s 19.040 (1)(b), protects against waste or damages and also covers the “the value of the use and occupation of such property . . . from the time of the appeal until the delivery of the possession thereof, and since the landlord may bring a separate action at law for payment of back rent under ORS s 91.220.” *Id.* at 78.

The *Lindsey* case is clearly distinguishable from the matter pending before this Court in that Mississippi law does not require two levels of bonding such as a general appeal bond then a double bond added to it. In fact, the state requires no bond to be posted if the taxpayer chooses to pay the tax under protest and seeks a refund. Furthermore, unlike the bond at issue in *Lindsey*, the Commission is not entitled to the entire or partial bond posted if its case is not proven. If it prevails, the Commission would only be entitled to the original amount on the order plus any statutory interest, which had accrued during the pendency of the appeal. Finally, the bond

requirement is legitimately related to protection of the revenue stream in that no waste can occur of monies while the appeal is going forward.

Akins' reliance on *Boddie v. Connecticut*, 401 U.S. 371 (1971) is misplaced, as it is clearly distinguishable from the instant matter. The *Boddie* case involved a divorce action and not a tax matter, the latter the United States Supreme Court has found to concern the government's "exceedingly strong interest in financial stability." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept.*, 496 U.S. 18, 37 (1990). When addressing a due process claim in regard to a tax dispute, the United States Supreme Court has held that,

[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause. The State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State. However, whereas "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest,' " *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

Id. at 36-37.

Akins further relies upon the case of *Saharoff v. Stone*, 638 F.2d 90 (9th Cir. 1980) which involves the Commodity Futures Trading Commission and does not involve taxes due a government entity. *Saharoff* sought review of an order of the Commodity Futures Trading Commission of misconduct after a full adversarial hearing before an administrative law judge

and subsequent appeal to the Commodity Futures Trading Commission. The United States Senate had stated in 7 U.S.C. §18 (g) that judicial review of the order was conditioned upon posting of a bond double the amount awarded. In *Saharoff*, the Ninth Circuit also found that this provision did not result in a denial of due process related to the bond requirement because an opportunity to be heard existed at the administrative level therefore *Boddie v. Connecticut* was inapplicable. *Boddie* is just as inapplicable in the instant matter. The *Saharoff* Court found further that the bond requirement did not deny due process and protection but that the double bond did have rational basis, as the interests asserted by *Saharoff* were not fundamental in the constitution and was upheld.

Here, as in *O'Day*, there is clear congressional intent to require a bond to secure the award. Determination of the amount is a peculiarly judicial function, and the Act is by its terms to be upheld in any valid application. 536 F.2d 861-62. See 7 U.S.C. s 17. *Saharoff* was required to file the bond as reduced by the motions panel. His proposed alternatives do not satisfy the statutory requirement. The appeal is dismissed.

Id. at 93. There was no subsequent appeal to the United States Supreme Court.

Unlike *United States v. Kras*, 409 U.S. 434 (1973), as cited by *Akins*, where an indigent debtor was unable to pay bankruptcy filing fees and therefore denied a discharge. The instant matter involves the collection of taxes whereby the United States Supreme Court has ruled that there exists an exceedingly strong government interest in financial stability that is rationally related to the requirement of payment in full of taxes or posting of a bond before even administrative review as in *Rosewell v. LaSalle*. Further, there has been no showing of proof that *Akins* is indigent. *Kras* is inapplicable as well to the current action.

