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STATEMENT OF THE ISSUES

The chancery court erred when it found it had jurisdiction and failed 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 the requirements of Miss. Code Ann. §§ 27-77-5 (Rev. 2005) and 27-77-7² (Rev. 2005).

STATEMENT OF THE CASE

The Mississippi Department of Revenue formally known as the Mississippi State Tax Commission³ (hereinafter "MSTC") filed a cross appeal based upon the chancery court's failure to dismiss Khurana's appeal for lack of subject matter jurisdiction, jurisdiction over the MSTC, and that 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.

STATEMENT OF FACTS

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. 5, p. 14 & 18). The Orders required, "the taxpayer **shall** within 30 days from the date of the order

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 With the reorganization of the Mississippi State Tax Commission into the Mississippi Department of Revenue and the creation of the Mississippi Board of Tax Appeals which became effective on July 1, 2010, the statutes in issue, Miss. Code Ann. §§ 27-77-5 and 27-77-7 were amended. However, the prior versions in effect and controlling in this case have been cited and copies provided in the addendum.

³ See Footnote 1.

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. 5, p. 12-19).

On or about October 4, 2007, Khurana filed a Complaint in the Chancery Court of Pike County, Mississippi attempting to appeal the Orders pursuant to Miss. Code Ann. § 27-77-7. (R. 6-14). Khurana alleged in his Complaint that he posted a bond; however, he did not post a bond or pay the taxes. (R.E. 7, p. 62-63; R. 57-58). 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. 6, p. 1). 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. 6, p.1). The letter accompanying the checks provided no explanation for the payment. (R.E. 6, p. 2). In a telephone conference with the Commission Secretary,⁴ Khurana’s attorney advised that the checks received on October 11, 2007 were paid in protest. (R.E. 7, p. 49-50; R. 44). However, Khurana failed to fully pay the assessment for VK’s Wine & Liquor. (R.E. 5, p. 18; 6, p. 20). The VK’s Wine & Liquor audit assessment was not fully paid until on or about August 19, 2010. (R. 496).

On November 5, 2007, the MSTC filed a Motion for Summary Judgment asserting that Khurana had failed to perfect his appeal pursuant to Miss. Code Ann. §§ 27-77-5 and

⁴ Now known as the Executive Director of the Board of Tax Appeals. §§ 27-3-1 *et. seq.* & 27-4-1 *et. seq.*

27-77-7. (R.E. 7, p. 22-63; R. 17-58). The Court denied the MSTC's Motion for Summary Judgment. (R.E. 2, p. 5-9; R. 61-62 & 66-70). Therefore, on March 3, 2008, the MSTC filed its Motion for Reconsideration of the Order Denying the MSTC's Motion for Summary Judgment which was also denied. (R.E. 8, p. 64-67; 3, p. 10; R. 74 & 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. 4, p. 11; R. 173).

SUMMARY OF THE ARGUMENT

The present appeal involves a clear and unambiguous statute, Miss. Code Ann. § 27-77-7⁵, that requires a taxpayer to post a bond in double the amount in controversy or in the alternative pay the tax in dispute under protest before filing an action to seek a review of the decision of the State Tax Commission. The bond or payment requirement is a lawful exercise of authority of the Legislature to place condition precedents on bringing an action under Miss. Code Ann. § 27-77-7 to ensure that the revenues ultimately determined to be due to the State are protected. The chancery court erred when it failed to dismiss Khurana's case for failing to perfect his appeal pursuant to Miss. Code Ann. §§ 27-77-5 and 27-77-7. Though Khurana filed his petition within the thirty day time period, he neglected to post a bond or pay the tax within the thirty day timeframe. If a taxpayer chooses to pay the tax in lieu of posting a bond, Miss. Code Ann. § 27-77-7 requires the taxpayer *prior* to filing their petition, to pay the tax to the agency, under protest, and seek a refund of the taxes. Khurana failed to pay the tax assessment, under

⁵ See Footnote 2, *supra*.

protest, *prior* to filing his petition in chancery court. Additionally, he did not attempt to pay the assessment until the thirty-seventh day. Therefore, Khurana never perfected his appeal and the chancery court erred in failing to dismiss the case for lack of subject matter jurisdiction, lack of jurisdiction over the MSTC, and failure to state a claim upon which relief can be granted.

