

**IN THE SUPREME COURT OF MISSISSIPPI**

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**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**

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**BRIEF OF THE APPELLANT**

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**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**

**ORAL ARGUMENT REQUESTED**

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**CERTIFICATE OF INTERESTED PARTIES**

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Walter D. Akins, d/b/a Akins Construction Company, plaintiff and appellant
2. James G. McGee, Jr., and Harris H. Barnes, III, Barnes, McGee, and Associates, P.A.,  
Flowood, Mississippi, counsel for Walter D. Akins, d/b/a Akins Construction Company
3. State of Mississippi
4. Mississippi Department of Revenue, f/k/a Mississippi State Tax Commission
5. Kanitta Franklin Toole, and James Powell, counsel for the Mississippi Department of  
Revenue
6. Hon. Patricia D. Wise, Chancellor, First Judicial District of Hinds Count, Mississippi

  
Harris H. Barnes, III, (MSB # [REDACTED])  
James G. McGee, Jr. (MSB # [REDACTED])  
Counsel of Record for Walter D. Akins,  
d/b/a Akins Construction Company

## **STATEMENT REGARDING ORAL ARGUMENT**

This case addresses an issue of vital importance to every citizen of the State of Mississippi, which is: Does the procedure outlined in Mississippi Code Annotated § 27-77-7 for obtaining judicial review of state tax assessments comport with constitutional norms of due process? For this reason alone the Court should grant oral argument. In addition, however, Mr. Akins believes that oral argument would help clarify the issues. Accordingly, Mr. Akins requests oral argument.

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## STATEMENT OF THE ISSUE

Due process requires that taxpayers be afforded an "adequate opportunity" for "judicial review" of an asserted tax liability. The Chancellor dismissed Mr. Akins complaint for judicial review of an assessment of state sales tax because he could not afford to pay the tax or post bond equal to "double the amount in controversy" within 30 days from the date of the Commission's order affirming the assessment, as required by Mississippi Code Annotated § 27-77-7 at the time this case was decided.<sup>1</sup> Mr. Akins had no other opportunity for judicial review, and absent any relief afforded by this Court, he is forever precluded from further contesting his liability for the assessment. Was Mr. Akins afforded a constitutionally adequate opportunity for judicial review?

## STATEMENT OF THE CASE

### A. Procedural History

The Mississippi State Tax Commission ("MSTC") assessed additional sales tax against Mr. Akins for the periods of January 1, 2002 through September 30, 2005. (R. at 9:5-7, 20:5-7, 41;5-7.) After exhausting his administrative remedies, Mr. Akins petitioned the Chancery Court of Hinds Count, First Judicial District, for judicial review. (R. at 1-9.) The Chancellor dismissed his complaint because he could not afford to pay the tax or post bond equal to "double

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<sup>1</sup> Mississippi Code Annotated § 27-77-7 was amended during the 2009 general session. 2009 Miss. Laws 492, § 115. Among other things, the amendment lengthens the time to file an appeal from thirty (30) to sixty (60) days, reduces the bond required in lieu of payment from double to one-half the amount in controversy, and gives the chancellor the authority to waive the bond in its entirety if the court finds the State's interest is adequately protected. *Id.* At first blush, the amendment appears to continue to require taxpayers to pay the full amount of the assessment if they do not, or cannot, post bond in lieu of payment; however, there is language indicating otherwise. *See id.* at (3) ("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. . . . 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.") The amendment's effective date was July 1, 2010, *id.* at § 146, but a savings clause renders it inapplicable to this appeal. *Id.* at § 144.

the amount in controversy” within 30 days from the date of the assessment, as was required by Mississippi Code Annotated § 27-77-7 at the time this case was decided. (R. at 119:10) It is from this decision that Mr. Akins appeals.

**B. Statement of the Facts**

Mr. Akins has worked as a contractor for approximately fifteen (15) years and is the sole proprietor of Akins Construction, a small, mostly residential, construction business located in Starkville, Oktibbeha County, Mississippi. The majority of Akins Construction’s projects include small residential structures with minimal profit.

Following an audit of Mr. Akins’ records, the MSTC assessed sales tax against Mr. Akins for the periods of January 1, 2002 through September 30, 2005. (R. at 9:5-7, 20:5-7, 41:5-7.) Mr. Akins appealed the assessment to the MSTC’s Board of Review (“Board of Review”). On August 1, 2008, the Board of Review entered an order decreasing the assessed amount from \$22,640 to \$20,139, but otherwise affirming the assessment. (R. at 9, 20, 41.) Thereafter, Mr. Akins appealed to the three-member State Tax Commission (“Commission”). A hearing was held on June 3, 2009, and on July 14, 2009, the Commission entered an order affirming the assessment as reduced by the Board of Review. (R. at 7-8, 18-19, 39-40.)