D. Statutorily Prescribed Period of Time Within Which to Satisfy Appeal Prerequisites is Constitutional

Akins argues that the time period given him to pay the tax was too short. However, *Akins* cites no law in support of his argument that a certain amount of time is required for

payment to satisfy due process. Additionally, Akins fails to address when the actual assessment was issued that began his administrative appeal. The Board of Review entered an order affirming the audit assessment on August 1, 2008. Then almost a year after that, on July 14, 2009, the Commission issued its order. Akins provides no argument or explanation regarding his failure to procure the necessary funds during the approximate twelve months that he participated in the administrative appeal process. If one year was not enough time, then how much time is required to satisfy due process according to Akins argument? There is no rule prohibiting payments during the pendency of an appeal. If Akins had paid the taxes and it was later determine that he had overpaid his taxes, a refund may be made with interest at the rate of one percent (1%) per month. Miss. Code Ann. § 27-65-53. The Board of Review issued its order affirming the tax assessment on August 1, 2008. (RE 9). Without including the period of time from the issuance of the initial assessment through the hearing before the Board of Review and subsequent issuance of an order, there was a period of at least twelve months that passed without action on Akins' part to attempt to satisfy the appeal requisites. Additionally, the Court provided Akins additional time from the filing of his Petition in August of 2009 to January 14, 2010, the date of the reconvened hearing, to either post the bond or pay the tax.⁷ He did neither.

There is no question in this case that Akins was afforded due process by the provisions of Miss. Code Ann. § 27-77-1, *et seq.* Not only did the taxpayer have the “meaningful opportunity” to be heard on the validity of the assessment prior to its becoming final, Akins was heard twice, once before the Board of Review and once again before the State Tax Commission as provided in Miss. Code Ann. § 27-77-5. This framework clearly constituted a predeprivation process. Additionally, Miss. Code Ann. § 27-77-7 provided a postdeprivation process to the taxpayer.

⁷ Although not before the Court, the Commission does not believe the Court would have had the authority to allow the post-filing payment of the tax or the posting of a bond to establish jurisdiction over the appeal.

The postdeprivation process afforded to taxpayers by Miss. Code Ann. § 27-77-7 is both clear and certain. Not only has the State of Mississippi afforded the taxpayer due process through the appellate procedures outlined in Miss. Code Ann. § 27-77-1, *et seq.*, the Commission has gone above and beyond the minimal requirements pronounced by the United States Supreme Court. The appeal procedures established by Miss. Code Ann. § 27-77-1, *et seq.* provided Akins with due process and his claim to the contrary is without merit.

II. THE CHANCERY COURT WAS CORRECT IN DISMISSING FOR LACK OF SUBJECT MATTER JURISDICTION

In order for the Chancery Court to obtain subject matter jurisdiction the taxpayer “shall within thirty (30) days from the date of this order pay to the Mississippi State Tax Commission the amount of \$20,139.00, being the assessment as affirmed by the order, including interest to date, or file a petition in Chancery Court appealing the order pursuant to Miss. Code Ann. § 27-77-7. Even 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 the taxpayer pays the assessment as affirmed herein **under protest prior** to the filing of such petition. This order and the findings contained herein shall become final if the taxpayer 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”. Commission Order (RE 7-8).

The only process for properly appealing an Order of the Commission is contained in Miss. Code Ann. § 27-77-7 pursuant to Miss. Code Ann. § 27-77-5. Section 27-77-7(1) of the Mississippi Code provides in pertinent part as follows: “[t]he 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.” Even though a chancery court is a court

of law and equity, the equitable maxim is that equity follows the law. *Hill v. Boyland*, 40 Miss. 618, 1866 WL 1904, *2 (Miss. Err. & App. 1866). Akins argument that the chancery court may change the law in the name of equity is counter to this well-established maxim. A chancery court “cannot ignore an unambiguous statutory principle in an effort to shape relief.” *Farmer v. Department of Public Safety*, 907 So. 2d 981, 984-85 (¶12)(Miss.2005)(citing *Estate of Miller*, 840 So. 2d.703, 708 (Miss. 2003)). Pursuant to Miss. Code Ann. § 27-77-7, Akins had a choice to either pay the tax or post a bond. To his own peril, Akins chose to do neither.