ARGUMENT

A. Standard of Review

The *de novo* standard applies to the “review of a trial court’s grant or denial of summary judgment and pursuant to Miss. R. Civ. P. 56(c), we examine all the evidentiary matters before us, such as admissions in pleadings, answers to interrogatories, depositions, affidavits, etc.” *City of Jackson, Mississippi, Mayor Harvey Johnson and Ramie Ford v. Jane Doe, et. al*, No. 2010-CA-00341 ¶6 (Miss. 2011) and *Cousin v. Enterprise Leasing Company-South Central, Inc.*, 948 So. 2d 1287, 1289 ¶6 (Miss. 2007). Summary judgment is proper where “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *WW, Inc. et. al v. Rainbow Casino-Vicksburg Partnership, L.P. et. al*, No. 2010-CA-00361-SCT ¶6 (Miss. 2011); *Morton v. City of Shelby*, 984 So. 2d 323, 329 ¶10 (Miss. 2007) and *Bulloch v. City of Pascagoula*, 574 So. 2d 637, 639 (Miss. 1991).

B. The Chancery Court Lacked Jurisdiction To Consider The Complaint Filed By Khurana Based On The Clear Language Of Miss. Code Ann. § 27-77-7.

“The right to appeal is governed by statute.” *Bowling v. Madison County Board of Supervisors*, 724 So.2d 431, 433 (Miss. Ct. App. 1998), and the Mississippi Supreme Court has “repeatedly required strict compliance with the appeal provisions of our rules and appeal statutes.” *Bertucci v. Miss. Dept. of Corrections*, 597 So.2d 643, 647 (Miss. 1992). It is well settled law that “a party has no right to appeal, except insofar as it has been given by law.” *Gill v. Miss. Dept. of Wildlife Conservation*, 574 So. 2d 586, 590 (Miss. 1990). Further, the Court in *Rosson v. McFarland*, 933 So. 2d 969, 971 ¶6 (Miss. 2006)(emphasis added) found that, “an appeal is **not** a matter of right but is subject to the statutory provisions.” This rule is firmly rooted in our State. The Court in *E.S. Dismukes v. J.P. Stokes*, 41 Miss. 430, 1867 WL 2306, *2 (Miss. 1867)(with emphasis) found:

When the legislature has passed laws regulating the mode of proceeding and limiting the cases and the courts in which the right may be exercised, the rules prescribed **must** be followed, because they are clearly such as the legislature had the power to enact. **Nothing appears to be more clearly within the legislative power over matters pertaining to public policy, than the question, in what cases and to what courts shall a party be entitled to an appeal or a writ of error?** In such cases the question to be settled is, whether or not it would best promote the purposes of justice, and the peace and quiet of the community, to allow a matter once or twice regularly adjudicated in the courts to be further litigated in other courts; and this question depends not upon matter of legal right, but upon considerations of public policy. It turns upon the grave question, at what point should litigation in particular cases cease, and what rule, in relation to the particular case, would best promote the public good? When the legislature determines this question and fixes the rule in any particular case, the question is thereby settled, whether or not the right to prosecute a writ of error or an appeal exists, and whether it comes within the ‘jurisdiction properly

belonging to a Court of Errors and Appeals.’ The general rule, therefore, clearly is, that the legislature has the power to deny the right of prosecuting a writ of error or an appeal in this court, in any particular case, and that a rule so enacted will be conclusive of the question of jurisdiction, unless it be in contravention of a positive right, with a clear indication of the remedy in the constitution. Yet the power to establish the rule is within the province of the legislature, and it would not be our province to set aside their action.

Khurana’s appeal of the MSTC’s audit assessments is controlled by Miss. Code Ann. §§ 27-77-5 and 27-77-7.⁶ Section 27-77-5(7)(emphasis added) of the Mississippi Code Annotated states in pertinent part:

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.

