

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	3
SUMMARY OF THE ARGUMENT.....	18
ARGUMENT.....	19
A. The Chancery Court Erred by Denying the MSTC’s Motion for Summary Judgment and Finding It Had Jurisdiction.....	19
1. Standard of review for a motion for summary judgment.....	19
2. The chancery court lacked jurisdiction of Khurana’s appeal.....	19
3. Equity follows the law.....	23
B. The Court Should Affirm the Chancery Court’s Finding That The MSTC’s Audit Assessments are Prima Facie Correct And That Khurana Failed to Maintain Adequate Records.....	27
1. Standard of review.....	27
2. Burden of Proof.....	28
3. The appropriate standard of review of the MSTC’s sales tax audit assessment is prima facie correct.	30
a. The MSTC’s audit assessments are correct.....	30
b. Khurana failed to maintain adequate records; therefore, the MSTC’s audit assessments are prima facie correct.....	31

4. The MSTC is entitled to deference in the interpretation of its statutes.....	35
C. The Court Should Affirm the Chancery Court’s Dismissal of Khurana’s Case Pursuant to Miss. R. Civ. P. 41(b) Motion to Dismiss Because Khurana Failed to Meet His Burden of Proof.....	37
1. Standard of review of a motion to dismiss pursuant to Miss. R. Civ. P. 41(b).....	37
2. Khurana bore the burden to overcome the prima facie correctness of the audit assessment.....	38
3. Khurana bore the burden to probe by a preponderance of the evidence that he was entitled to a refund.....	41
4. Khurana failed to prove all elements required of him in seeking a refund.....	42
5. Dismissal of Khurana’s case pursuant to Miss. R. Civ. P. 41(b) was proper.....	44
CONCLUSION.....	45
CERTIFICATE OF SERVICE.....	47
ADDENDUM.....	48
Miss. Code Ann. § 27-77-5	
Miss. Code Ann. § 27-77-7	
Miss. Code Ann. § 27-65-3	
Miss. Code Ann. § 27-65-37	
Miss. Code Ann. § 27-65-43	
“Competent Evidence” BLACK’S LAW DICTIONARY 195 (Abridged 6 th ed. 1991)	
“Admissible Evidence” BLACK’S LAW DICTIONARY (9 th ed. 2009)	

“Preponderance of the Evidence” BLACK’S LAW DICTIONARY (9th ed. 2009)

“Prima Facie” BLACK’S LAW DICTIONARY 825 (6th ed. 1991)

“Prima Facie Case” BLACK’S LAW DICTIONARY (9th ed. 2009)

“Relevant Evidence” BLACK’S LAW DICTIONARY (9th ed. 2009)

TABLE OF AUTHORITIES

STATE STATUTES

Miss. Code Ann § 15-1-3.....	25
Miss. Code Ann § 27-3-1	1, 6
Miss. Code Ann § 27-4-1	1, 6
Miss. Code Ann § 27-65-3	31, 32, 36
Miss. Code Ann § 27-65-37	7, 16, 18, 30, 31, 32, 38, 39
Miss. Code Ann. § 27-65-43.....	7, 16, 31, 36
Miss. Code Ann. § 27-65-87.....	36
Miss. Code Ann. § 27-77-5.....	<i>Passim</i>
Miss. Code Ann. § 27-77-7.....	<i>Passim</i>

FEDERAL CASES

<i>Arkansas v. Farm Credit Servs. Of Central Ark.</i> , 520 U.S. 821, 117 S.Ct. 1776 (1997).....	29
<i>Raleigh v. Dept. of Illinois</i> , 530 U.S. 15, 120 S.Ct. 1951 (2000).....	29
<i>United States v. Bisceglia</i> , 420 U.S. 141, 95 S.Ct 915 (1975).....	29
<i>United States v. Rexach</i> , 482 F.2d 10 (1 st Cir.), <i>cert. denied</i> 414 U.S. 1039, 94 S.Ct. 540 (1973).....	29

STATE CASES

<i>A.D. Buffington v. MSTC</i> , 43 So. 3d 450 (Miss. 2010),	27, 35
<i>Ballouch v. City of Pascagoula</i> , 574 So. 2d 637(Miss.1991).....	19
<i>Balouch v. State of Mississippi</i> , 938 So. 2d 253 (Miss. 2006).....	24
<i>Barton v. Blount</i> , 981 So.2d 299 (Miss.Ct.App.2007).....	32, 33

<i>Bertucci v. Mississippi Department of Corrections</i> , 597 So. 2d 643 (Miss.1992)	19
<i>Bowen v. Desoto County Bd. of Supervisors</i> , 852 So.2d 21 (Miss.2003).....	20
<i>Bowling v. Madison County Board of Supervisors</i> , 724 So. 2d 431(Miss.Ct.App.1998).....	19
<i>Buelow v. Glidwell</i> , 757 So. 2d 216 (Miss. 1999).....	37, 42, 43, 44
<i>C.H. Campbell, Admr., Etc. v. J.M. Doyle</i> , 57 Miss.292 (1879).....	20
<i>Century 21 Deep South Properties v. Carson</i> , 612 So.2d 359 (Miss.1992).....	37
<i>Cole v. State</i> , 608 So. 2d 1313 (Miss.1992).....	25
<i>Cousin v. Enterprise Leasing Co.-South Central, Inc.</i> , 948 So. 2d 1287(Miss. 2006).....	19
<i>Cummings v. Miss. Dep't of Employment Sec.</i> , 980 So.2d 340 (Miss.Ct.App.2008).....	29
<i>Davis v. Clement</i> , 468 So. 2d 58 (Miss.1985).....	37, 43
<i>Ellison v. Mobile & O.R. Co.</i> , 36 Miss. 572 (1858).....	33
<i>EMC Enterprise, Inc. v. Mississippi Department of Employment Security</i> , 11 So.3d 146, 150 (Miss.Ct.App.2009).....	29
<i>Estate of Miller</i> , 840 So. 2d 703 (Miss. 2003).....	24, 26
<i>Farmer v. Dept. Of Public Safety</i> , 907 So. 2d 981 (Miss. 2005).....	24
<i>Farris v. Miss. Transp. Comm'n</i> , 2011 WL 982986; No. 2009-CC-01919-COA (Miss. Ct. App. 2011).....	37
<i>Fidelity & Guaranty Ins. Co. v. Blount</i> , 2011 WL 1048247; Nos. 2008-CA-01931-SCT, 2009-CA-01248-SCT (Miss. 2011).....	27
<i>Green v. Cleary Water, Sewer & Fire District</i> , 17 So.3d 559 (Miss.2009).....	20

<i>Hill v. Byland</i> , 40 Miss. 618, 1866 WL 1904 (Miss. Err. & App. 1866).....	23, 24
<i>Hinds County Sch. Dist. Bd. of Trs. V. R.B.</i> , 10 So.3d 387, 394 (Miss.2008).....	27
<i>Horvath v. Eppling</i> 164 La.93, 113 So. 778 (1927).....	20
<i>L.H. Conrad Furniture Co. v. Miss. State Tax Comm'n</i> , 160 Miss.185, 133 So.652, 655 (Miss. 1931).....	35
<i>Ladner v. Stone County</i> , 938 So.2d 270 (Miss. Ct. App. 2006).....	37
<i>Manufab, Inc. v. Mississippi State Tax Commission</i> , 808 So.2d 947 (Miss.2002).....	36
<i>Marx v. Bounds</i> , 528 So. 2d 822 (1988).....	18, 30, 31, 32, 36, 38, 39
<i>Martin v. Franklin Co.</i> , 29 So. 3d 862 (Miss. Ct. App. 2010).....	37
<i>Mask v. MSTC</i> , 667 So.2d 1313, 1314-15 (Miss.1996).....	35
<i>McKnight v. Mound Bayou Pub. Sch. Dist.</i> , 879 So.2d 493 (Miss.Ct.App.2004).....	33
<i>Miss. Dep't of Env'tl. Quality v. Weems</i> , 653 So.2d 266 (Miss.1995).....	36
<i>Miss. Methodist Hosp. and Rehab. Ctr., Inc. v. Miss. Div. of Medicaid</i> , 21 So.3d 600, 606 (Miss.2009).....	28, 35
<i>Miss. Power Co. v. Jones</i> , 369 So. 2d 1381 (Miss.1979).....	24
<i>Miss. State Personnel Board v. Armstrong</i> , 454 So. 2d 912 (Miss.1984).....	19
<i>Mississippi State Tax Comm'n v. Dyer Inv. Co., Inc.</i> , 507 So.2d 1287, 1289 (Miss.1987).....	35
<i>Mississippi State Tax Comm'n v. Vicksburg Terminal, Inc.</i> , 592 So.2d 959 (Miss.1991).....	35
<i>Morton v. City of Shelby</i> , 984 So. 2d 323 (Miss. 2007).....	19
<i>Newell v. Jones County</i> , 731 So.2d 580 (1999).....	20
<i>State ex. Rel. Pair v. Burroughs</i> , 487 So.2d 220 (Miss.1986).....	32

<i>Phillips Construction Co., Inc. v. Miss. State Highway Commission</i> , 420 So. 2d 1374 (Miss.1982).....	19
<i>Planters Bank & Trust Co. v. Sklar</i> , 555 So. 2d 1024 (Miss.1990).....	21
<i>Riley v. Town of Lambert</i> , 856 So. 2d 721, 723 (Miss. Ct. App. 2003).....	22, 23
<i>Stuckey v. Provident Bank</i> , 912 So. 2d 859 (Miss.2005).....	19
<i>Tandy Electronics, Inc. v. Fletcher</i> , 554 So. 2d 308 (Miss.1989).....	20
<i>Timms v. Pearson</i> , 876 So.2d 1083 (Miss. Ct. App. 2004).....	44
<i>Tolliver v. Mldadineo</i> , 987 So. 2d 989 (Miss.Ct.App.2008).....	25, 26, 44
<i>Univ. of Miss. Med. Ctr. V. Robinson</i> , 876 So.2d 337 (Miss.2004).....	25
<i>Wallace v. Town of Raleigh</i> , 815 So. 2d 1203 (Miss. 2002).....	24
<i>5K Farms, Inc. v. Mississippi State Tax Comm'n</i> , --- So.3d ---, 2011 WL 880401 (Miss. Ct. App. 2011).....	20, 21, 22, 23, 42

RULES

Miss. R. Civ. P. 12(b)(1).....	23
Miss. R. Civ. P. 12(b)(2).....	23
Miss. R. Civ. P. 12(b)(6).....	23
Miss. R. Civ. P. 12(e).....	5
Miss. R. Civ. P. 41(b).....	3, 18, 37, 43, 44, 45, 46
Miss. R. Civ. P. 56(c).....	19

SECONDARY SOURCES

“Competent Evidence” BLACK’S LAW DICTIONARY 195 (Abridged 6 th ed. 1991).....	39
---	----

“Admissible Evidence” BLACK’S LAW DICTIONARY (9 th ed. 2009).....	39
“Preponderance of the Evidence” BLACK’S LAW DICTIONARY (9 th ed. 2009).....	41
“Prima Facie” BLACK’S LAW DICTIONARY 825 (6 th ed. 1991).....	38
“Prima Facie Case” BLACK’S LAW DICTIONARY (9 th ed. 2009).....	38
“Relevant Evidence” BLACK’S LAW DICTIONARY (9 th ed. 2009).....	39, 40

STATEMENT OF THE ISSUES

1. Whether the chancery court erred in failing to dismiss the appeal of Chander Paul Khurana d/b/a VK Quick Mart and VK's Wine & Liquor (hereinafter jointly referred to as "Khurana") for failure to perfect his appeal of the Orders of the Full Commission of the Mississippi State Tax Commission¹ pursuant to Miss. Code Ann. §§ 27-77-5 (Rev. 2005) and 27-77-7² (Rev. 2005).
2. Whether the chancery court properly found that the MSTC's audit assessments are prima facie correct.
3. Whether Khurana failed to overcome the prima facie correctness of the MSTC's audit assessments.
4. Whether the MSTC is entitled to deference as to its interpretation of adequate records.

STATEMENT OF THE CASE

A. Nature of the case

Khurana appeals the order and final judgment entered by the Pike County Chancery Court affirming the sales tax assessments against Khurana and in favor of the Mississippi Department of Revenue formally known as the Mississippi State Tax Commission³ (hereinafter "MSTC"). The MSTC filed a cross appeal based upon the

¹ On July 1, 2010, the Mississippi State Tax Commission became the Mississippi Department of Revenue pursuant to Miss. Code Ann. §§ 27-3-1 and 27-4-1 *et. seq.* Additionally, the prior "Full Commission" became a separate Mississippi agency known as the Mississippi Board of Tax Appeals (MBTA). However, for consistency with the lower court's record and to avoid confusion, the Department will refer to itself as the MSTC and the MBTA as the Full Commission.

² Miss. Code Ann. §§ 27-77-5 and 27-77-7 were amended effective July 1, 2010, however the prior versions in effect and controlling in this case have been cited and copies provided in the addendum.