On August 13, 2009, Mr. Akins petitioned the Chancery Court for the First Judicial District of Hinds County, Mississippi, for review of the MSTC’s order affirming the assessment. (Dkt. at 1:2, R. at 1-9.) The MSTC moved to dismiss for lack of subject matter jurisdiction on the ground that Mr. Akins had neither paid the assessment in full within thirty (30) days from the date of the Commission’s order and prior to filing his complaint, nor posted bond “in an amount equal to double the amount in controversy” in conjunction with filing his complaint. Miss. Code Ann. § 27-77-7(3). (R. at 113-116.)

A hearing was held on October 9, 2009. (Tr. at 2:1.) At the hearing, Mr. Akins argued

that he was not given sufficient credit for sales tax paid on component material purchases. (R. at 29-30:10.) Sales tax is imposed at a rate of seven percent (7%) whereas contractors' tax is imposed at a rate of three and one-half percent (3½%). *See id.* at § 27-65-17 (sales tax); *id.* at § 27-65-21 (contractors' tax). Therefore, had he been properly credited for sales tax paid on component material purchases in determining whether the requirements of § 27-77-7 were satisfied, the credit would be more than sufficient to offset the contractors' tax assessment. (R. at 29-30:10.) In addition, Mr. Akins asserted that dismissing his appeal would deprive him of his constitutional right to due process because he could not afford to pay the full amount of the assessment within the limited time frame specified by § 27-77-7(1). (Tr. at 8:17-11:1, R. at 33:5-20, R. at 34-35:41.). Rather than rendering a decision or taking the matter under advisement, the Court adjourned the hearing so that Mr. Akins could attempt to obtain a bond from a qualified surety and the MSTC could review whether Mr. Akins was given sufficient credit for sales tax paid on component material purchases. (Tr. at 16-17:17, 19:20-8.).

On January 14, 2010, the Court reconvened the hearing on the MSTC's motion to dismiss. (Tr. at 16-17:17.) The MSTC reported that it had reviewed Mr. Akins records and had determined that they were not sufficient to support allowing any additional credit for sales tax paid component material purchases. (Tr. at 16-17:17.) For his part, Mr. Akins reported that he had attempted, but was unable, to obtain bond from Barksdale Bonding. (Tr. at 19:20-8.) Accordingly, he renewed his constitutional objections. (Tr. at 21:26-23:20.) The Court took the matter under advisement and requested the parties brief their positions on the constitutional issues. (Tr. at 25:24-26:5.) On March 9, 2010, the Court entered an Order granting the MSTC's motion to dismiss for lack of subject matter jurisdiction. (R. at 116-120.)

## **SUMMARY OF THE ARGUMENT**

Due process requires that taxpayers be afforded an adequate opportunity for judicial

review. Although Mississippi Code Annotated § 27-77-7 sets forth a procedure for obtaining either prepayment or post payment judicial review, neither was constitutionally adequate under the circumstances. Any opportunity for prepayment judicial review was rendered inadequate by the double bond required by § 27-77-7(3), which is unconstitutional to the extent that the amount required is not rationally related to a legitimate governmental interest. At the same time, Mr. Akins was effectively deprived of an opportunity for post payment judicial review because there was no realistic possibility that he could afford to pay the tax within the limited period of time prescribed by § 27-77-7(1). Thus, in the absence of an alternative procedure, the lower court erred in dismissing Mr. Akins complaint because otherwise he has no constitutionally adequate opportunity for judicial review.

### STANDARD OF REVIEW

"When reviewing an issue of subject matter jurisdiction, this Court applies a de novo standard of review." *Schmidt v. Catholic Diocese of Biloxi*, 18 So.3d 814, 821 (Miss.2009). "Whether [a party] received due process is a question of law, which this Court will review de novo." *Green v. Mississippi Dept. of Human Services*, 40 So. 3d 660, 663 (¶ 12) (Miss. App. 2010) (citing *J.C.N.F. v. Stone County Dep't. of Human Servs.*, 996 So.2d 762, 770 (¶ 27) (Miss. 2008)). "[S]tatutory interpretation is a matter of law which this Court reviews de novo." *Adams v. Baptist Memorial Hospital-Desoto, Inc.*, 965 So.2d 652, 655 (Miss. 2007) (quoting) *Franklin Collection Serv., Inc. v. Kyle*, 955 So.2d 284, 287 (Miss. 2007).