Section 27-77-7 (emphasis added) provides in pertinent part:

(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

⁶ See Footnote 2, *supra*.

collect the tax from anyone else.

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

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

The Court of Appeals found that Miss. Code Ann. § 27-77-7 is clear and unambiguous. *5K Farms v. Miss. State Tax Comm'n*, 2011 WL 880401 *2; No. 2009-CA-01787-COA ¶10 (Miss. Ct. App. 2011)⁷. The Court further found that

[t]he taxpayer has thirty days to file an appeal in the chancery court. The taxpayer is also required to pay a bond or the amount of the tax under protest. A basic tenet of statutory construction is that 'shall' is mandatory and 'may' is discretionary. *Planters Bank & Trust Co. v. Sklar*, 555 So. 2d 1024, 1027 (Miss.1990). There is no question that the language of the statute is plain and unambiguous. *5K Farms*

⁷ It should be noted that a Petition for Writ of Certiorari is currently pending before the Mississippi Supreme Court in the *5k Farms v. Mississippi State Tax Comm'n*, 2011 WL 880401 *2; NO. 2009-CA-01787-COA (Miss. Ct. App. 2011).

was required to post a bond or pay the amount of the tax under protest, and it did neither; thus, the chancellor did not err in dismissing the case.

5K Farms, 2011 WL 880401 at *2; NO. 2009-CA-01787-COA ¶ 10.

The Court also found that “in order to perfect its appeal, 5K Farms was ordered by statute to file a written notice and pay a bond or the amount of the tax under protest. *Id.* at *3 ¶13. 5K Farms failed to post a bond; thus, its appeal was not perfected.” *Id.* at *3 ¶13.

The provisions found in § 27-77-7 provide the proper appeal process for Khurana to seek review of the Full Commission’s Orders. Those provisions required that within thirty days of the date of the commission order, Khurana either post a bond or pay the tax and file a petition in chancery court. § 27-77-7. Khurana elected to pay the tax; therefore, he was required to follow the conditions precedent to filing that suit. Those conditions are “prior to the filing of the petition, pay to the agency, under protest, the amount ordered by the commission to be paid and seek a refund of such taxes, plus interest thereon.” Miss. Code Ann. § 27-77-7. Further, § 27-77-7(1)(with emphasis) provides that the order of the commission “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.” Unless the conditions precedent occur, then the chancery court never obtains jurisdiction because the appeal was not perfected for failure to properly file it pursuant to Miss. Code Ann. § 27-77-7⁸.

⁸ See also *Akins v. Miss. Dept. of Revenue*, No. 2010-CA-00599-SCT ¶¶ 17 & 19 (2011) and *5K Farms v. Miss. State Tax Comm’n*, 2011 WL 880401 *2; No. 2009-CA-01787-COA ¶10 (Miss. Ct. App. 2011).

1. The requirement to either post a bond or pre-pay the tax is jurisdictional.

Recently, this Court found in *Akins v. Miss. Dept. of Revenue*, No. 2010-CA-00599-SCT ¶¶ 17 & 19 (Miss. 2011) that pursuant to Miss. Code Ann. § 27-77-7 that failure to pay the tax or post a bond before seeking judicial review deprived the chancery court of jurisdiction of the appeal. Citing *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 37, 110 S.Ct. 2238, 110 L. Ed. 2d 17 (1990), the *Akins* Court further found that

allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult.

Akins, No. 2010-CA-00599-SCT at ¶17.