³ See Foot note 1.

chancery court's failure to dismiss Khurana's appeal for lack of subject matter jurisdiction, jurisdiction over the MSTC, and there was no relief which could be granted to Khurana for his failure to perfect his appeal pursuant to Miss. Code Ann. §§ 27-77-5 and 27-77-7.

B. Course of proceedings and disposition in court below

On May 12 and May 16, 2006, the MSTC issued sales tax assessments against Khurana d/b/a VK Quick Mart for the sales tax periods of November 1, 2002 through November 30, 2005 and Khurana d/b/a VK's Wine and Liquor for the tax periods of December 1, 2004 through November 30, 2005. Khurana appealed the assessments to the MSTC Board of Review (hereinafter "Board of Review") which affirmed the assessments. Dissatisfied with the Board of Review's decision, Khurana appealed the Orders of the Board of Review to the MSTC Full Commission⁴ (hereinafter "Full Commission"). On September 4, 2007, the Full Commission issued Orders affirming the sales tax audit assessments issued against Khurana. On October 4, 2007, Khurana filed a Complaint with the Pike County Chancery Court but failed to post a bond or pay the tax assessed. The MSTC filed a Motion for Summary Judgment. The court denied the Motion for Summary Judgment and the MSTC filed a Motion for Reconsideration. On October 20, 2008, the court denied the MSTC's Motion for Reconsideration. On November 3, 2008, the MSTC filed a Petition and Brief in Support of Petition for Interlocutory Appeal by Permission to the Mississippi Supreme Court. The Mississippi Supreme Court denied the Petition.

⁴ See Foot note 1.

A trial of this matter was held on March 9, 2010. After Khurana's case in chief, the MSTC *ore tenus* made a Motion to Dismiss pursuant to Miss. R. Civ. P. 41(b) which the court granted with prejudice. Khurana filed a Motion for a New Trial and an Amended Motion for New Trial. After a hearing on the Motions, the Court denied the Motions on September 13, 2010. Khurana appealed to the Mississippi Supreme Court on October 1, 2010. The MSTC filed its cross appeal as to the denial of the Motion for Summary Judgment and Motion for Reconsideration on October 5, 2010.

STATEMENT OF FACTS

A. Background

On May 12, 2006, the MSTC issued an audit assessment against Khurana d/b/a VK Quick Mart for sales taxes for the period of November 1, 2002 through November 30, 2005 in the amount of \$84,783.00. (T. 30, L. 21-23; T. 82, L. 19-21; T. 44, L. 15; Ex. D4). On May 16, 2006, the MSTC issued an audit assessment against Khurana d/b/a VK's Wine & Liquor for sales taxes for the period of December 1, 2004 through November 30, 2005 in the amount of \$6,858.00. (T. 30, L. 24-25; T. 44, L. 19; Ex. D2 & D4). Khurana appealed the audit assessments to the Board of Review. (T. 44, L. 1-2; Ex. D4). After the Board of Review hearing, the Board requested that the MSTC staff and Khurana's CPA meet and exchange any documents that Khurana wanted considered. (T. 45, L. 3-8; Ex. D1, p. 5; Ex. D4, p. 2). Khurana's CPA failed to attend the meeting on October 6, 2006. (T. 45, L. 3-8; Ex. 1, p. 5; Ex. D4, p. 2). Therefore, on October 11, 2006, the Board of Review upheld the audit assessments. (T. 45, L. 3-8; Ex. D4).

Dissatisfied with the Board of Review's decision, Khurana appealed the audit assessments to the Full Commission. (R.E. 12, 16 & 80; T. 45, L. 11-13; Ex. D1, p. 6).

Prior to the Full Commission hearing, the parties met regarding Khurana's complaints as to the audit assessments. (R.E. 80; Ex. D1, p. 6). Also, Khurana provided some additional documents to the MSTC. (R.E. 80; T. 46, L. 4-7; Ex. D1, p. 6). After receipt and review of the additional documentation from Khurana, the MSTC made adjustments to the audit assessments which reduced the amount owed. (R.E. 80; T. 46, L. 4-9; Ex. D1, p. 6). Khurana was still unsatisfied with the audit assessments as reduced; therefore, the Full Commission held a hearing. (R.E. 12; Ex. D5).

B. Motion for Summary Judgment

On September 4, 2007, the Full Commission affirmed the sales tax assessments as reduced in the amounts of \$80,930.00 and \$5,274.00 against Khurana. (R.E. 12-18; T. 45, L. 18-29; Ex. D5, p. 3, 7). The Orders required, "the taxpayer shall within 30 days from the date of the order pay to the Mississippi State Tax Commission the amounts of eighty thousand nine hundred thirty dollars (\$80,930.00) and five thousand two hundred seventy-four dollars (\$5,274.00) being the assessments as affirmed by the Orders, including interest to date, or file a petition in the chancery court appealing the orders, pursuant to Miss. Code Ann. § 27-77-7." (R.E. 14-15, 18; T. 45, L. 18-29; Ex. D5, p. 3, 7).

On or about October 4, 2007, Khurana filed a Complaint in the Chancery Court of Pike County, Mississippi appealing the Orders. (R. 6-14). He did not post a bond or pay the taxes. (R.E. 7; R. 17-58). On October 11, 2007, the MSTC received via hand delivery

check numbers 11873 and 11874 in the amounts of \$80,930.00 and \$5,062.00 respectively. (R.E. 20) The checks were written on the trust account of Wren Way, Khurana's attorney, in an attempt to pay the assessments as ordered by the Full Commission. (R.E. 20). The letter accompanying the checks provided no explanation for the payment. (R.E. 21; R.43-45). In a telephone conference with Samuel T. Polk, Commission Secretary⁵, Khurana's attorney advised that the checks received on October 11, 2007 were paid in protest. (R.E. 49-50; R. 44). However, Khurana failed to fully pay the assessment for VK's Wine & Liquor. (R.E. 18, 20; T. 87, L. 27-29, 88, L. 1-3).

On November 5, 2007, the MSTC filed a Motion for Summary Judgment or in the Alternative Motion for a More Definite Statement asserting that Khurana had failed to perfect his appeal pursuant to Miss. Code §§ 27-77-5 and 27-77-7 and failed to state with specificity issues with the audit assessments pursuant to Miss. R. Civ. P. 12(e). (R.E. 22-63; R. 17-58). On December 17, 2007, a hearing was held on the Motions. (R.E. 5; R. 66). The MSTC argued that Khurana failed to perfect his appeal by failing to pay the tax prior to filing his Complaint; therefore, the court lacked subject matter jurisdiction, jurisdiction over the MSTC, and Khurana failed to state a claim upon which relief could be granted. (R.E.22-63; R. 20). Khurana and his attorney failed to file a response or appear at the hearing on the MSTC's Motions. (R.E. 7; R. 68). The Court Ordered Khurana to file a More Definite Statement and denied the MSTC's Motion for Summary Judgment. (R.E. 5-9; R. 61-62 & 66-70).

⁵ The position of Commission Secretary no longer exists. Samuel T. Polk is now the Executive Director

In denying summary judgment, the trial court found:

This Court is aware that Plaintiff has failed to meet the technical requirements of Miss. Code Ann. §§ 27-77-5 and 27-77-7 that Petitioner must appeal the Commission's assessments within thirty (30) days of the date of the commission order and either post a bond in double the amount in controversy or pay the taxes in full prior to filing its Petition. However, the chancery court is a court of law and equity. Equity frowns on forfeiture and this Plaintiff has attempted to pursue his legal remedies with the court to review what he deems to be an erroneous assessment. He has in fact cured the deficiency in the failure to either file the bond or prepay the taxes; and therefore, the court would find that it would constitute an inequitable forfeiture to deny him the opportunity to pursue a court review of the assessment. (R.E. 8, R.69).

On March 3, 2008, the MSTC filed its Motion for Reconsideration of the Order Denying the MSTC's Motion for Summary Judgment. (R.E. 64-67; R. 74). A hearing was held on the MSTC's Motion on April 7, 2008. (R. 78). The court denied the MSTC's Motion for Reconsideration on October 20, 2008. (R.E. 10; R. 167). In response, the MSTC filed a Petition and Brief in Support of Petition for Interlocutory Appeal by Permission to the Mississippi Supreme Court on November 3, 2008 which was denied. (R.E. 11; R. 173).

The checks tendered to pay Khurana's tax assessments were written on his attorney's trust account. (R.E. 20; Ex. D6). At a trial of this matter, Khurana failed to introduce any evidence that he reimbursed his attorney the taxes paid out of the trust account. (T. 14-120). Khurana failed to meet his burden that he alone bore the burden of the tax sought to be collected and that he did not directly or indirectly collect the tax from

someone else. (T. 14-120). The VK's Wine & Liquor audit assessment was not fully paid until on or about August 19, 2010. (R. 496).

C. Trial

A trial of this matter was held on March 9, 2010. (T. 1). The issues before the trial court were as follows: (1) (a) whether Khurana had adequate records as prescribed by Miss. Code Ann. § 27-65-43 and (b) whether the MSTC's assessments were prima facie correct pursuant to Miss. Code Ann. § 27-65-37; (2) whether Khurana met his burden of proof to show that the MSTC wrongfully assessed Khurana d/b/a VK Quick Mart with additional sales taxes by (a) failing to remove draws from a credit line from taxable sales, (b) failing to give proper credit for check cashing; and (c) failing to remove the cash pay outs attributed to Khurana for employee salaries; (3) whether Khurana met his burden of proof to show that the MSTC wrongfully assessed Khurana d/b/a VK's Wine & Liquor with additional sales taxes when Khurana paid sales taxes based on his purchases from the ABC Division and not his sales to his customers; and (4) whether the allowance of Khurana's requested adjustments resulting in a negative mark-up overcomes the prima facie correctness of the MSTC's audit assessments.

Khurana bore the burden to prove by a preponderance of the evidence that the sales tax assessments were incorrect and that he was entitled to an adjustment of the amount assessed. Khurana introduced no testimony or documentary evidence to support his argument that the MSTC's audit assessments were incorrect. (T. 14-120). Khurana offered a purported expert witness, Michael Mahoney, C.P.A. (hereinafter "Mahoney"); however, the expert failed to produce his own audit or any other documentary evidence

demonstrating that the assessments were incorrect. (T. 90-120). Therefore, Khurana failed to meet his burden. (R.E. 69; R. 355).

Further, Mahoney testified that the only issues that Khurana had with the audit assessment for VK Quick Mart was with the credit given for checks made payable to cash and the line of credit. (T. 102). Khurana's attorney corroborated that his only issues with the VK Quick Mart audit assessment was the alleged lack of credit given for the line of credit. (T. 122, L. 19-20). Khurana appears to have abandoned his appeal of the audit assessment of VK's Wine & Liquor. (T. 102 & 122, L 19-20; Brief for Appellant at 4). Khurana's issue before this Court is related only to whether: (a) the chancery court erred in dismissing his case, (b) he maintained adequate records of gross proceeds of sales and (c) he received all the credit he was entitled regarding his check cashing business. (Brief for Appellant at 4).

1. Audit

Ryan Smith (hereinafter "Smith"), the auditor for the MSTC, testified that after an audit is opened, a letter is sent to the taxpayer noting the time and date that the audit would be held and a list of records that a taxpayer would need to provide. (R.E. 154; T. 39, L. 15-22; Ex. D1, p.89-90; Ex. D2, p. 17-18). The MSTC requested Khurana provide copies of the following documents: (1) all State and Federal income tax returns, (2) all sales and use tax returns, (3) any other applicable taxes reported to the State of Mississippi, (4) general ledger and subsidiary journals, (5) work papers related to the preparation of all tax returns, (6) asset depreciation schedules, (7) any and all records of sales including sales books, invoices or register tapes, (8) purchase invoices for

merchandise, equipment, fixtures and supplies sorted by year, month and vendor, (9) bank statements for business and personal checking and savings accounts including all deposit slips validated by bank, and cancelled checks and proof of returned checks, (10) records of any loans made to Khurana, (11) records of accounts receivables and bad debts, (12) records of cash payouts, (13) records of personal withdrawal of stock from inventory, (14) records of payroll and (15) any other records that may have significance in an audit of this scope and nature. (R.E. 155; D1, p. 90 & D2, p. 18).

Smith testified in checking a business' accuracy for sales tax reporting he reviewed the businesses records, specifically, if available, "sales ledgers, compare the deposits to the bank statements, look at purchase invoices, calculate cash paid outs⁶ to see if there were any and look at sales invoices." (T. 15, L. 24-28).