### ARGUMENT

**Mr. Akins was deprived of his right to procedural due process because he was not afforded a constitutionally adequate opportunity for judicial review.**

- A. The exaction of a tax constitutes a deprivation of property that implicates the Due Process clause of the Federal and State Constitutions. Due process in this context requires that taxpayers be afforded an adequate opportunity for judicial review.**

"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." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept.*, 496 U.S. 18, 36, 110 S. Ct. 2238, 250 (U.S. 1990). At a minimum, due process requires notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976); *Natural Father v. United Methodist Children's Home*, 418 So.2d 807, 810 (Miss.1982). In the context of tax assessments and collections, the United States Supreme Court has consistently held that a meaningful opportunity to be heard does not require the State to afford taxpayers with an opportunity for prepayment judicial review, but if no such opportunity exists, the State must provide taxpayers with an adequate opportunity" for postpayment judicial review. *See, e.g., McKesson Corp.*, 496 U.S. at 38; *Bob Jones University v. Simon*, 416 U.S. 725, 746-747, 94 S.Ct. 2038, 2050-51 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611, 94 S.Ct. 1895, 1902 (1974); *Bull v. U.S.*, 295 U.S. 247, 259-260, 55 S.Ct. 695, 699-700 (1935); *Phillips v. Commr.*, 283 U.S. 589, 595-569, 51 S.Ct. 608, 611-612 (1931). This Court must decide whether Mr. Akins' was afforded the process the above cited cases say that he was due.

**B. The conditions prescribed by Mississippi Code Annotated § 27-77-7 render any otherwise adequate opportunity for judicial review constitutionally inadequate. There is no alternative procedure for obtaining judicial review. Therefore, Mr. Akins was not afforded an adequate opportunity for judicial review.**

Mississippi Code Annotated § 27-77-7 sets forth the exclusive procedure for obtaining judicial review of state tax assessments in Mississippi. Under that section, a taxpayer has an opportunity for prepayment judicial review only if the taxpayer posts bond equal to double the amount in controversy within 30 days from the date of the Commission's order affirming the assessment. *Id.* at (1), (3). If the taxpayer cannot post sufficient bond, the taxpayer may obtain judicial review only if the taxpayer pays the full amount of the assessment within the 30 period

described above. *Id.* If the taxpayer cannot pay the tax or post double bond with 30 days from the date of the Commission's order affirming the assessment, this Court has held that the taxpayer is forever precluded from obtaining any further judicial review. *See Davis v. Attorney General*, 935 So. 2d 856 (Miss. 2006) (holding that Commission order affirming assessment of additional income tax was a final adjudication that precluded taxpayers from later seeking refund for erroneously paid taxes after they paid the additional tax, under res judicata and collateral estoppel doctrines, because taxpayers failed to appeal within thirty (30) days of the order).

Mr. Akins argues the procedure outlined in § 27-77-7 did not afford him with a constitutionally adequate opportunity for judicial review because (1) any constitutionally adequate opportunity for prepayment judicial review was negated by the double bond requirement, which is itself unconstitutional, and (2) any opportunity for post payment judicial review was little more than illusory because there was no realistic possibility that he could come up with over \$20,000 within the limited period of time specified in § 27-77-7(1).

**C. Section 27-77-7 conditions the right to prepayment judicial review on posting double bond. The double bond requirement is itself unconstitutional. Therefore, the double bond requirement renders the opportunity for prepayment judicial review constitutionally inadequate.**

The United States Supreme Court and lower federal courts have previously held double bond requirements similar to the one in § 27-77-7 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment or equal protection principles embodied in the Fifth Amendment. *See generally Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862 (1972); *Saharoff v. Stone*, 638 F.2d 90, 92-93 (9th Cir. 1980); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 859-862 (9th Cir. 1976).

**1. A double bond requirement violates equal protection to the extent that it is not rationally related to a legitimate governmental interest.**

The seminal case in this regard is *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862 (1972).