Therefore, “the requirement to pay the tax before seeking judicial review has been held to provide taxpayers with a fair opportunity to challenge the validity of the tax.” *Id.*

Further, this Court has repeatedly held that “statutory bond requirements are jurisdictional.” *Miss. State Personal Board v. Armstrong*, 454 So. 2d 912, 915 (Miss. 1984).⁹ *Armstrong* failed to file an appeal bond within six months of the Appeals Board's decision as required by statute; therefore, the court in *Armstrong* found that the circuit

⁹ See also *Phillips Construction Co. Inc v. Miss. State Highway Comm.*, 420 So. 2d 1374 (Miss. 1982)(supersedeas bond required in appeals to the circuit court from arbitration board determinations under sections 65-2-15 is jurisdictional prerequisite); *Kennedy v. Gervais*, 345 So.2d 1039 (Miss.1977) (failure to file appeal bond within 45 day period prescribed by 11-51-5 deprives Supreme Court of jurisdiction and requires dismissal); *Fisher v. Crowe*, 289 So.2d 921 (Miss.1974) (same); See generally 50 Miss.L.J. 719, 731-732 (1979).

court's first order dismissing the petition for lack of jurisdiction was proper and that its reversal of the decision was in derogation of the statute and erroneous. *Id.* at 915.

Additionally, in *Phillips Construction Co., Inc. v. Miss. State Highway Comm'n*, 420 So. 2d 1374, 1375 (1982) the Court held that the Miss. State Highway Commission failed to perfect its appeal; therefore, the circuit court lacked jurisdiction of the appeal. The statute provided that "either party may appeal" and an essential part of the appeal was the required supersedeas bond. *Id.* The court further noted, "the legislature, if it intended otherwise, easily could have said, 'If the claimant appeals, it is required to file a bond.'" *Id.* at 1376. Therefore, the court held that the required supersedeas bond is jurisdictional, and the appeal is not perfected until the bond is approved by the circuit judge and filed. *Id.*

The requirement of a bond to confer jurisdiction is not a new concept. The Court in *Pearson v. Wilson*, 57 Miss. 848, 1880 WL 6878, *9 & *10 (Miss. 1880)(emphasis added) found that:

The appeal by Pearson from the finding of the jury before the justice of the peace was void, because he gave no appeal bond, which was a condition precedent to an appeal. The bond prescribed by Chancellor Fly, and approved by him, to operate as a *supersedeas*, is not an appeal bond or a substitute for it. The Circuit Court properly refused the application for leave to amend the appeal, by giving a proper appeal bond. The act of March 5, 1878 (citations omitted), requires, as a condition of the right of appeal, the giving of a bond, within five days, "in the sum of three hundred dollars, to be approved by the justice, payable to the opposite party, conditioned for the payment of all costs." This requirement is unaffected by the act of March 2, 1880 (citations omitted), which provides for the appeal to operate as a *supersedeas* upon terms therein prescribed. No appeal bond having been given, or attempted to be given, there was

nothing to amend. A defective appeal bond might perhaps have been amended, but the entire failure to give one could not be supplied by the Circuit Court. To do that would be to acquire jurisdiction by the action of the Circuit Court, whereas the law requires that an appeal prayed, and an appeal bond approved, by the justice, within five days, shall give jurisdiction of the case to the Circuit Court.

It is the misfortune of Mr. Pearson that there was misapprehension as to the requirement of law for taking an appeal, and that, by non-observance of the law applicable to his case, he lost the opportunity afforded him by law to test the correctness of the finding of the jury. This is no more than has often occurred to other litigants, and though much to be regretted is without remedy in his case as in any other. **Such is the law applicable to all alike, and it is the duty of all citizens to uphold and maintain it, as in it is found the safeguard of the rights of every one.**

Also, in *City of Laurel v. Keyes*, 30 So. 3d 397, 398 ¶4 (Miss. Ct. App. 2010), the Court of Appeals held that the trial court lacked jurisdiction over Keyes' appeal because his Notice of Appeal did not meet the statutory requirements. *Id.* at 398 ¶5. Kenneth Keyes filed a notice of appeal and not a writ of certiorari. *Id.* The statute required the writ of certiorari must be in the form of a petition and supported by an affidavit. *Id.* The Court found Keyes notice of appeal did not contain a petition or any supporting affidavit; therefore, it could not be construed to be a petition for certiorari. *Keyes*, 30 So. 3d at 398 ¶5. Thus, the circuit court did not have jurisdiction over Keyes' appeal. *Id.*