Khurana kept bank statements and vendor purchase invoices for the audit period and used them to determine his sales for VK Quick Mart and VK's Wine & Liquor. (T. 30, L. 7-18; 40, L. 6-20; 83, L. 20-22). For VK Quick Mart, Khurana's sales figures came directly from the bank statements. (R.E. 82; T. 40, L. 9-10). Khurana subtracted the checks he contended were cashed for check cashing, amounts for money orders sold and total rebate checks from vendors from total monthly deposits to arrive at monthly sales. (R.E. 82; T. 40, L. 10-13). The gas deduction on the sales tax return came directly from the ledger showing what Khurana paid to the gas company each week. (R.E. 82; T. 40, L. 13-15). The gas deduction was subtracted from the sales figure to arrive at taxable income. (R.E. 82; T. 40, L. 15-17). This number is multiplied by seven percent and the

⁶ "cash paid out" is cash on hand paid out of the cash register instead of being deposited into the bank

discount is subtracted to arrive at tax due. (R.E. 82; T. 40, L. 17-18). The beer credit is calculated based on the beer purchases and is then subtracted from tax due to arrive at net tax due. (R.E. 82; T. 40, L. 18-20). The only documentation provided to Smith to demonstrate this process was some copies of the sales tax returns. (T. 40, L. 21-26). Smith also testified that,

Mr. Khurana does do check cashing. He says he keeps 10-15,000.00 dollars on hand for check cashing. He charges a fee of \$1 per hundred showing on the check. Mr. Khurana takes a deduction for this money on his monthly sales tax return, however, he has no record showing that this money was redeposited into his checking account. I looked over the deposit slips that were included with the bank statements and nothing is specified on the deposit slip about check cashing money being redeposited. (R.E. 83; T. 34, L. 5-13).

For VK's Wine & Liquor, Khurana incorrectly reported his sales using the amounts he spent on his purchases from the Alcoholic Beverage Control Division (hereinafter "ABC"); instead of what he actually sold at VK's Wine & Liquor. (T. 30, L. 10-12). Khurana testified does not keep cash register receipts. (T. 84, L. 16-21). He does not keep any kind of ledger for his daily sales. (T. 30, L. 14-15). As a result of this reporting method, he is reporting the purchase price of his inventory instead of his total gross sales. (T. 30, L. 15-17). This results in his sales being significantly under reported. (T. 30, L. 17-18).

The VK Quick Mart and VK's Wine & Liquor audit assessments were done on a cash flow and/or deposit analysis. (T. 43, L. 20; 55, L. 15-29; 56, 1-4). A cash flow analysis consists of "review the deposits, determines what is taxable sales, calculate cash

paid outs based on the purchase invoices and the checks written to each vendor and do an assessment based on the cash flow of the business.” (T. 43, L. 22-26). Smith further explained it:

Because the audit was done as a cash flow which is an analysis of deposits, which is taking the money deposited into the account as taxable and calculating the sales tax that way. The cash paid outs were calculated and added back because that money was paid out of the cash register in cash and would not have been deposited into the bank accounts. Therefore, picking up strictly the deposits would not pick up all of the sales that went through the store. (T. 55, L. 15-22).

Smith also noted that Khurana did not pay himself a salary, but compensated himself by paying for all of his personal expenses out of the business account. (T. 40, L. 29, 41, L. 1-4). Also, Khurana paid vendors with checks and cash on hand. (T. 82, L. 17-26).

For VK Quick Mart, Mahoney alleged that the MSTC had not removed all checks made payable to cash and Khurana was entitled to a reduction in his liability to account for the additional checks made payable to cash. (R.E. 80). Smith recalculated all checks made payable to cash and compared the new total to the previous one he calculated in the original audit. (R.E. 80). His calculation of the total amount of checks made payable to cash was equal to the amount that he previously calculated. (R.E. 80; T. 37, L. 19-23; Ex. D1, p. 6). Mahoney failed to provide any check numbers which were missing from Smith’s calculation or demonstrate that a reduction in the assessment was warranted. (T. 90-120).

2. Records Provided to the Auditor

For VK Quick Mart, Khurana kept bank statements, some vendor purchase invoices, credit card statements and utility bills. (R.E. 76; T. 28, L. 21-26; and 30, L. 2-24; 37, L. 5-8). For the VK's Wine & Liquor audit, Khurana furnished to the auditor bank statements and some, but not all, purchase invoices. (T. 30, L. 2-6; 43, L. 14-18; 77, L. 27-29; 78, L. 1-8; 84, L. 13-28).

Smith and Khurana both testified that Khurana failed to keep records of the gross income, gross receipts or gross proceeds of sales of both VK Quick Mart and VK's Wine & Liquor, such as register receipts or tapes, or a general ledger. (R.E. 76; T. 29, L. 5-8; 30, 2-18; 83, L. 21-29; 84, L. 1-28). Additionally, Smith and Khurana both testified that Khurana kept no records of his check cashing business, no records of his commission from the check cashing business, and no records demonstrating the mark-ups he utilized during the audit period in his stores. (R.E. 76-77; T. 34, L. 5-13; 37, L. 16-17; 52, L. 18-23; 85, L. 27-29; 86, L. 1-8; Ex. D1, p. 2-3). Also, Khurana did not keep a separate bank account for his check cashing business but comingled these checks in the VK Quick Mart store's bank account. (R.E. 78-79; Ex. D1, p. 4-5). Khurana also failed to provide a bank account during the audit period. (T. 31; L. 27-29; 32, L. 1; Ex. D15). Khurana did not provide Smith with records of the line of credit. (T. 52-53, L. 28-1; T. 77, L. 21-23; T. 78, L. 19-21).

3. Adequate Records

Khurana's attorney asked Smith if the records provided by Khurana were adequate for Smith to perform an audit and Smith answered yes. (T. 19, L. 13-23). However, Smith

testified that Khurana did not keep adequate records as required by the Mississippi sales tax law. (T. 32-33, L. 29-3). Additionally, Smith testified that adequate records consists of "records of gross income, gross receipts or gross proceeds of sales of a business, including all invoices of merchandise purchased, all bank statements and canceled checks and all other books or accounts as may be necessary to determine the amount of tax for which he is liable." (T. 33, L. 8-20). Smith also testified that these records could be "purchase and sales invoices, general ledgers, income tax returns, bank statements with copies of checks included, copies of sales tax returns, cash register tapes, cash register reconciliation sheets from each day when the cash registers were checked up and any other sales records that the taxpayer keeps." (T. 32, L. 22-27). No alternative definition of "adequate records" was presented by Khurana. (T. 14-120).

4. Checks made payable to cash

Khurana operated a check cashing business out of VK Quick Mart. (T. 71, L. 1-3). He charges the customer 1% to cash their check. (T. 79, L. 5-6; 88, L. 13-14). Khurana sometimes requires the customer to make a purchase before he will cash their check. (T. 79, L. 4-6; 88, L. 6-12).

Khurana testified that one way he funded his check cashing business, was writing and cashing checks made payable to cash. (T. 78, L. 22-24). Smith testified that all checks made payable to cash were removed from taxable sales, because if he had not removed the checks from taxable sales, the mark-up would have been unreasonably high. (R.E. 77; T. 23, L. 24-29; 24, L. 1-7; 88, L. 6-9; Ex. D1, p. 3). Based on the records provided to the MSTC, Smith removed cash paid outs of \$12,055,291.37 in checks made

payable to cash from the taxable sales of VK Quick Mart for the audit period. (R.E. 86; T. 24, L. 21-22; 35, L. 5-8; 53, L. 17-18; 88, L. 6-12; 38, L. 11-12; Ex. D1, p. 2-3). The MSTC also removed from taxable sales a 1% commission fee totaling \$120,552.91. (R. E. 86; T. 34, L. 22-28; 35, L. 1-2; Ex. D1, p. 2-3). Not all checks made payable to cash were negotiated to fund the check cashing business. (T. 72, L. 2-15; 88, L. 16). During the testimony of Shawn Lowery, (hereinafter "Lowery"), Branch Manager of State Bank & Trust, it was shown that one \$20,000.00 check made payable to cash was in fact processed and paid towards the line of credit. (T. 70, L.16-29; 71, L. 3-17; Ex. D13).

5. Line of Credit

Khurana testified that in 2002, the line of credit was only available a couple of months. (T. 76, L. 25-29). Khurana introduced no evidence or testimony that he utilized a line of credit in 2003 and 2004. (T.76, L. 25-29; 77, L. 1-3). From February 23, 2005 through November 25, 2005, Khurana had 27 draws at \$20,000.00 each from a line of credit he held with State Bank & Trust in McComb, Mississippi. (T. 66, L. 29; Ex. D16).

The MSTC's Exhibits 13 and 16 reflecting the State Bank and Trust Co.'s account number xxx-xx-3525 and the 2005 line of credit were the only documents introduced by Khurana to support his contention that he was entitled to a reduction in the audit assessment amount for the line of credit. (T. 14-120; Ex. D.13; Ex. D.16). Khurana failed to provide any documentation reflecting that any draws from the line of credit were ever deposited into any of his bank accounts. (R.E. 76-77; T. 20, L. 22-24; 65, L. 2-11; 78, L. 19-21). Further, Khurana, Lowery and Smith testified that Khurana **never** deposited the draws from his line of credit into his bank accounts. (T. 37-38, L. 27-2; 65, L. 6-10; 86,

5K Farms neither posted a bond nor paid the amount of tax under protest. *Id.* Further, the failure to pay the tax or post a bond was not a form defect and the appeal was not perfected. *Id.* at * 3, (§ 13).

In *Riley v. Town of Lambert*, 856 So. 2d 721, 723 (§7) (Miss. App. 2003) the Court upheld the dismissal of Riley's appeal for failure to perfect his appeal. Riley was required to simultaneously file a written notice of appeal and cost bond within 30 days of such judgment with the clerk of the circuit court having jurisdiction. *Id.* The written notice of appeal and posting the cost bond perfects the appeal. *Id.* However, Riley filed the cost bond late and also failed to file the appearance bond. *Riley*, 856 So. 2d at 723, (§8). Therefore, the Court found that Riley's appeal was not timely perfected; because, it "is not perfected until two things occur: the filing of a written notice of appeal and a cost bond. Both of these filings are to be done within thirty days of the judgment from which the appeal is taken." *Id.*

The chancery court erred when it found it had jurisdiction despite Khurana's failure to meet the technical requirements of §§ 27-77-5 and 27-77-7. Section 27-77-7(4) is clear that jurisdiction does not vest in the chancery court unless the "petition under subsection (1) is properly filed." This did not occur in the instant case.

There were no genuine issues as to any *material* fact and the MSTC was entitled to a judgment as a matter of law. The MSTC issued its Orders on September 4, 2007. Khurana was required by October 4, 2007 to file a petition with the chancery court and either (1) post a bond when he filed his Petition on October 4, 2007, or (2) *prior* to filing his Petition, pay the assessments under protest to the agency and seek a refund.

However, Khurana failed to file a bond and did not attempt to pay the assessments until October 11, 2007, seven (7) days after time had elapsed for perfecting his appeal. Even then, he failed to fully pay the tax ordered by the MSTC for VK's Wine & Liquor. The VK Wine & Liquor assessment remained partially unpaid until on or about August 19, 2010, almost three years after time had elapsed to perfect his appeal.

Khurana's failure to pay the assessments to the agency under protest *prior* to filing his complaint with the Pike County Chancery Court is no different than Curtis Riley's failure to timely file the cost bond in *Riley v. Town of Lambert* or 5K Farms failure to post a bond at all. Khurana, like 5K Farms and Curtis Riley, failed to perfect his appeal, and the chancery court erred when it refused to dismiss his case. The requirements of § 27-77-7 are mandatory, clear and unambiguous. Khurana failed to perfect his appeal pursuant to the requirements of §27-77-7; therefore, according to § 27-77-5 the Orders of the MSTC were final and the chancery court did not have jurisdiction under Rules 12 (b) (1), (2) and (6) of the Mississippi Rules of Civil Procedure and Khurana's case should have been dismissed with prejudice for lack of jurisdiction over the subject matter, for lack of jurisdiction over the MSTC, and for failure to state a claim upon which relief could be granted. The chancery court erred when it looked to equity and failed to enforce strict compliance with the plain language of the statute.

3. Equity follows the law.

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).¹⁰ This Court has stated that 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, 984-985 (Miss.2005) citing *Estate of Miller*, 840 So.2d 703, 708 (Miss.2003). The Court of Appeals in *5K Farms*, 2011 WL 880401 at *2; NO. 2009-CA-01787-COA (§ 10) has found that § 27-77-7 is clear and unambiguous.

