

IN THE SUPREME COURT OF MISSISSIPPI

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

APPELLANTS

VS.

NO. 2010-CA-00599

MISSISSIPPI DEPARTMENT OF REVENUE

APPELLEE

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

REPLY BRIEF OF THE APPELLANT

**HARRIS H. BARNES, III (MS BAR [REDACTED])
JAMES G. MCGEE, JR. (MSB [REDACTED])
BARNES, MCGEE AND ASSOCIATES, P.A.
5 River Bend Place, Suite A
Flowood, Mississippi 39232
Telephone: (601) 981-6336
Facsimile: (601) 981-7075**

ATTORNEYS FOR APPELLANT

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REBUTTAL ARGUMENT

I. Due Process requires an “adequate opportunity” for judicial review – administrative review will not suffice.

The essence of the taxpayer’s argument is that due process requires an “adequate opportunity” for “judicial review” either before or after an exaction of a tax.¹ While Mississippi Code Annotated § 27-77-7 establishes a procedure for obtaining judicial review, the conditions imposed by that section negate any adequate opportunity for judicial review; therefore, in the absence of an alternative opportunity for obtaining judicial review, Mr. Akins was deprived of his right to procedural due process because he was not afforded an adequate opportunity for judicial review of the assessments made against him.

In response, the Mississippi Department of Revenue (“MDOR”) argues that the requirements of due process were satisfied by providing Mr. Akins with an opportunity for administrative review before the Board of Review and the three-member Mississippi State Tax Commission, which is now known as the Mississippi Board of Tax Appeals. It then builds on this proposition in the remainder of its arguments. In support of its position, the MDOR cites the following language from the United States Supreme Court’s decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, wherein it described a States’ constitutional duty to provide relief from the exaction of an unlawful tax:²

Because 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

¹ *Phillips v. Comm’r*, 283 U.S. 589, 595 (1931); see also *Bob Jones University v. Simon*, 416 U.S. 725, 746 (1974) (“This is not a case where an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different.”).

² 496 U.S. 18, 37 (1990).

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’ ” . . . it is well established that a State need not provide a predeprivation process for 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.³

Despite the Court's explicit reference to “[a]llowing taxpayers the opportunity to litigate their tax liabilities . . . ,” the MDOR equates the Court's references to “process” and “proceedings” to administrative review.⁴ Therefore, it argues that the State of Mississippi has satisfied the requirements of due process by providing Mr. Akins with an opportunity for administrative review.⁵ Devoid of context, the Court's language arguably could be interpreted to support the DOR's position, especially given the somewhat unfortunate use of such loose terms as “predeprivation process” and “tax enforcement proceedings.” Read in context, however, it's clear that the Court would have held that the lack of any opportunity for judicial review constitutes a denial of procedural due process.

The principle that due process requires an adequate opportunity for judicial review has been embedded in law since at least 1931, when the United States Supreme Court issued its opinion *Phillips v. Commissioner*.⁶ In *Phillips*, the taxpayer challenged the recently enacted procedure that allowed the Internal Revenue Service to enforce transferee liability for a tax in the

³ *McKesson*, 496 U.S. at 36-37 (internal citations and footnotes omitted).

⁴ *Id.*

⁵ See Miss. Code Ann. § 27-77-5 (prescribing procedure for administrative review).

⁶ 283 U.S. 589.

same manner that it would against the underlying taxpayer.⁷ There, Justice Brandeis, writing for the Court noted:

The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.⁸

Forty years later, the Court reaffirmed this essential principle in *Bob Jones University v. Simon*.⁹ In that case, the taxpayer sought injunctive relief from the IRS's revocation of its tax-exempt status because of the school's racially discriminatory admissions policies. The taxpayer alleged, among other things, that the revocation violated its rights to due process and equal protection under the laws. Ultimately, the court rejected the taxpayer's request to create an exception to the Anti-Injunction Act. It did so, in part, because taxpayer had an alternative opportunity for judicial review. Had that not been the case, however, the Court noted that "[its] conclusion might well be different."¹⁰