Therefore, the requirements for posting a bond have not been met and Akins failed to perfect his appeal under that prong of Miss. Code Ann. 27-77-7. The only other way the taxpayer may perfect an appeal to Chancery Court is **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.** Miss. Code Ann. § 27-77-7(3)(emphasis added). Other than posting an appeal bond, the law does not provide for any exceptions to the requirement for paying the tax under protest. Neither requirement was met by Akins. Miss. Code Ann. § 27-77-7 provides that “the findings 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.” (Emphasis added). The Petition filed in Chancery Court was not accompanied by the bond nor was the payment of the tax made to the Commission for the ordered amount prior to the filing of the Petition as required under Miss. Code Ann. § 27-77-7(3); therefore, this action was properly dismissed for lack of subject matter jurisdiction by the Hinds County Chancery Court.

It is a well established legal principle that statutory interpretation is inappropriate where the language used by the legislature in the statute is plain and unambiguous and conveys a clear and definite meaning. *Balouch v. State of Mississippi*, 938 So. 2d 253, 259 (Miss. 2006). The

appeal statute at issue is plain on its face and requires that \$21,688.00, the amount specified in the State Tax Commission's Order, must be paid or a proper bond posted. (RE 7-8). In fact, Rule 82 of the Mississippi Rule of Civil Procedure provides in subsection (a) that the rules shall not be construed to extend or limit the jurisdiction of the courts of Mississippi.

In the case of *Bertucci v. Dept of Corrections*, 597 So. 2d 643 (Miss. 1992), the Supreme Court dismissed an appeal filed by the Mississippi Department of Corrections for lack of jurisdiction. The Court noted that it had "repeatedly required strict compliance with the appeal provision of our rules and appeal statutes." The Court declined to ignore statutory requirements and accept that a brief was in substantial compliance with the controlling statute of Miss. Code Ann. § 11-51-93. The Court was not willing to accept anything less than full compliance with all the essentials within the time allowed.

The Supreme Court of Mississippi has also upheld dismissal of an appeal based on appellant's failure to strictly comply with statutory appeal procedures by not filing a petition for writ of certiorari nor posting a bond with security in the case of *Jackson State University v. Upsilon Chapter of Omega Psi Phi Fraternity*, 952 So. 2d 184 (Miss. 2007).

In *Luckett v. Mississippi Wood, Inc.*, 481 So. 2d 288, 290 (Miss. 1985), the Mississippi Supreme Court held that "[a]s a threshold inquiry, subject matter jurisdiction must be determined before the court has authority to decide whether [the] plaintiff has stated a claim upon which relief may be granted." Due to the failure of the taxpayer to adhere to the requirements under Miss. Code Ann. § 27-77-7(3), the Chancery Court lacked jurisdiction over the subject matter of the petition and the dismissal of the action by the Chancery Court should be affirmed.

CONCLUSION

The statutory scheme found in Miss. Code Ann. § 27-77-7, *et seq.* has provided Akins with two full administrative hearings and an opportunity for judicial review, thereby meeting the



due process requirements of the United States Constitution. Administrative review insures that no procedural defects exist and the requirement of payment of taxes or posting of a bond satisfies a legitimate state interest. There is no arbitrary action or unequal treatment by the government as these procedures apply to all taxpayers. The process of review meets constitutional standards. The lower court should be affirmed as the statutory scheme is valid and Akins has not met the requirements set forth in Miss. Code Ann. § 27-77-7 to either pay the tax or post a bond in double the amount in controversy in order to grant jurisdiction to the Chancery Court.

The Commission respectfully prays that the Court, after hearing oral argument or upon due consideration of the submissions, will affirm the Hinds County judgments in favor of the Commission.

Respectfully submitted this 7th day of January, 2011.

**MISSISSIPPI DEPARTMENT OF REVENUE,
FORMERLY THE MISSISSIPPI STATE TAX
COMMISSION**

BY: 

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CERTIFICATE OF SERVICE

I, Kenitta Franklin Toole, attorney of record for the Mississippi Department of Revenue,
hereby certify that I have this day caused to be served a true and correct copy of the foregoing
Brief of the Appellee, via First Class United States mail, postage prepaid, to the following:

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Hon. Patricia D. Wise
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This the 7th day of January, 2011.


Kenitta Franklin Toole