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)(citing *Miss. Power Co. v. Jones*, 369 So. 2d 1381, 1388 (Miss.1979)). In *Balouch v. State*, 938 So.2d at 259-60 (§16) the Supreme Court stated:

[t]his Court must presume the words in the statute were “intended to convey their usual meaning absent some indication to the contrary.” *Wallace v. Town of Raleigh*, 815 So.2d 1203, 1208 (Miss.2002) (internal citation omitted). There is nothing before this Court to indicate that the legislature intended anything other than the literal meaning of the words in this statute. The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would encroach upon the power of the Legislature. The courts have neither the authority to write into the statute something which the legislators did not write therein, nor to ingraft upon it any exception not included by them. *Id.*

¹⁰ See *Hill v. Boyland*, 40 Miss. 618, 1866 WL 1904, *2 (Miss. Err. & App. 1866) in which the Court stated, “And from the period when proceedings at law were subjected to particular limitations, courts of chancery have, with striking uniformity, applied them to similar cases within their jurisdiction even when there was no analogous statutory bar they refused relief to Stale demands where the party had slept upon his rights. And after a statutory bar was affixed to the legal remedy, the remedy in a court of equity in analogous cases has been confined to the same period. Indeed, both in the English and American courts, this principle has been so long and so firmly settled that it has grown into a maxim that ‘equity follows the law’; and nothing but an express declaration of the legislative will could have the effect of changing this long course of judicial decision. Whether, therefore, the terms of the act in question embrace courts of equity or not, the principles upon which they have always acted in applying statutes of limitation, as well as a just regard for uniformity in the rules governing the rights of parties, require adherence to these doctrines until they shall be altered by express legislation.”

Further, in *Tolliver v. Mldadineo*, 987 So. 2d 989, 996 (¶18) (Miss. Ct. App. 2008) the Mississippi Court of Appeals found

Mississippi statutory and case law is clear on the barring effect of the passing of a statute of limitations on an action. Miss. Code Ann. § 15-1-3 (Rev.2003) (“The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy.”); *Univ. of Miss. Med. Ctr. v. Robinson*, 876 So.2d 337, 340(¶ 11) (Miss.2004). “This bar is a vested right which cannot be revived.” *Robinson*, 876 So.2d at 340(¶ 11). “The running of the statute of limitations is the point where one's right to pursue a remedy is extinguished and another's vested right in the bar rises.” *Id.*

Additionally, in *Cole v. State*, 608 So. 2d 1313, 1317-18 (Miss. 1992) this Court stated that

(c) the rule that courts will not read exceptions into a statute of limitations.....(d) a time limitations statute containing no exception in favor of persons under legal disability runs against the right of action existing in favor of such person, upon the expiration of the limitations period, bars the right to sue to the same extent and with the same effect as if he or she were a person *sui juris*. The primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time.... The fact that a barred claim is a just one or has the sanction of a moral obligation does not exempt it from the limitation period. These statutes of repose apply with full force to all claims and courts cannot refuse to give the statute effect merely because it seems to operate harshly in a given case.

The *Estate of Miller* case dealt with the slayer's statute.¹¹ The Mississippi Supreme Court found the slayer's statute is one of exclusion, not inclusion and merely acts to exclude a slayer from participation in the victim's estate. *Id.* at 706. It does not act to include the victim in the slayer's estate due to the slayer's crime. This would contradict the statute's stated purpose. *Id.* at 706.

The right to appeal is governed by statute. The Court of Appeals has already found that § 27-77-7 is clear and unambiguous; therefore, the chancery court erred when it failed to adhere to the strict compliance of the appeals statute. Not only are appeals statutes, statutes of strict compliance; the MSTC asserts that the appeals process in §§ 27-77-5 and 27-77-7 are also statutes of exclusion. They provide the procedure for appealing MSTC Orders. When a taxpayer's appeal is not within the parameters of the statutes, then they are excluded from appealing; because, their right to pursue the remedy is extinguished and the MSTC's vested right in the bar rises. Since equity follows the law, Khurana failed to meet the requirements of properly perfecting his appeal of the MSTC Orders and his appeal is excluded like the victim's heirs in *Estate of Miller* or the beneficiaries in *Tolliver*.

¹¹ See *Miller*, 840 So.2d 703. One who willfully causes the death of another is barred from participating in the victim's estate. *Id.* at 708. A husband murdered his wife and committed suicide; however, the coroner could not determine who died first; therefore, the burden was on the victim's heirs to show that the slayer predeceased the victim wife. The Slayer statute was not enacted to ease the burden to prove survivorship. Since the order of death could not be established the Court applied the Uniform Simultaneous Death Law (91-3-1 to -15) which says the property of each person shall be disposed of as if he had survived. Slayer cannot take under the wife's inheritance and the slayer husband is deemed to have survived the victim wife; therefore, the slayer's son was the sole heir to him. The sole purpose of a slayer statute is to prevent the slayer from benefiting from the death of the victim or profiting from the wrongdoing. *Id.* at 705-06. Had the Statute been enacted for the dual purpose of adjudicating slayer status and for altering the intestate succession of both the slayer and victim, it would have so stated. *Id.* at 706.

Section 27-77-7 requires a taxpayer to pay under protest the amount ordered by the Full Commission *prior* to filing their petition in chancery court. Allowing Khurana to proceed despite his failure to (1) (a) pay the tax *prior* to filing his petition in chancery court (b) under protest to the agency and then (c) seek a refund of the taxes paid encroached upon the legislature and wrote an exception into the law that the legislature had not provided. Effectively the chancery court usurped jurisdiction which had not attached due to the exhaustion of the statute of limitations for failure to perfect the appeal. Therefore, the MSTC was entitled to summary judgment because (1) there were no genuine issues as to any material facts, (2) appeals statutes require strict compliance, (3) appeals statutes are statutes of exclusion, and (4) Khurana failed to meet the requirements under § 27-77-7 to properly perfect his appeal of the Full Commission Orders and the chancery court erred in granting Khurana leave to appeal based on equity.

B. The Court Should Affirm the Chancery Court's Finding that the MSTC's Audit Assessments Are Prima Facie Correct And That Khurana Failed to Maintain Adequate Records.

1. Standard of Review

The standard of review of orders of the MSTC is well settled in this State. The Mississippi Supreme Court reiterated the applicable standard of review in *A.D. Buffington v. MSTC*, 43 So. 3d 450, 453, (¶12) (Miss. 2010)¹², when it held that:

Appellate review of an agency's decision is a limited inquiry.
Hinds County Sch. Dist. Bd. of Trs. v. R.B., 10 So.3d 387, 394
(Miss.2008). As this Court has held:

¹² See also *Fidelity & Guaranty Ins. Co. v. Blount*, 2011 WL 1048247 at *5, ¶ 26 (Miss. 2011). It should be noted that currently a Motion for Rehearing is pending in this case, *Fidelity & Guaranty Ins. Co. v. Blount*, Nos. 2008-CA-01931-SCT, 2009-CA-01248-SCT.

We will reverse the decision of an administrative agency only if the decision (1) was unsupported by substantial evidence; (2) was arbitrary and capricious; (3) was beyond the power of the administrative agency to make; or (4) violated the complaining party's statutory or constitutional right....

An agency's interpretation of a rule or statute governing the agency's operation is a matter of law that is reviewed de novo, but with great deference to the agency's interpretation. This duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate. However, if an agency's interpretation is contrary to the unambiguous terms or best reading of a statute, no deference is due. An agency's interpretation will not be upheld if it is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Miss. Methodist Hosp. and Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 606-07 (Miss.2009).

2. Burden of Proof

Miss. Code Ann. § 27-77-7 provides in pertinent part

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 statute clearly provides that Khurana, as the petitioner in this case, bore the burden of proof in this matter. Further, the Court of Appeals recently affirmed this well-settled rule finding that "A rebuttable presumption exists in favor of the administrative

agency's decision and findings, and **the challenging party has the burden of proving otherwise.**" (emphasis added) *EMC Enterprise, Inc. v. Mississippi Department of Employment Security*, 11 So.3d 146, 150 (Miss.Ct.App.2009)(citing *Cummings v. Miss. Dep't of Employment Sec.*, 980 So.2d 340, 344 (§13) (Miss.Ct.App.2008)). Also, the United States Supreme Court in *Raleigh v. Dept. of Illinois*, 530 U.S. 15, 20, 120 S.Ct. 1951, 1955 (2000) found that

the very fact that the burden of proof has often been placed on the taxpayer indicates how critical the burden rule is, and reflects several compelling rationales: the vital interest of the government in acquiring its lifeblood, revenue, see *Arkansas v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997); the taxpayer's readier access to the relevant information, see *United States v. Rexach*, 482 F.2d 10, 16 (C.A.1), cert. denied, 414 U.S. 1039, 94 S.Ct. 540, 38 L.Ed.2d 330 (1973); and the importance of encouraging voluntary compliance by giving taxpayers incentives to self-report and to keep adequate records in case of dispute, see *United States v. Bisceglia*, 420 U.S. 141, 145, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975). These are powerful justifications not to be disregarded lightly.

Khurana erroneously asserts that the MSTC bears the burden to prove Khurana did not have adequate records, that the MSTC did not meet this burden, and that the Court erroneously defined adequate records by indicating Khurana's failure to keep cash register tapes or general ledgers of sales constituted a failure to keep adequate records. Khurana cites no statutory or caselaw which supports his contention that the MSTC bore the burden of proof in this case. The legislature clearly put the burden of proof on Khurana to prove that he overpaid his taxes and was entitled to a refund. The chancery court correctly applied the burdens of proof in this case and its ruling should be affirmed.

3. The appropriate standard of review of the MSTC's sales tax audit assessment is prima facie correct.

The language in Miss. Code Ann. § 27-65-37(emphasis added) is clear that the MSTC's assessments are prima facie correct in several instances:

if adequate records of the gross income or gross proceeds of sales are not maintained or invoices preserved as provided herein; or if an audit of the records of the taxpayer, or any return filed by him, or any other information discloses that taxes are due and unpaid, the commissioner **shall make assessments** of taxes, damages, and interest from **any information available, which shall be prima facie correct.**

Further, the Mississippi Supreme Court in *Bounds*, 528 So. 2d at 826 held that the MSTC's audit assessments are prima facie correct. Khurana has cited no statutory or caselaw in support of his argument that he did not bear the burden.

- a. The MSTC's Audit Assessments are prima facie correct.

The MSTC contends its audit assessments are prima facie correct pursuant to § 27-65-37. Further, in *Bounds*, 528 So. 2d at 826, the Supreme Court found, “[i]n order for the Commissioner’s assessments to be prima facie correct, the Commissioner’s auditor must make them ‘from any information available’ § 27-65-37(1972).” The MSTC based its assessments off of the information provided to it by Khurana which was “any information available”; therefore, the MSTC’s assessments are prima facie correct. The statute is clear that the MSTC’s audit of a taxpayer’s records is prima facie correct. Thus, this Court need not reach the decision whether the records were adequate in order to find that the MSTC’s audit assessments were prima facie correct and Khurana bore the burden to overcome that presumption. Khurana’s argument to the contrary is completely without merit and not supported by the clear statutory language.

- b. Khurana failed to maintain adequate records; therefore, the MSTC's audit assessments are prima facie correct.

Failure of the taxpayer to keep adequate records provides another avenue for the court to find that the MSTC's assessments are prima facie correct pursuant to Miss. Code Ann. § 27-65-37. The Court in *Bounds*, 528 So. 2d at 826-27 found the "lack of adequate records alone gives rise to the presumption that the Commissioner's assessments are prima facie correct."

Miss. Code Ann. § 27-65-43 (1992)(emphasis added) provides

It shall be the duty of every person taxable under this chapter to keep and preserve for a period of three (3) years adequate records of the gross income, gross receipts or gross proceeds of sales of the business, including all invoices of merchandise purchased, all bank statements and cancelled checks, and all other books or accounts as may be necessary to determine the amount of tax for which he is liable. Said records shall be adequate in substance to conform with the provisions of this chapter and the regulations promulgated by the commissioner, and all of such records shall be written in the English language. All records shall be open for examination, at any time, by the commissioner or his duly authorized agent. The commissioner may require any information or records from computer information systems on media common to those systems. Taxpayers' records may be sampled for audit purposes at the discretion of the commissioner and **any assessment rendered as a result of same shall be considered prima facie correct.**

One component of determining what constitutes adequate records of "gross income, gross receipts or gross proceeds of sales" is to look at how Mississippi Sales Tax Law defines the phrases. Miss. Code Ann. § 27-65-3(h)(2006) defines "gross proceeds of sales" in pertinent part as

the value proceeding or accruing from the full sale price of tangible personal property, including installation charges,

carrying charges, or any other addition to the selling price on account of deferred payments by the purchaser, without any deduction for any kind except those expressly exempt by this chapter.

Section 27-65-3(i) provides in pertinent part that “gross income”

Means the total charges for service or the total receipts (actual or accrued) derived from trades, business...including the sale or rental of tangible personal property...without any deduction for rebates, cost of property given as property sold, cost of materials used, labor costs, interest paid, losses or any expense whatever.