The statute and its language dictates whether the pre-suit requirements are jurisdictional. The court in *Arceo v. Tolliver*, 949 So. 2d 691, 696 ¶7 (2006) found medical negligence notice requirements were mandatory pursuant to the Legislature's

requirements which stated “shall” and provided no exceptions to alleviate the prerequisite condition or prior notice. *Id.*

Further, the Court of Appeals in *5K Farms*, 2011 WL 880401, No. 2009-CA-01787-COA *3 ¶13 found that the failure to post a bond was not a form defect, but necessary to perfect the appeal. Additionally, *Akins* found jurisdiction failed to attach to the chancery court if the tax or bond are not paid prior to seeking judicial review. *Akins*, No. 2010-CA-00599-SCT ¶¶ 17 & 19.

Section 27-77-7 requires that a taxpayer within thirty days of the Order, either (1) post the bond or (2) prior to filing the petition, pay the tax assessed by the Commission in its Order **and** file a petition in chancery court. Khurana alleged he posted a bond, but did not. Khurana attempted to pay the assessments seven days after the deadline to appeal had passed. Even then he failed to fully pay the assessment for VK’s Wine & Liquor Store until on or about August 19, 2010. *Akins*, No. 2010-CA-00599-SCT ¶¶ 17 & 19 and *5K Farms*, 2011 WL 880401, No. 2009-CA-01787-COA *3 ¶13 are the controlling cases on this issue and both have found that the requirement to pay the tax or post the bond before seeking judicial review is jurisdictional.

Akins further recognized that though the bond is required to accompany the petition, it is the actual posting of the bond on or before the filing of the petition or the payment of the tax under protest prior to filing the petition that the statute requires. This is not simply an issue of form of the petition, but a substantive requirement designed to protect the revenues of the State. It is an act that is required prior to filing suit and necessary to allow jurisdiction to attach when a Petition is filed in chancery court.

Consequently, Miss. Code Ann. § 27-77-7 is akin to the statute requirements in *Armstrong*, *Phillips Construction*, *Keyes*, and *Tolliver* and its pre-suit requirements are jurisdictional.

Khurana failed to meet the statute's pre-suit requirements just like *Akins*, *5K Farms*, *Armstrong*, *Tolliver*, *Keyes*, and the Miss. State Highway Commission in *Phillip's Construction*; therefore, the Court should find that the chancery court lacked jurisdiction of this matter and the Orders of the Full Commission were final pursuant to § 27-77-7(1). Since Khurana failed to properly appeal, jurisdiction never vested with the chancery court and the chancery court lacked jurisdiction to hear the appeal. The court in *Akins* and *5K Farms* correctly found that the failure to follow the conditions precedent or pre-suit requirements deprived the chancery court of jurisdiction. Further, this case is similar to *Pearson* in that Khurana had a misapprehension as to the requirement of law for taking an appeal, and that, by non-observance of the law applicable to his case, he lost the opportunity afforded him by law to test the correctness of the Full Commission's findings. Therefore, the Court should (1) overrule the chancery court's denial of the MSTC's Motion for Summary Judgment, (2) find that Khurana failed to meet the conditions precedent of the statute rendering the State Tax Commission Orders final and (3) that jurisdiction never vested with the chancery court.

2. The requirement to pay the tax or post the bond is a pre-suit requirement.

Even if the Court finds that paying the tax or posting the bond is not jurisdictional, it is a pre-suit requirement which must be met. The Mississippi Legislature has the authority to set pre-suit requirements. *Wimley v. Reid*, 991 So. 2d 135, 139 ¶¶ 17 & 19

(Miss. 2008). The Court in *Wimley*, 991 So. 2d at 139 ¶¶ 17 & 19 (emphasis added) noted:

We guard just as diligently the Legislature's prerogative to set forth in legislation whatever **substantive, pre-suit requirements for causes of action, and prerequisites to filing suit, it deems appropriate. Pre-suit requirements are clearly within the purview of the Legislature and do not encroach upon this Court's rule-making responsibility.** Indeed, we consistently have held that the Legislature has authority to establish pre-suit requirements as a **condition precedent** to filing particular kinds of lawsuits. For instance, the Legislature promulgated, and we have enforced, Section 11-46-11(1), which requires that notice be provided to the putative defendant prior to bringing a claim under the Mississippi Tort Claims Act. Miss. Code Ann. §11-46-11(1). Similarly, the Legislature promulgated, and we have enforced, Section 15-1-36(15)'s requirement of notice prior to bringing a medical-negligence claim. Miss. Code Ann. § 15-1-36 (15); *see e.g. Arceo v. Tolliver*, 949 So. 2d 691, 693-97 (Miss. 2006)(strictly construing and applying statute which requires plaintiffs to give notice before commencing a medical negligence action).

In *Wimley*, the statute at issue required Wimley to attach a certificate to the Complaint. *Wimley*, 991 So. 2d at 136-37 ¶¶6. The Certificate required that the attorney attest that he had "consulted with at least one expert as to the standard of care or negligence and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action." *Id.* After Reid filed his answer, Wimley filed a Motion to Amend her Complaint and attached the Certificate. *Id.* at 136 ¶ 2. The Court found that the failure to attach a certificate to the complaint was procedural because it was done at the time of filing the complaint; however, it did not overrule the statute's pre-suit requirement to consult an expert witness. *Id.* It was not before the court and the court did not address

whether Wimley had met the pre-suit requirements. *Id.* at 139 ¶20.

The Court of Appeals in *Jones v. Laurel Family Clinic*, 37 So. 3d 665,668 ¶12 (Miss. Ct. App. 2010) affirmed the dismissal of Barbara Jones' complaint for failure to strictly comply with the Mississippi Tort Claims Act (hereinafter "MTCA") pre-suit requirement to provide ninety (90) days notice prior to filing suit. Jones gave notice on July 9, 2007; however, she filed her complaint eighty-five (85) days later on October 2, 2007. *Id.* at 667 ¶3. The Court also found that the case *Stuart v. University of Mississippi Medical Center*, 21 So. 3d 544 (Miss. 2009) did not conflict with *Jones*, noting that the Court in *Stuart* found the defendant waived the affirmative defense of Stuart's noncompliance by waiting over two years to seek dismissal. *Id.* at 668 ¶ 11.

In *Stuart*, UMMC waited over two years to seek the dismissal of Stuart's case due to his failure to meet the ninety (90) day notice requirement prior to filing suit. *Stuart*, 21 So. 3d at 547 ¶6. Consequently, the court found that UMMC waived the defense. *Id.* However, the court found "the notice requirements in the MTCA are substantive requirements, which are no more or less important than a statute of limitations." *Id.* at 550 ¶11. Justice Waller likens the pre-suit exhaustion requirement to that of federal laws such as EEOC claims' right to sue letter. *Id.* at 551 (Justice Waller concurring). In his concurrence, Justice Waller further stated:

While the right under our state and federal constitutions to access our courts is a matter beyond debate, this right is coupled with responsibility, including the responsibility to comply with legislative enactments, rules, and judicial decisions. *Arceo v. Tolliver*, 949 So. 2d 691, 697 (Miss. 2006). Although the pre-suit notice requirements of Section 11-46-11 are not jurisdictional, their satisfaction is a necessary condition precedent to a plaintiff's right to file suit.

However, that condition precedent can be waived.

Stuart, 21 So. 3d at 552 ¶19 (J. Waller concurring).

Khurana is distinguished from *Stuart* because the MSTC did not waive its defense. The MSTC filed a Motion for Summary Judgment in lieu of an Answer immediately raising the issue of Khurana's failure to perfect his appeal by failing to pay the tax, under protest, prior to filing his petition. Therefore, the MSTC did not waive its defense and was entitled to summary judgment in its favor.