McKesson is consistent with the Court's decisions in *Phillips* and *Bob Jones*. In *McKesson*, the taxpayer brought a refund action in Florida state court, alleging that Florida's liquor excise tax violated the Commerce Clause of the United States Constitution. Trial court agreed and issued injunctive relief, barring any future enforcement of the provision at issue. However, the court refused to order a refund or any other form of relief for the taxes previously paid and timely challenged under the unconstitutional statutory scheme. The Florida Supreme Court affirmed the lower court and the taxpayer petitioned for writ of certiorari.¹¹ The precise question before the Court concerned the quality of the remedy available to the taxpayer in the

⁷ *Id.*

⁸ *Id.* at 595-597 (internal citations omitted).

⁹ 416 U.S. 725 (1974).

¹⁰ *Id.* at 746.

¹¹ *McKesson*, 496 U.S. at 23-26.

refund action. Thus, the Court's holding was that due process requires "not only a fair opportunity [for taxpayers] to challenge the accuracy and legal validity of their tax obligation, . . . but also a 'clear and certain remedy' . . . for erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."¹²

Accordingly, nothing in *McKesson* or any of the Court's other cases addressing the requirements of due process in the context of tax assessments and collections indicates that the requirements of due process can be satisfied merely by providing taxpayers with anything less than an adequate opportunity for judicial review.

II. The MDOR's arguments fail because they rest on the flawed proposition that the requirements of due process were satisfied by providing Mr. Akins with an opportunity for administrative review.

In our opening brief, we assert that the conditions imposed by §27-77-7 render any opportunity for judicial review afforded by that section constitutionally inadequate. Specifically, we argue that the double bond required as a condition for prepayment judicial review negates the adequacy of any opportunity for such review, and that the 30 day statute of limitations effectively forecloses, and therefore negates the adequacy of, any opportunity for postpayment review. Thus, in the absence of an alternative procedure for obtaining judicial review, we contend that Mr. Akins was deprived of his right to procedural due process because he was not afforded an adequate opportunity for judicial review of the assessments made against him.

While the MDOR makes several eloquent arguments supported by numerous cases from this and other jurisdictions in an attempt to refute our assertions, they all fail for the same reason: they are built on the flawed proposition that the requirements of due process were satisfied by providing Mr. Akins with an opportunity for judicial administrative review. Consequently, they

¹² *Id.* at 39 (internal citations and footnotes omitted).

fail to refute our principle assertion that Mr. Akins was deprived of his right to due process of law because the procedure in § 27-77-7 does not provide an adequate opportunity for judicial review of the assessments made against him.

CONCLUSION

Contrary to their protestations otherwise, due process requires an adequate opportunity for judicial review of either before or after the exaction of a tax. Mississippi Code Annotated § 27-77-7 sets forth a procedure for obtaining judicial review, but the conditions imposed by that section rendered any opportunity afforded thereby constitutionally inadequate. There is no alternative procedure for obtaining judicial review. Therefore, unless this Court reverses the lower court's order dismissing Mr. Akins' petition for judicial review of the assessments made against him, he will be deprived of his right to due process of law.

Respectfully submitted this the 23rd day of February, 2011.

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

BY: 

James G. McGee, Jr.
Harris H. Barnes, III

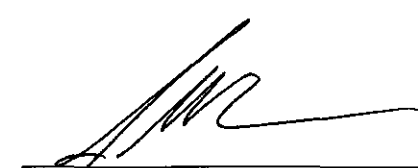
CERTIFICATE OF SERVICE

I do hereby certify that I have this date mailed through the United States Postal Service, postage prepaid, a true and correct copy of the above and foregoing REPLY BRIEF OF THE APPELLANT to the following:

Kenitta Franklin Toole, Esq.
Mississippi Department of Revenue
P.O. Box 1033
Jackson, Mississippi 39215

James Powell, Esq.
Mississippi Department of Revenue
P.O. Box 1033
Jackson, Mississippi 39215

This the 23rd day of February, 2011



James G. McGee, Jr.
Harris H. Barnes, III