In this State, *Marx v. Bounds, supra* is the controlling case on what constitutes adequate records pursuant to § 27-65-37. In *Bounds*, 528 So. 2d at 824 - 28, Mr. Bounds only kept purchase invoices and bank records. The auditor found that Bounds determined the amount of sales taxes due by utilizing bank statements of each business. *Id.* at 823. Bounds computed total sales by adding total monthly deposits, estimated cash payouts to employees and vendors, and estimated owner cash withdrawals. *Id.* The record undisputedly supports the fact that adequate records of gross sales were not maintained by Bounds, sales invoices were not maintained, and cash payouts were only estimated. *Bounds*, 528 So. 2d at 825. Therefore, any calculation of gross sales was necessarily an estimate only. *Id.*

Additionally, this Court has found that “[a] construction which will render any part of a statute inoperative, superfluous, or meaningless is to be avoided.” *Barton v. Blount*, 981 So.2d 299, 303 (Miss.Ct.App.2007)(citing *State ex. rel. Pair v. Burroughs*, 487 So.2d 220, 226 (Miss.1986)). Further, this Court has determined that it “must, if possible, read the entire statute in a way that harmonizes all of its parts consistent with its

scope and object.” *Barton v. Blount*, 981 So.2d 299, 303 (Miss. Ct. App.2007) citing *McKnight v. Mound Bayou Pub. Sch. Dist.*, 879 So.2d 493, 497-98 (¶15) (Miss.Ct.App.2004) (quoting *Ellison v. Mobile & O.R. Co.*, 36 Miss. 572, 585 (1858)).

Khurana’s assertion that the MSTC was able to make an assessment; therefore his records must have been adequate is flawed and would render this portion of the statute inoperative as long as a taxpayer gave the MSTC some documents. It is certainly not what was intended by the legislature.

Khurana testified that he failed to keep register tapes, z tapes, general ledgers, or other documentation of his gross proceeds of sales, gross receipts or gross income. Like Bounds, Khurana kept only vendor invoices and bank statements. Khurana’s vendor invoices are only indicative of what he purchased for resale. Further, Khurana’s bank statements are indicative of the flow of money in and out of that account and are not a record of gross sales, gross receipts or gross income of his store. Additionally, none of the purchase invoices or bank statements which were exhibits in the trial of this matter reflected “the value proceeding or accruing from the full sale price of tangible personal property” or “the total charges for service or the total receipts (actual or accrued) derived from trades, business...”; therefore, the purchase invoices and bank statements cannot constitute “adequate records” of gross income, gross receipts or gross proceeds of sales of Khurana’s businesses. Also, the utility bills and credit card statements were not indicative of Khurana’s gross proceeds of sales, but merely his purchases and expenses. Therefore, Khurana’s process for determining his gross proceeds of sales is merely an estimation of those sales just like Bounds. Smith testified that

For VK Quick Mart, Khurana's sales figures came directly from the bank statements. He subtracted checks cashed for check cashing, amounts for money orders sold and total rebate checks from vendors from total monthly deposits to arrive at monthly sales. The gas deduction on same page as sales tax return came directly from the ledger showing what Khurana paid to the gas company each week. The gas deduction was subtracted from the sales figure to arrive at taxable income. This number is multiplied by seven percent and the discount is subtracted to arrive at tax due. The beer credit is calculated based on the beer purchases and is then subtracted from tax due to arrive at net tax due. The only documentation provided to Smith to demonstrate this process was some copies of the sales tax returns.

Khurana also testified that he paid vendors in cash; however, his process for determining sales does not reflect that any cash paid out to vendors was added back to account for sales income. Also, Smith testified that for VK's Wine & Liquor, Khurana reported his sales based on the purchase price paid for the inventory based off of information received from the Alcoholic Beverage Control Division. Again, the purchase information is only indicative of what he purchased, not what he sold. Further, Khurana introduced no testimony as to how he determined his monthly gross sales or gross income, nor what amount he alleged represented his businesses' gross sales, gross income or gross receipts. Though Khurana called Mahoney as an expert witness, the chancellor made it clear that Mahoney was argumentative and totally unhelpful to the court. Also, Mahoney disputed that the MSTC's Exhibit 18, page 9 "Tax Effect of Khurana's Requested Adjustments" was reflective of VK Quick Mart's sales and/or sales tax liability due. Therefore, the Court should affirm the chancery court's finding that Khurana failed to keep adequate records of gross proceeds of sales, gross receipts or gross income for his businesses during the audit period. Thus, the MSTC's audit assessments were prima facie correct.

4. The MSTC is entitled to deference in the interpretation of its statutes.

The MSTC's interpretation of "adequate records" is entitled to deference. It is a well settled rule that the construction of a statute by the agency charged with its execution and application is entitled to great weight and should not be overturned except for the most convincing reasons and unless it is clear that such construction is erroneous. *L.H. Conrad Furniture Co. v. Miss. State Tax Comm'n*, 160 Miss. 185, 133 So. 652, 655 (Miss. 1931). The Court "affords great deference to an agency's interpretation of statutes and rules which govern its operation." *A.D. Buffington v. MSTC*, 43 So. 3d at 453, (§12); *In re Dean*, 972 So. 2d 590, 594 (Miss. 2008) and *Mask v. MSTC*, 667 So. 2d 1313, 1314-15 (Miss. 1996).¹³

The Court in *Buffington* further held that:

This duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate. However, if an agency's interpretation is contrary to the unambiguous terms or best reading of a statute, no deference is due. An agency's interpretation will not be upheld if it is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Miss. Methodist Hosp. and Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 606-07 (Miss.2009).

¹³ See also *Mississippi State Tax Comm'n v. Dyer Inv. Co., Inc.*, 507 So.2d 1287, 1289 (Miss.1987)(actions of an administrative agency is limited by the familiar arbitrary and capricious standard) and *Mississippi State Tax Comm'n v. Vicksburg Terminal, Inc.*, 592 So.2d 959, 961 (Miss.1991)(the appeal is a limited one since courts cannot enter the field of the administrative agency; and the court will entertain the appeal to determine whether or not the order of the agency was supported by substantial evidence, was arbitrary or capricious, was beyond the power of the administrative agency to make or violated some statutory or constitutional right.)

The MSTC, through its executive officer, is charged with the administration and enforcement of the provisions of the Mississippi Sales Tax Law. *Miss. Code Ann.* § 27-65-87. Unless the court finds that this interpretation is manifestly contrary to the statute, it should be given controlling weight. *Manufab, Inc. v. Mississippi State Tax Commission*, 808 So.2d 947, 950 (Miss. 2002)(citing *Miss. Dep't of Env'tl. Quality v. Weems*, 653 So.2d 266, 273 (Miss. 1995)).

Khurana has presented no evidence, nor has he argued, that any entity other than the MSTC is responsible for the execution and application of *Miss. Code Ann.* §§ 27-65-37 and 27-65-43. Therefore, absent the most convincing reasons and a clearly erroneous construction by the agency, the interpretation by the MSTC should be afforded great deference.

The MSTC's interpretation of what constitutes adequate records based on *Miss. Code Ann.* §§ 27-65-3 and 27-65-43 and *Marx v. Bounds*, 528 So. 2d 822 is reasonable and in accordance with law. Requiring a taxpayer to maintain contemporaneous records of gross sales or gross income such as register tapes, z tapes, or a general ledger to constitute adequate records is not arbitrary or capricious and not an abuse of discretion. The request is reasonable and in accordance with law. Therefore, the Court should affirm the chancery court's ruling that Khurana failed to maintain adequate records of gross income, gross receipts or gross proceeds of sale.

C. The Court Should Affirm the Chancery Court's Dismissal of Khurana's Case Pursuant to Miss. R. Civ. P. 41(b) Motion to Dismiss Because Khurana Failed to Meet His Burden Of Proof.

1. Standard of review of motion to dismiss pursuant to Miss. R. Civ. P. 41(b).

“This Court applies the substantial evidence/manifest error standards to an appeal of a grant or denial of a motion to dismiss pursuant to M.R.C.P. 41(b).” *Century 21 Deep South Properties v. Corson*, 612 So. 2d 359, 369 (Miss. 1992). A motion to dismiss pursuant to Miss. R. Civ. P. 41(b) should be granted if the “plaintiff has failed to prove one or more essential elements of his claim or if the quality of the proof offered is insufficient to sustain the plaintiff’s burden of proof.” *Buelow v. Glidewell*, 757 So. 2d 216, 220 (¶12) (Miss. 1999) (citing *Davis v. Clement*, 468 So. 2d 58, 61-62 (Miss. 1985)). The Court reiterated the standard of review when a case has been dismissed pursuant to Miss. R. Civ. P. 41(b) at the close of plaintiff’s case in chief in *Farris v. Miss. Transp. Comm’n*, 2011 982986 * 2, (¶ 9); No. 2009–CC–01919–COA (Miss. Ct. App. 2011):

When considering a motion for involuntary dismissal under Rule 41(b) of Mississippi Rules of Civil Procedure, “the trial court should consider ‘the evidence fairly, as distinguished from in the light most favorable to the plaintiff,’ and the judge should dismiss the case if it would find for the defendant.” *Ladner v. Stone County*, 938 So.2d 270, 273 (¶ 10) (Miss.Ct.App.2006) (quoting *Century 21 Deep S. Props., Ltd. v. Corson*, 612 So.2d 359, 369 (Miss.1992)). The trial judge's factual findings will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence. *Martin*, 29 So.3d at 865 (¶ 8).

2. Khurana bore the burden to overcome the presumption of the prima facie correctness of the audit assessments.

Miss. Code Ann. § 27-65-37 is clear that the MSTC's assessments are prima facie correct¹⁴. Further, this Court in *Marx v. Bounds*, 528 So. 2d at 826 held that the MSTC's audit assessments are prima facie correct. Having found the MSTC's audit assessments prima facie correct, then Khurana bore the burden to overcome the prima facie correctness of the assessments with competent evidence. *Id.* The Court in *Bounds*, 528 So. 2d at 827-28 further found:

The only evidence offered by Bounds was his own undocumented recollection of the prices and markups of various goods he offered for sale at the stores in the month of March, 1983, although Bounds was testifying in May of 1986, approximately three years later. The taxpayer's uncorroborated testimony that the assessments were excessive does not fulfill the taxpayer's burden of proof. Pursuant to Miss. Code Ann. § 27-65-37, the Commission may use "any information available" in making its assessment. In this case the Commission used as a basis the best and most reliable information available when making the audit namely, the markups in use by Mr. Bounds at the time of the audit. A taxpayer's uncorroborated testimony that he sold goods at or below cost, coupled with a failure to maintain adequate records reflecting true sales, does not overcome the Commission's prima facie correct assessment and, without other proof, does not suffice. It should be noted by the Court that the taxpayer's accountant did testify as corroborating Bounds' statements. However, this testimony also fails because the accountant based his testimony on Bounds' representations and recollections of his markups during the audit period. The reliability of this testimony is questionable...This Court therefore concludes that the taxpayer's proof was so inconsistent or improbable as to be

¹⁴ Prima Facie is Latin for a fact presumed to be true unless disproved by some evidence to the contrary. BLACK'S LAW DICTIONARY 825 (Abridged 6th ed. 1991). Prima Facie Case is (1) the establishment of a legally required rebuttable presumption (2) a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor. BLACK'S LAW DICTIONARY (9th ed. 2009).

unworthy of belief, and that the taxpayer did not overcome by competent evidence the State Tax Commission's prima facie case.

The Court also noted that the only records kept by Leon Bounds in *Marx v. Bounds*, 528 So. 2d at 824 were purchase invoices and bank records. Further, "there were no records reflecting actual sales by the convenience stores, no sales invoices, no record of cash withdrawals, and no record of actual markups on the store's inventories." *Id.* at 824. Therefore, the Court found Bounds did not meet his burden and overcome the prima facie correctness of the MSTC's assessments. *Id.* at 825. The court further said that a taxpayer may not prevail by merely saying his own return was correct or by merely submitting the applicable forms. *Id.* at 826. Bounds failed to produce an audit, actual books and records or summaries thereof or other evidence to establish that he owed less tax than the amount assessed by the Commission. *Bounds*, 528 So. 2d at 826. In order to overcome the presumption of validity, the taxpayer must produce competent evidence. *Id.* at 826.

Competent evidence is "that which the very nature of the thing to be proven requires the production of a writing where its contents are the subject of inquiry." BLACK'S LAW DICTIONARY 195 (Abridged 6th ed. 1991). The 9th edition of Black's Law Dictionary does not specifically define competent evidence, but points the reader to "admissible evidence" and "relevant evidence." BLACK'S LAW DICTIONARY (9th ed. 2009). "Admissible evidence is evidence that is relevant and is of such a character (not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it." BLACK'S LAW DICTIONARY (9th ed. 2009). "Relevant evidence is tending to prove or disprove a matter in issue. Relevant evidence is both probative and material and is

admissible unless excluded by a specific statute or rule.” BLACK’S LAW DICTIONARY (9th ed. 2009).