Further, like the MTCA and the medical negligence statutes, Miss. Code Ann. § 27-77-7 also has a pre-suit requirement. Section 27-77-7 requires a person to post a bond or prior to filing the petition, pay to the agency, under protest, the amount ordered by the commission to be paid. §27-77-7. Though the bond is required to accompany the petition, it is the actual posting of the bond on or before the filing of the petition or the payment of the tax under protest prior to filing the petition that the statute requires. This is not simply an issue of form of the petition and/or complaint, but a substantive requirement designed to protect the revenues of the State. Either the payment of the tax under protest before filing the petition or the posting of the bond is a pre-suit requirement which the Mississippi Legislature is granted the power to prescribe as a condition precedent to filing a lawsuit challenging a State Tax Commission Order. Pursuant to § 27-77-7(1), the Orders of the State Tax Commission became final on October 4, 2007 when Khurana failed to perfect his appeal within the thirty (30) day timeframe by (1) either posting the bond or paying the tax to the agency, under protest, prior to filing his petition **and** (2) filing his petition in chancery court. Therefore, the Pike County

Chancery Court lacked jurisdiction to hear the appeal pursuant to § 27-77-7(4) due to Khurana's failure to perfect his appeal by **properly** appealing the Orders.

C. Miss. Code Ann. § 27-77-7 Conditions Precedent Nor The Decision In *5K Farms v. Miss. State Tax Comm'n* Conflict With The Decision In *Miss. State Tax Comm'n v. Medical Devices, Inc.*

Khurana contends that the decision in *5K Farms v. Miss. State Tax Comm'n*, 2011 WL 880401, No. 2009-CA-01787-COA (2011) conflicts with the case *Miss. State Tax Comm'n v. Medical Devices, Inc.*, 624 So. 2d 987 (Miss. 1993). Though the Department believes that this Court's decision in *Akins v. Miss. Dept. of Revenue*, No. 2010-CA-00599-SCT (Miss. 2011) settles the issue of the requirements for properly appealing a Full Commission Order pursuant to Miss. Code Ann. § 27-77-7, it will address Khurana's mischaracterization of the *Medical Devices, Inc.* case.

Despite Khurana's contention, the repeal of Miss. Code Ann. §§ 27-7-71(repealed 2005), 27-7-73(repealed 2005), 27-65-45(repealed 2005), 27-65-47(repealed 2005), and 27-65-49(repealed 2005) and the enactment of Miss. Code Ann. §§ 27-77-1 *et seq.* in their place shows the Legislature's intention to change the old law and provide a new law for appeals of State Tax Commission Orders overruling any prior conflicting interpretation. *Moore v. Molpus*, 578 So. 2d 624, 639 (Miss. 1991)(the amendment of the statute serves to overrule the prior interpretation which becomes for all practical purposes relegated to history). *See also Christus Health v. Beal*, 240 S.W.3d 282, 286 (Tex.App.-Houston [1st Dist.] 2007, no pet.)(holding that judicial interpretation of prior law was obsolete and had no application to amended definition).

However, the Department contends that there is no conflict between the cases. Khurana mischaracterizes the nature of the *Medical Devices, Inc.* case and fails to explain the distinctions between the previous sales tax appeals statutes and the appeals statutes which are applicable to this case. Under the old sales tax appeal statutes, the taxpayer's only avenue was pay the tax and sue for a refund of the tax paid. Further, a taxpayer contesting the sales tax assessment was not required to exhaust their administrative remedies before going to chancery court or protest the payment of the tax. However, the appeals statutes set out in Miss. Code Ann. §§ 27-77-1 *et seq.* and in effect at the time of Khurana's appeal require that the taxpayer exhaust his administrative remedies. Additionally, § 27-77-7 provides the taxpayer two options, either post a bond double the amount in controversy or prior to filing a petition, pay to the agency under protest the tax ordered to be paid by the Full Commission.