In *Lindsey*, the Supreme Court held that the double bond required for an appeal under Oregon's wrongful detainer statute violated the Equal Protection Clause. The statute in question required a lessee who wished to appeal to file a bond for the payment of twice the rental value of the premises from the time the action was commenced until final judgment. The Court noted "that the double-bond requirement heavily burdens the statutory right . . . to appeal." While the state could require adequate security to preserve an award already made and otherwise protect appellee against loss during appeal, the Court observed that the double bond requirement did not effectuate these purposes because the amount of the bond was unrelated to actual rent accrued or to specific damage sustained by the landlord. *Id.* at 77-78. The Court found the claim that the double bond requirement was necessary to screen out frivolous appeals unpersuasive as well, because "it not only bar[ed] nonfrivolous appeals by those who [were] unable to post the bond but also allow[ed] meritless appeals by others who could afford the bond." *Id.* at 78.

The Court noted that "reasonable procedural provisions to safeguard litigated property" are valid. But the statute in question was not reasonable because it "automatically doubled the stakes when a tenant [sought] to appeal an adverse judgment." *Id.* at 79. The Court said:

The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon.

*Id.* The court found this discrimination "arbitrary and irrational," and thus unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Id.*

Following the Supreme Court's decision in *Lindsey*, the Ninth Circuit, in *O'Day*, considered the validity of a provision in the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 449g(c), requiring a double bond in order to appeal a reparation award to district court. 536 F.2d 856. The court held that the double bond required by § 449g(c) was not rationally

As in *Boddie*, judicial review of the assessment is Mr. Akins' only vehicle of dispute resolution. He cannot negotiate his debt obligations with a private creditor as in *Kras*. If Mr. Akins and another private individual were at odds regarding an alleged debt, they could institute a court action by filing a complaint and a minimal filing fee. Furthermore, in *Kras*, the court would grant a voluntary request for discharge in bankruptcy if no objections are made and the filing fee had been paid. Then aggrieved party could then seek relief in other avenues, i.e., negotiate with creditors. By contrast, no alternative avenues are available for relief from an administrative order of the MSTC.

**3. *This analysis is in accord with the decision of other States that have addressed the issue.***

In *Schroeder Oil Co. v. Iowa State Department of Revenue and Finance*, 458 N.W.2d 602 (Iowa 1990), the Iowa Supreme Court decided this issue. There the Court rejected Schroeder's due process challenge to Iowa's tax revenue scheme insofar as the challenge was addressed to the absence of a hearing prior to payment. *Id.* at 604. The court quite candidly stated that the absence of a prepayment hearing was more than justified on the basis of practical necessity. A predeprivation hearing requirement would result in mass chaos, would paralyze the collection of tax revenue, and is not required under the authorities cited. The court did find merit, however, in the Schroeder's argument that the statute was unconstitutional as applied to it because of the failure to allow a post payment hearing. The court noted that, under the procedure invoked by the department, Schroeder, because of its financial plight, cannot contest the assessment at any stage. While the court was reluctant to hold that due process requires the State to suspend the collection of taxes to provide a hearing for each taxpayer, the court reasoned that after the government proceeded with the assessment and took whatever steps it chose to take to collect the

fundamentally unfair and unjust in restricting the Petitioner's ability to appeal the findings and order of the Commission to a neutral, independent tribunal. The fundamental unfairness of the statute is further magnified by its discriminatory nature of preventing the poor, who are unable to pay, from having full access to judicial review while allowing the wealthy, who are able to pay, unrestricted access to the courts.

## **CONCLUSION**

The ultimate question here is whether Mr. Akins was afforded due process of law. In this context, due process requires an adequate opportunity for judicial review. Although Mississippi Code Annotated § 27-77-7 sets forth a procedure for obtaining either prepayment or post payment judicial review, neither was constitutionally adequate under the circumstances. Mr. Akins was effectively deprived of an adequate opportunity for prepayment judicial review because he could not comply with the unconstitutional double bond requirement prescribed by § 27-77-7(3). Likewise, Mr. Akins was effectively deprived of an opportunity for post payment judicial review because there was no realistic possibility that he could afford to pay the tax within the short 30 day period required by § 27-77-7(1). Thus, in the absence of an alternative procedure for obtaining judicial review, Mr. Akins was deprived of his right to due process of law because he was not afforded an adequate opportunity for judicial review.

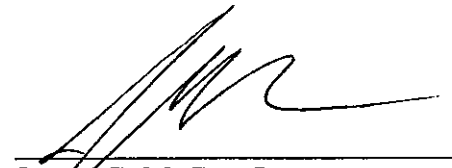
## **CERTIFICATE OF SERVICE**

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 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 5th day of October, 2010



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