Khurana finds himself in the same position as Leon Bounds. Khurana introduced no testimony or documentary evidence of what he alleged his sales were during the audit periods. Though Khurana called Mahoney as an expert witness, the chancellor made it clear that Mahoney was totally unhelpful to the court. Also, Mahoney disputed that the MSTC’s Exhibit 18, page 9 “Tax Effect of Khurana’s Requested Adjustments” was reflective of Khurana’s sales and/or sales tax liability due. Even if Khurana felt the figures in the MSTC’s Exhibit 18 were correct, that adjustment clearly resulted in a negative mark-up for three of four of the years during the audit period. Not even Khurana asserted he had negative markups on the items he sold in his stores; contradicting that page 9 of MSTC’s Exhibit 18 demonstrates more accurately Khurana’s tax liability. Khurana did not have a line of credit in 2003 or 2004; therefore, any reliance on the “Tax Effect of Khurana’s Requested Adjustments” or the “What If” analysis as a reflection of his true additional tax owed is misplaced and negates the accuracy of that analysis. There is no evidence to support the “What If” proposition of page 9 of Exhibit 18. Page 10 of Exhibit 18 reflects how the “What If” proposition is unbelievable and unreliable. Khurana introduced no other evidence of what his sales tax liability was during the audit period. Finally, Khurana and his expert failed to produce an audit, actual books and records or summaries thereof or other evidence to establish that he owed less tax than the amount assessed by the MSTC. Khurana failed to introduce any competent evidence;

therefore, he failed to overcome the presumption of correctness of the MSTC's audit assessments and the chancery court should be affirmed.

3. Khurana bore the burden to prove by a preponderance of the evidence that he was entitled to refund.

Khurana bore the burden of proof by a preponderance of the evidence that he was entitled to any or all of the relief he requested. Miss. Code Ann. § 27-77-7. "Preponderance of the evidence is the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." BLACK'S LAW DICTIONARY (9th ed. 2009).

Neither Khurana nor his expert offered an alternative audit or report demonstrating what, if any, Kurana purported to be his sales tax liability. Further, Khurana presented no testimony or documentary evidence of the following: (1) his true gross sales during the audit periods, (2) that the monies received from the lines of credit were ever deposited into his bank accounts, (3) what checks, if any, were not included in the figure "checks written to cash," (4) what internal controls he asserted the MSTC did not have, or (5) an alternate definition of "adequate records." Also, Khurana had no documentary evidence of his mark-ups during the audit periods. Therefore, Khurana failed to show by a preponderance of the evidence that the MSTC's audit assessments were incorrect; therefore, the Court correctly dismissed Khurana's case.

4. Khurana failed to prove all elements required of him in seeking a refund.

Miss. Code Ann. § 27-77-7 provides in pertinent part

(3)As an alternative to the posting of a 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....(4) In any petition in which a 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.**

The Court of Appeals recently found that Miss. Code Ann. § 27-77-7 is clear and unambiguous. *5K Farms*, 2011 WL 880401 *2; NO. 2009-CA-01787-COA (¶ 10).

The taxpayer in *Glidewell*, submitted insufficient proof that the “trailers were exported from the state within forty-eight hours and that the trailers at issue were registered and first used in another state.” *Glidewell*, 757 So. 2d at 221. The only evidence regarding the element that the trailers were exported from the state within forty-eight hours is found in the auditor’s report which noted that some trailers were delivered to the state line but others were picked up at Glidewell’s lot in Corinth or at the manufacturer. *Id.* Therefore, the second element may have been established as to some of the trailers at issue, but certainly not all. *Id.* Additionally, the court noted that Glidewell offered no evidence regarding the element that the trailers were registered and first used in another state. *Id.* at 216. The trial court erred in failing to dismiss the case at the close of Glidewell’s case in chief.

The trial court in *Davis*, 468 So. 2d at 62-63 found that the Davises exercised sporadic and temporary activity on the property such that they did not establish a claim of adverse possession nor did they meet their burden of proof; therefore, the trial court dismissed the Davises suit pursuant to Miss. R. Civ. P. 41(b). The Davises never established that the disputed area had been effectively fenced for ten consecutive years and offered no testimony to the effect that either they or their predecessors in title ever intended that the fence establish a claim of ownership to the property. *Id.* at 60. Further, an owner is not put on notice of an adverse claim by the occasional pasturing of cattle or the occasional cutting of timber. *Id.* at 63.

Khurana is akin to the plaintiffs in *Glidewell* and *Davis*; because, he too failed to satisfy all the requirements of him to receive the relief he requested and his case was properly dismissed. Instead of posting a surety bond, Khurana attempted to pay the tax and sue for a refund. Therefore, he bore the burden to 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. Khurana never testified to these matters. The checks paying the assessments were written on his attorney's trust account, but Khurana did not introduce any evidence or testimony that he repaid his attorney those funds. Further, he introduced no evidence that he alone bore the burden of the tax and that he did not directly or indirectly collect the tax from anyone else. This is a required element in seeking a refund of taxes paid. Just like the plaintiffs in *Glidewell* and *Davis*, Khurana's case was properly dismissed for failing to meet the required elements of his case.

5. Dismissal of Khurana's case pursuant to Miss. R. Civ. P. 41(b) was proper.

At the close of Khurana's case in chief, the MSTC moved for dismissal pursuant to Rule 41 of the Mississippi Rules of Civil Procedure. A motion to dismiss pursuant to Miss. R. Civ. P. 41(b) requires the trial court to "consider the evidence fairly and to give it such weight and credibility as the trial judge finds is appropriate. The motion should be granted if the plaintiff has failed to prove one or more essential elements of his claim or if the quality of the proof offered is insufficient to sustain the plaintiff's burden of proof." *Glidewell*, 757 So. 2d at 220.

Even if this Court does not agree with the reasoning utilized by the chancery court, its decision should not be overturned because an appeals court may affirm a chancellor's decision that reached the right result but for the wrong reason. *Timms v. Pearson*, 876 So.2d 1083, 1086 (¶12) (Miss.App.2004). Also, in *Tolliver*, 987 So. 2d at 996-97, (¶18) the court noted that "we sit as an appellate court and are most 'interested in the result of the decision, and if it is correct we are not concerned with the route-straight path or detour-which the trial court took to get there.'"

The MSTC's audit assessments are prima facie correct. Khurana failed to introduce sufficient testimony or proof to overcome the prima facie correctness of the MSTC's audit assessments. Further, Khurana failed to introduce any evidence or testimony showing by a preponderance of the evidence that the MSTC's audit assessments were incorrect. Also, he failed to provide his own allegations of what his sales were during the audit period or what he contended he owed, if anything, in sales taxes during the audit period. Khurana nor his expert put forth their own audit, records or

books demonstrating what Khurana's sales were during the audit period or what, if anything, he owed in taxes. Though Khurana alleged that he was entitled to a reduction in his tax liability for the credit line, he testified that he never deposited the credit line into his bank account. The MSTC performed a cash flow or deposit/credit analysis; therefore, the audit dealt with the money flowing into and out of Khurana's bank accounts. The line of credit was never included in the calculation because it never went into the bank account; therefore, it could not be removed from the calculation of taxable sales. Further, the MSTC removed over \$12,055,291.37 worth of checks made payable to cash from taxable sales during the audit period. In the 2005 income tax year alone, the MSTC removed \$2,990,178.38 worth of checks made payable to cash. The credit line accounted for only \$560,000.00 in funds; therefore, this amount could have been encompassed in the \$2,990,178.38 total for 2005.

Finally, Khurana failed to introduce any testimony or evidence that he alone bore the burden of the tax and did not directly or indirectly collect the tax from anyone else. This was a required element of Khurana's claim for a refund. Since Khurana failed to meet his burdens of proof, the chancery court was correct to dismiss his case pursuant to Rule 41(b) and this Court should affirm.

CONCLUSION


Miss. Code Ann. § 27-77-7 is clear and unambiguous. Khurana was required to appeal the Orders of the Full Commission within thirty (30) days and either (1) post a bond or (2) prior to filing the petition, pay to the agency under protest the amount ordered by the Commission. Khurana failed to perfect his appeal because he did not post a bond

or pay the tax in the manner prescribed by the statute; therefore, his case should have been dismissed for lack of subject matter jurisdiction, lack of jurisdiction over the MSTC, and for failure to state a claim upon which relief could be granted. Even if the chancery court did not err by allowing this matter to go to trial, the MSTC's audit assessments were prima facie correct. Khurana bore the burden to overcome the prima facie correctness of the assessments; however, he failed to introduce any competent evidence to overcome the prima facie correctness of the MSTC's audit assessments. Additionally, Khurana failed to prove by a preponderance of the evidence that the MSTC's audit assessments were incorrect. Also, Khurana was required to 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. Khurana introduced no evidence regarding whether he alone bore the burden or that he did not directly or indirectly collect the tax from someone else. Therefore, Khurana did not meet his burden and the court properly dismissed his case pursuant to Rule 41(b).

RESPECTFULLY SUBMITTED this the 20th day of June, 2011.

MISSISSIPPI DEPARTMENT OF REVENUE

By:



Gary W. Stringer (MSB # [REDACTED])
Heather S. Deaton (MSB # [REDACTED])
Mississippi Department of Revenue
Post Office Box 22828
Jackson, MS 39225-2828
Telephone: 601-923-7412
Facsimile: 601-923-7423


CERTIFICATE OF SERVICE

I, Heather S. Deaton, attorney representing the Mississippi Department of Revenue, do hereby certify that I have sent this date via U.S. Mail, postage prepaid, a correct copy of the foregoing Brief of the Cross Appellant/Appellee to the following:

Harris H. Barnes, III, Esq.
James G. McGee, Jr. Esq.
5 River Bend Place, Suite A
Flowood, Ms 39232

Honorable Debbra K. Halford
Pike County Chancery Court Judge
P.O. Box 575
Meadville, MS 39653

So certified this the 20th day of June, 2011.


Heather S. Deaton

ADDENDUM

Miss. Code Ann. § 27-77-5

Miss. Code Ann. § 27-77-7

Miss. Code Ann. § 27-65-3

Miss. Code Ann. § 27-65-37

Miss. Code Ann. § 27-65-43

“Competent Evidence” BLACK’S LAW DICTIONARY 195 (Abridged 6th ed. 1991)

“Admissible Evidence” BLACK’S LAW DICTIONARY (9th ed. 2009)

“Preponderance of the Evidence” BLACK’S LAW DICTIONARY (9th ed. 2009)

“Prima Facie” BLACK’S LAW DICTIONARY 825 (6th ed. 1991)

“Prima Facie Case” BLACK’S LAW DICTIONARY (9th ed. 2009)

“Relevant Evidence” BLACK’S LAW DICTIONARY (9th ed. 2009)

Miss. Code Ann. § 27-77-5

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

§ 27-77-5. Tax appeals procedure

(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)

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

Miss. Code Ann. § 27-77-7

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

(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)

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

Miss. Code Ann. § 27-65-3

West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 65. Sales Tax

In General

§ 27-65-3. Definitions

The words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them herein.

- (a) "Tax Commission" means the State Tax Commission of the State of Mississippi.
- (b) "Commissioner" means the Chairman of the State Tax Commission.
- (c) "Person" means and includes any individual, firm, copartnership, joint venture, association, corporation, promoter of a temporary event, estate, trust or other group or combination acting as a unit, and includes the plural as well as the singular in number. "Person" shall include husband or wife or both where joint benefits are derived from the operation of a business taxed hereunder. "Person" shall also include any state, county, municipal or other agency or association engaging in a business taxable under this chapter.
- (d) "Tax year" or "taxable year" means either the calendar year or the taxpayer's fiscal year.
- (e) "Taxpayer" means any person liable for or having paid any tax to the State of Mississippi under the provisions of this chapter.
- (f) "Sale" or "sales" includes the barter or exchange of property as well as the sale thereof for money or other consideration, and every closed transaction by which the title to taxable property passes shall constitute a taxable event.

"Sale" shall also include the passing of title to property for a consideration of coupons, trading stamps or by any other means when redemption is subsequent to the original sale by which the coupon, stamp or other obligation was created.

The situs of a sale for the purpose of distributing taxes to municipalities shall be the same as the location of the business from which the sale is made except that:

- (i) Retail sales along a route from a vehicle or otherwise by a transient vendor shall take the situs of delivery to the customer.
- (ii) The situs of wholesale sales of tangible personal property taxed at wholesale rates, the amount of which is allowed as a credit against the sales tax liability of the retailer, shall be the same as the location of the business of the retailer receiving the credit.
- (iii) The situs of wholesale sales of tangible personal property taxed at wholesale rates, the amount of which is not allowed as a credit against the sales tax liability of the retailer, shall have a rural situs.
- (iv) Income received from the renting or leasing of property used for transportation purposes between cities or counties shall have a rural situs.
- (g) "Delivery charges" shall mean and include any expenses incurred by a seller in acquiring merchandise for sale in the regular course of business commonly known as "freight-in" or "transportation costs-in." "Delivery charges" also include any charges made by the seller for delivery of property sold to the purchaser.
- (h) "Gross proceeds of sales" means the value proceeding or accruing from the full sale price of tangible personal property, including installation charges, carrying charges, or any other addition to the selling price on account of deferred payments by the purchaser, without any deduction for delivery charges, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by this chapter.

Where a trade-in is taken as part payment on tangible personal property sold, "gross proceeds of sales" shall include only the difference received between the selling price of the tangible personal property and the amount allowed for a trade-in of property of the same kind. When the trade-in is subsequently sold, the selling price thereof shall be included in "gross proceeds of sales."

"Gross proceeds of sales" shall include the value of any goods, wares, merchandise or property purchased at wholesale or manufactured, and any mineral or natural resources produced which are excluded from the tax levied by Section 27-65-15, which are withdrawn or used from an established business or from the stock in trade for consumption or any other use in the business or by the owner.

"Gross proceeds of sales" shall not include bad check or draft service charges as provided for in Section 97-19-57.

(i) "Gross income" means the total charges for service or the total receipts (actual or accrued) derived from trades, business or commerce by reason of the investment of capital in the business engaged in, including the sale or rental of tangible personal property, compensation for labor and services performed, and including the receipts from the sales of property retained as toll, without any deduction for rebates, cost of property sold, cost of materials used, labor costs, interest paid, losses or any expense whatever.

"Gross income" shall also include the cost of property given as compensation when said property is consumed by a person performing a taxable service for the donor.

However, "gross income" or "gross proceeds of sales" shall not be construed to include the value of goods returned by customers when the total sale price is refunded either in cash or by credit, or cash discounts allowed and taken on sales. Cash discounts shall not include the value of trading stamps given with a sale of property.

(j) "Tangible personal property" means personal property perceptible to the human senses or by chemical analysis as opposed to real property or intangibles and shall include property sold on an installed basis which may become a part of real or personal property.

(k) "Installation charges" shall mean and include the charge for the application of tangible personal property to real or personal property without regard to whether or not it becomes a part of the real property or retains its personal property classification. It shall include, but not be limited to, sales in place of roofing, tile, glass, carpets, drapes, fences, awnings, window air conditioning units, gasoline pumps, window guards, floor coverings, carports, store fixtures, aluminum and plastic siding, tombstones and similar personal property.

(l) "Newspaper" means a periodical which:

- (i) Is not published primarily for advertising purposes and has not contained more than seventy-five percent (75%) advertising in more than one-half (1/2) of its issues during any consecutive twelve-month period excluding separate advertising supplements inserted into but separately identifiable from any regular issue or issues;
- (ii) Has been established and published continuously for at least twelve (12) months;
- (iii) Is regularly issued at stated intervals no less frequently than once a week, bears a date of issue, and is numbered consecutively; provided, however, that publication on legal holidays of this state or of the United States and on Saturdays and Sundays shall not be required, and failure to publish not more than two (2) regular issues in any calendar year shall not exclude a periodical from this definition;
- (iv) Is issued from a known office of publication, which shall be the principal public business office of the newspaper and need not be the place at which the periodical is printed and a newspaper shall be deemed to be "published" at the place where its known office of publication is located;
- (v) Is formed of printed sheets; provided, however, that a periodical that is reproduced by the stencil, mimeograph or hectograph process shall not be considered to be a "newspaper"; and
- (vi) Is originated and published for the dissemination of current news and intelligence of varied, broad and general public interest, announcements and notices, opinions as editorials on a regular or irregular basis, and advertising and miscellaneous reading matter.

The term “newspaper” shall include periodicals which are designed primarily for free circulation or for circulation at nominal rates as well as those which are designed for circulation at more than a nominal rate.

The term “newspaper” shall not include a publication or periodical which is published, sponsored by, is directly supported financially by, or is published to further the interests of, or is directed to, or has a circulation restricted in whole or in part to any particular sect, denomination, labor or fraternal organization or other special group or class or citizens.

For purposes of this paragraph, a periodical designed primarily for free circulation or circulation at nominal rates shall not be considered to be a newspaper unless such periodical has made an application for such status to the Tax Commission in the manner prescribed by the commission and has provided to the Tax Commission documentation satisfactory to the commission showing that such periodical meets the requirements of the definition of the term “newspaper.” However, if such periodical has been determined to be a newspaper under action taken by the State Tax Commission on or before April 11, 1996, such periodical shall be considered to be a newspaper without the necessity of applying for such status. A determination by the State Tax Commission that a publication is a newspaper shall be limited to the application of this chapter and shall not establish that the publication is a newspaper for any other purpose.

CREDIT(S)

Laws 1934, Ch. 119, § 1; Laws 1936, Ch. 158, § 1; Laws 1938, Ch. 113, § 1; Laws 1944, Ch. 129, § 1; Laws 1946, Ch. 262, § 1; Laws 1948, Ch. 467, § 1; Laws 1950, Ch. 530, § 1; Laws 1954, Ch. 369, § 2; Laws 1955, 1st Ex. Sess., Ch. 109, § 2; Laws 1956, Ch. 419, § 1; Laws 1958, Ch. 574, § 1; Laws 1968, Ch. 588, § 1; Laws 1970, Ch. 546, § 1; Laws 1972, Ch. 506, § 1; Laws 1982, 1st Ex. Sess., Ch. 17, § 32; Laws 1983, Ch. 546, § 4; Laws 1986, Ch. 451, § 1; Laws 1995, Ch. 508, § 1; Laws 1996, Ch. 523, § 1; Laws 1997, Ch. 493, § 1, eff. from and after passage (approved March 27, 1997); Laws 2005, Ch. 325, § 1, eff. July 1, 2005.

Miss. Code Ann. § 27-65-37

West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 65. Sales Tax

In General

§ 27-65-37. Assessment of tax

If adequate records of the gross income or gross proceeds of sales are not maintained or invoices preserved as provided herein, or if an audit of the records of a taxpayer, or any return filed by him, or any other information discloses that taxes are due and unpaid, the commissioner shall make assessments of taxes, damages, and interest from any information available, which shall be prima facie correct. The commissioner shall give notice to the taxpayer of such assessments and demand payment of the tax, damages and interest within ten days from date of delivery of the notice. Such notice shall be sent by certified or registered mail or delivered by an agent of the commissioner either to the taxpayer or someone of suitable age and discretion at the taxpayer's residence or place of business.

If the taxpayer shall fail or refuse to comply with the notice of assessment or shall fail to petition for a hearing, the commissioner shall proceed as provided in section 27-65-39.

CREDIT(S)

Laws 1932, Ch. 90, § 8; Laws 1934, Ch. 119, § 8; Laws 1936, Ch. 158, § 11; Laws 1938, Ch. 113, § 1; Laws 1942, Ch. 138, § 1; Laws 1944, Ch. 129, § 7; Laws 1952, Ch. 403, § 4; Laws 1955, 1st Ex. Sess., Ch. 106, § 1; Laws 1958, Ch. 576, § 1, eff. from and after passage (approved March 10, 1958).

Miss. Code Ann. § 27-65-43

West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 65. Sales Tax

In General

§ 27-65-43. Taxpayer records required

It shall be the duty of every person taxable under this chapter to keep and preserve for a period of three (3) years adequate records of the gross income, gross receipts or gross proceeds of sales of the business, including all invoices of merchandise purchased, all bank statements and cancelled checks, and all other books or accounts as may be necessary to determine the amount of tax for which he is liable. Said records shall be adequate in substance to conform with the provisions of this chapter and the regulations promulgated by the commissioner, and all of such records shall be written in the English language. All records shall be open for examination, at any time, by the commissioner or his duly authorized agent.

The commissioner may require any information or records from computer information systems on media common to those systems. Taxpayers' records may be sampled for audit purposes at the discretion of the commissioner and any assessment rendered as a result of same shall be considered prima facie correct.

The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep and allow examination of such records shall subject the taxpayer to all the penalties of Section 27-65-85 of this chapter.

CREDIT(S)

Laws 1932, Ch. 90, § 8; Laws 1934, Ch. 119, § 8; Laws 1936, Ch. 158, § 11; Laws 1938, Ch. 113, § 6; Laws 1944, Ch. 129, § 8; Laws 1952, Ch. 403, § 5; Laws 1992, Ch. 402, § 1, eff. July 1, 1992.

Competency is for the court; credibility for the jury. Yet in some cases the term "credible" is used as an equivalent for "competent". In law of contracts, of legal age without mental disability or incapacity. *See also* Ability; Authority; Capacity; Competent; Competent evidence; Competent witness. *Duly qualified; Incompetency; Power; Qualified.*

Competency proceedings. Hearings conducted to determine a person's mental capacity. Such may be held within criminal context to determine competency to stand trial, or to be sentenced, or to determine whether at time of offense the accused was legally sane. *See e.g.* 18 U.S.C.A. §§ 241 et seq. Such may also be held in civil context to determine whether person should be committed for treatment.

Competency to stand trial. A person lacks competency to stand trial if he or she lacks capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in preparing his or her defense. To be "competent to stand trial" a defendant must have, at time of trial, sufficient present ability to consult with his/her lawyer with a reasonable degree of understanding and a rational as well as factual understanding of the proceedings against him or her. Due process prohibits the government from prosecuting a defendant who is legally incompetent to stand trial. The issue of competency is collateral to the issue of guilt. *See* Insanity.

Competent. *Duly qualified; answering all requirements; having sufficient capacity, ability or authority; possessing the requisite physical, mental, natural or legal qualifications; able; adequate; suitable; sufficient; capable; legally fit.* A testator may be said to be "competent" if he or she understands (1) the general nature and extent of his property; (2) his relationship to the people named in the will and to any people he disinherits; (3) what a will is; and (4) the transaction of simple business affairs. *See also* Capacity; Competency; Incompetency.

Competent authority. As applied to courts and public officers, this term imports jurisdiction and due legal authority to deal with the particular matter in question.

Competent court. A court, either civil or criminal, having lawful jurisdiction.

Competent evidence. That which the very nature of the thing to be proven requires, as, the production of a writing where its contents are the subject of inquiry. Also, generally, admissible (i.e. relevant and material) as opposed to "incompetent" or "inadmissible" evidence. *See also* Competency; Evidence; Relevant evidence.

Competent witness. One who is legally qualified to be heard to testify in a cause. A witness may

not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. *Fed.Evid.R. 602.*

As used in statutes relating to the execution of wills, the term means a person who, at the time of making the attestation, could legally testify in court to the facts which he attests by subscribing his name to the will. *See also* Competency.

Competition. Contest between two rivals. The effort of two or more parties, acting independently, to secure the business of a third party by the offer of the most favorable terms; also the relations between different buyers or different sellers which result from this effort. It is the struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time. The term implies the idea of endeavoring by two or more to obtain the same object or result. *See also* Compete.

Unfair competition in trade. *See* Combination in restraint of trade; Price-fixing; Sherman Antitrust Act; Unfair competition.

Competitive bidding. Such bidding generally encompasses the submission of bids to complete a project and an award of the contract to the responsible bidder best able to complete the project in a manner which is financially most advantageous to community.

Competitive civil service examination. Examination which conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed by other examiners of equal ability and experience. Such exam may be open in which case all may take it or may be promotional in which case only those in service may compete against others in service.

Competitors. Persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival.

Compilation /kōmpōlēyshən/. A bringing together of preexisting statutes in the form in which they were enacted, with the removal of sections which have been repealed and the substitution of amendments in an arrangement designed to facilitate their use. A literary production composed of the works or selected extracts of others and arranged in methodical manner. *Compare* Code; Codification. *See also* Compiled statutes; Revised statutes.

In accounting, a term used in connection with the presentation of financial statements when the accountant has accumulated or compiled the financial information of an entity and does not give assurance that the financial statements are presented in conformity with generally accepted

Black's Law Dictionary (9th ed. 2009), evidence

EVIDENCE

evidence, *n.* (14c) **1.** Something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact <the bloody glove is the key piece of evidence for the prosecution>. [Cases: Criminal Law ¶661; Federal Civil Procedure ¶2011; Trial ¶33, 43.] **2.** See *fact in evidence* under **FACT**. **3.** The collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute <the evidence will show that the defendant breached the contract>. **4.** The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding <under the rules of evidence, the witness's statement is inadmissible hearsay that is not subject to any exception>. — Also termed (in sense 4) *rules of evidence*. [Cases: Criminal Law ¶661; Federal Civil Procedure ¶2011; Trial ¶43.] — **evidence**, *vb.*

"Evidence is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact." James B. Thayer, *Presumptions and the Law of Evidence*, 3 Harv. L. Rev. 141, 142 (1889).

"Evidence, broadly defined, is the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain. Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. In legal acceptance, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 'Evidence' has also been defined to mean any species of proof legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, and the like." 31A C.J.S. *Evidence* § 3, at 67–68 (1996).

adminicular evidence. Rare. Corroborating or auxiliary evidence presented for the purpose of explaining or completing other evidence.

admissible evidence. (18c) Evidence that is relevant and is of such a character (e.g., not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it. — Also termed *competent evidence*; *proper evidence*; *legal evidence*. [Cases: Criminal Law ¶661; Federal Civil Procedure ¶2011; Trial ¶43.]

autoptic evidence. See *demonstrative evidence*.

best evidence. (17c) Evidence of the highest quality available, as measured by the nature of the case rather than the thing being offered as evidence. • The term is usu. applied to writings and recordings. If the original is available, it must be offered rather than a copy or oral rendition. Fed. R. Evid. 1002. — Also termed *primary evidence*; *original evidence*. See **BEST-EVIDENCE RULE**. Cf. *secondary evidence*. [Cases: Criminal Law ¶398–403; Evidence ¶157–187.]

"In some circumstances, 'best evidence' may mean that evidence which is more specific and definite as opposed to that which is merely general and indefinite or descriptive. However, 'best evidence' or 'primary evidence' is variously defined as that particular means of proof which is indicated by the nature of the fact under investigation as the most natural and satisfactory, or as that kind of proof which under any possible circumstances affords the greatest certainty of the fact in question; or as evidence which carries on its face no indication that better remains behind." 32A C.J.S. *Evidence* § 1054, at 417 (1996).

character evidence. (1949) Evidence regarding someone's general personality traits or propensities, of a praiseworthy or blameworthy nature; evidence of a person's moral standing in a community. Fed. R. Evid. 404, 405, 608. • Character evidence is usu., but not always, prohibited if offered to show that the person acted in conformity with that character. Cf. *reputation evidence*. [Cases: Criminal Law ¶375; Evidence ¶106; Witnesses ¶333–362.]

circumstantial evidence. (18c) **1.** Evidence based on inference and not on personal knowledge or observation. — Also termed *indirect evidence*; *oblique evidence*. Cf. *direct evidence* (1). [Cases: Criminal Law ¶338(2), 552; Evidence ¶100, 587.] **2.** All evidence that is not given by eyewitness testimony.

"Indirect evidence (called by the civilians, *oblique*, and more commonly known as *circumstantial evidence*) is that which is applied to the principal fact, indirectly, or through the medium of other

facts, by establishing certain circumstances or minor facts, already described as evidentiary, from which the principal fact is extracted and gathered by a process of special inference.... " Alexander M. Burrill, *A Treatise on the Nature, Principles and Rules of Circumstantial Evidence* 4 (1868).

"Some circumstantial evidence is very strong, as when you find a trout in the milk." Henry David Thoreau, *Journal*, 11 Nov. 1850, in 2 *Journal of Henry D. Thoreau* 94 (Bradford Torrey & Francis H. Allen eds., 1962).

"Evidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence, is termed circumstantial evidence." William P.

Richardson, *The Law of Evidence* § 111, at 68 (3d ed. 1928).

"Testimonial evidence readily defines itself by its name; it is any assertion by a human being, offered to evidence the truth of the matter asserted. Circumstantial evidence is any and all other evidence. Scientifically the term 'circumstantial' is indefensible, for it does not correlate with 'testimonial'; a more correct equivalent would be 'nontestimonial.' But no one has yet invented an acceptable substitute for 'circumstantial.'" John H. Wigmore, *A Students' Textbook of the Law of Evidence* 38 (1935).

clear and convincing evidence. (17c) Evidence indicating that the thing to be proved is highly probable or reasonably certain. • This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials. — Also termed *clear and convincing proof*. See REASONABLE DOUBT. Cf.

PREPONDERANCE OF THE EVIDENCE. [Cases: *Evidence* ¶596(1).]

communicative evidence. See *testimonial evidence*.

competent evidence. 1. See *admissible evidence*. 2. See *relevant evidence*.

conclusive evidence. (17c) 1. Evidence so strong as to overbear any other evidence to the contrary. — Also termed *conclusive proof*. [Cases: *Criminal Law* ¶549; *Evidence* ¶584(1).] 2. Evidence that so preponderates as to oblige a fact-finder to come to a certain conclusion.

concomitant evidence. (17c) Evidence that, at the time of the act, the alleged doer of the act was present and actually did it.

conflicting evidence. (1803) Evidence that comes from different sources and is often irreconcilable.

corroborating evidence. (17c) Evidence that differs from but strengthens or confirms what other evidence shows (esp. that which needs support). — Also termed *corroborative evidence*. Cf. *cumulative evidence*.

credible evidence. (17c) Evidence that is worthy of belief; trustworthy evidence.

critical evidence. (18c) Evidence strong enough that its presence could tilt a juror's mind. • Under the Due Process Clause, an indigent criminal defendant is usu. entitled to an expert opinion of the merits of critical evidence. — Also termed *crucial evidence*.

crucial evidence. See *critical evidence*.

cumulative evidence. (18c) Additional evidence that supports a fact established by the existing evidence (esp. that which does not need further support). Cf. *corroborating evidence*. [Cases: *Criminal Law* ¶675; *Federal Civil Procedure* ¶2011; *Trial* ¶56.]

demeanor evidence. (1909) The behavior and appearance of a witness on the witness stand, to be considered by the fact-finder on the issue of credibility. [Cases: *Criminal Law* ¶553; *Evidence* ¶588.]

demonstrative evidence (di-mon-str<<schwa>>-tiv). (17c) Physical evidence that one can see and inspect (i.e. an explanatory aid, such as a chart, map, and some computer simulations) and that, while of probative value and usu. offered to clarify testimony, does not play a direct part in the incident in question. • This term sometimes overlaps with and is used as a synonym of real evidence. — Also termed *illustrative evidence*; *autoptic evidence*; *autoptic proference*; *real evidence*; *tangible evidence*. See *nonverbal testimony* under TESTIMONY. Cf. *real evidence*; *testimonial evidence*. [Cases: *Criminal Law* ¶404.5-404.85; *Evidence* ¶188-198.]

"There remains a source of proof, distinct from either circumstantial or testimonial evidence, viz., what the tribunal sees or hears by its own senses. Whether this should be termed 'evidence' or not is a question of words, open to difference of view. But it is universally conceded to be an available source of proof. Bentham's term for it, 'real evidence,' came into wide vogue, but is ambiguous. The term 'autoptic proference' (etymologically meaning 'showing to the tribunal's own vision') is preferable." John H. Wigmore, *A Students' Textbook of the Law of Evidence* 39 (1935).

derivative evidence. (1961) Evidence that is discovered as a result of illegally obtained evidence and is therefore inadmissible because of the primary taint. See EXCLUSIONARY RULE; FRUIT-OF-THE-POISONOUS-TREE DOCTRINE. [Cases: *Criminal Law* ¶394.1(3).]

opposing party. • Rebuttal evidence is introduced in the rebutting party's answering case; it is not adduced, e.g., through cross-examination during the case-in-chief of the party to be rebutted. — Also termed *rebutting evidence*. [Cases: Criminal Law ¶683; Federal Civil Procedure ¶2015; Trial ¶62.]

relevant evidence. (18c) Evidence tending to prove or disprove a matter in issue. • Relevant evidence is both probative and material and is admissible unless excluded by a specific statute or rule. Fed. R. Evid. 401-403. — Also termed *competent evidence*. Cf. *material evidence*; *probative evidence*. [Cases: Criminal Law ¶338; Evidence ¶99.]

reputation evidence. (1888) Evidence of what one is thought by others to be. • Reputation evidence may be introduced as proof of character when character is in issue or is used circumstantially. Fed. R. Evid. 405(a). — Also termed *reputational evidence*. Cf. *character evidence*. [Cases: Criminal Law ¶375; Evidence ¶106; Witnesses ¶333-362.]

retrospectant evidence (re-tr<<schwa>>-spek-t<<schwa>>-nt). (1929) Evidence that, although it occurs after an act has been done, suggests that the alleged doer of the act actually did it <when goods have been stolen, and the thief is sought, a person's later possession of those goods amounts to retrospectant evidence that this person took them>. — Also termed *traces*.

satisfactory evidence. (17c) Evidence that is sufficient to satisfy an unprejudiced mind seeking the truth. — Also termed *sufficient evidence*; *satisfactory proof*. [Cases: Evidence ¶584(1).]

scientific evidence. (17c) Fact or opinion evidence that purports to draw on specialized knowledge of a science or to rely on scientific principles for its evidentiary value. See DAUBERT TEST. [Cases: Criminal Law ¶388; Evidence ¶150, 505-574.]

secondary evidence. (17c) Evidence that is inferior to the primary or best evidence and that becomes admissible when the primary or best evidence is lost or inaccessible. • Examples include a copy of a lost instrument or testimony regarding a lost instrument's contents. — Also termed *mediate evidence*; *mediate testimony*; *substitutionary evidence*. See Fed. R. Evid. 1004. Cf. *best evidence*. [Cases: Criminal Law ¶398, 403; Evidence ¶157-187.]

secondhand evidence. See HEARSAY.

secret evidence. (1983) Classified information that may be used against a defendant in an immigration proceeding but withheld from the defendant, the defendant's lawyer, and the public on national-security grounds. • The use of secret evidence was made easier under the Anti-Terrorism and Effective Death Penalty Act of 1996. [Cases: Aliens, Immigration, and Citizenship ¶423.]

signature evidence. Highly distinctive evidence of a person's prior bad acts. • While ordinarily inadmissible, signature evidence will be admitted if it shows, for example, that two crimes were committed through the same planning, design, scheme, or modus operandi, and in such a way that the prior act and the current act are uniquely identifiable as those of the defendant. See Fed. R. Evid. 404(b). [Cases: Criminal Law ¶369.15; Evidence ¶129(5), 133.]

slight evidence. (18c) A small quantity of evidence; esp., the small amount of evidence sufficient to remove a presumption from a case or for a rational fact-finder to conclude that something essential has not been established beyond a reasonable doubt. See SLIGHT-EVIDENCE RULE.

state's evidence. (1886) Testimony provided by one criminal defendant — under a promise of immunity or reduced sentence — against another criminal defendant. See TURN STATE'S EVIDENCE.

substantial evidence. (17c) 1. Evidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla. See SUBSTANTIAL-EVIDENCE RULE. [Cases: Administrative Law and Procedure ¶791; Evidence ¶597.] 2. The product of adequately controlled investigations, including clinical studies, carried out by qualified experts that establish the effectiveness of a drug under FSA regulations. 21 USCA § 355(e).

substantive evidence (s<<schwa>>-b-st<<schwa>>-n-tiv). Evidence offered to help establish a fact in issue, as opposed to evidence directed to impeach or to support a witness's credibility. [Cases: Criminal Law ¶337; Evidence ¶266.]

substitutionary evidence. See *secondary evidence*.

sufficient evidence. See *satisfactory evidence*.

tainted evidence. (1876) Evidence that is inadmissible because it was directly or indirectly obtained by illegal means. See FRUIT-OF-THE-POISONOUS-TREE DOCTRINE. [Cases: Criminal Law ¶394; Evidence ¶154.]

tangible evidence. Physical evidence that is either real or demonstrative. See *demonstrative evidence*; *real evidence*.

testimonial evidence. (1831) A person's testimony offered to prove the truth of the matter asserted; esp., evidence elicited from a witness. — Also termed *communicative evidence*; *oral evidence*. Cf. *demonstrative evidence*. [Cases: Trial ¶43.]

Black's Law Dictionary (9th ed. 2009), preponderance of the evidence

PREPONDERANCE OF THE EVIDENCE

preponderance of the evidence. (18c) The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. • This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. — Also termed *preponderance of proof*; *balance of probability*. See REASONABLE DOUBT. Cf. *clear and convincing evidence* under EVIDENCE. [Cases: Evidence ⇨598.]

"Criminal convictions are so serious in their consequences that it is felt that an accused person should be freed, if there is any fair or reasonable doubt about his guilt, even though there seems to be considerable likelihood that he did commit the crime.... In civil cases, however, the consequence of losing a case, although serious enough in many cases, is not considered to be such as to require so stringent a rule. Accordingly the plaintiff is entitled to a verdict if he proves the case 'by the preponderance of the evidence.' In other words, he is entitled to a verdict even though there may be a reasonable doubt as to the liability of the accused, if the jury is satisfied nevertheless that the plaintiff has proved his case." Charles Herman Kinnane, *A First Book on Anglo-American Law* 562 (2d ed. 1952).

© 2009 Thomson Reuters

Bryan A. Garner, Editor in Chief

END OF DOCUMENT

(c) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works

Black's Law Dictionary (9th ed. 2009), *prima facie*

PRIMA FACIE

prima facie (**pr**I-m<<schwa>> **fay**-sh<<schwa>> or **fay**-shee), *adv.* [Latin] (15c) At first sight; on first appearance but subject to further evidence or information <the agreement is *prima facie* valid>. [Cases: Evidence ◊53, 85, 584(1).]

© 2009 Thomson Reuters

Bryan A. Garner, Editor in Chief

END OF DOCUMENT

(c) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works

Black's Law Dictionary (9th ed. 2009), prima facie case

PRIMA FACIE CASE

prima facie case. (1805) **1.** The establishment of a legally required rebuttable presumption. [Cases: Evidence ¶53, 85.] **2.** A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor. [Cases: Evidence ¶584(1).]

© 2009 Thomson Reuters

Bryan A. Garner, Editor in Chief

END OF DOCUMENT

(c) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works