Prior to the enactment of Miss. Code Ann. §§ 27-77-5 and 27-77-7, sales tax appeals were governed by Miss. Code Ann. §§ 27-65-42, 27-65-45 (repealed 2005), 27-65-47(repealed 2005), and 27-65-49 (repealed 2005).¹⁰ Sections 27-65-45(repealed 2005), 27-65-47(repealed 2005) and 27-65-49(repealed 2005) were repealed and §§ 27-77-1 *et seq.* were enacted in their place. Khurana's contention that the previous statute is similar or almost identical to §§ 27-77-1 *et seq.* is misleading and incorrect.

The previous appeal statutes for **sales** taxes did not allow the posting of a bond. *See* §§ 27-65-42, 27-65-45(repealed 2005), 27-65-47(repealed 2005), and 27-65-49(repealed 2005). The statutes provided that the taxpayer could pay the tax and seek a

¹⁰ Copies of the statutes are provided in the addendum.

refund, but it did not require full payment. *See* §§ 27-65-42 and 27-65-47(repealed 2005). Section 27-65-47(repealed 2005)(emphasis added) provided that a person improperly charged with any tax imposed and required to pay the same, **may recover the amount paid** together with interest, in any proper action or suit against the commissioner for the amount paid into the state treasury. It further gave the chancery court original jurisdiction. § 27-65-47(repealed 2005). Section 27-65-49(repealed 2005) provided that the taxpayer allege and prove that they alone bore the burden of the tax sued for and did not directly or indirectly collect the tax from his customers. Further, § 27-65-49(repealed 2005) did not require that the taxpayer protest against the payment, unlike § 27-77-7 which requires the taxpayer pay under protest. Section 27-65-49(repealed 2005) also provided that the suits to recover taxes be filed within three years from the time the return was filed or from the time the assessment was made. Section 27-65-42 was not repealed and provides a three year statute of limitations to seek a refund from the date the sales tax return was filed or the sales tax assessment made.

Though the taxpayer in the *Medical Devices* case only made a partial payment of \$28,278.29, the statute clearly only allowed Medical Devices to seek repayment of the amount it had paid. *Medical Devices, Inc.*, 624 So. 2d at 988. Further, the statutes had no provision requiring the taxpayer to “pay the amount ordered to be paid or properly appeal the order of the commission to chancery court.” Miss. Code Ann. § 27-77-5(7). Also, the previous statutes did not provide, “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.” Miss.

Since 5K Farms neither posted a bond nor paid the amount of tax under protest, the Court affirmed the dismissal. *Id.* Further, the Court found that “in order to perfect its appeal, 5K Farms was ordered by statute to file a written notice and pay a bond or the amount of the tax under protest. *Id.* at *3 ¶13. 5K Farms failed to post a bond; thus, its appeal was not perfected.” *Id.* at *3 ¶13.

The Court may also find it helpful to look at the previous appeals statute for income taxes. Miss. Code Ann. §§ 27-7-71(repealed 2005)¹² and 27-7-73(repealed 2005)¹³ were repealed on July 1, 2005, but provided the appeals avenue for income taxes prior to the enactment of Miss. Code Ann. §§ 27-77-1 *et. seq.* In *Davis v. Attorney General*, 935 So. 2d 856, 861-62 ¶10 (Miss. 2006) the court found:

Upon exhausting the remedies provided under Section 27-7-71, an appeal to the chancery court must be perfected within thirty (30) days of receipt of the Tax Commission findings, as outlined in Section 27-7-73. When the Appellants accepted the Tax Commission determination and paid the tax, the Tax Commission findings became final under Section 27-7-73. Appellant had the option, within thirty (30) days of receiving notification of the Tax Commission determination, of paying the tax or appealing under Section 27-7-73. Under Section 27-7-73, the Tax Commission findings are “final” unless the taxpayer files a petition in chancery court ‘requesting a hearing of the case on its merits’ accompanied by a bond ‘in a sum double the amount in controversy.’ Miss. Code Ann. § 27-7-73. Assuming *arguendo* that Appellants had exhausted all administrative remedies available under Section 27-7-71, the chancellor’s determination that the remedy provided by Section 27-7-73 was not utilized remains unaltered. Because Appellants affirmatively accepted the Tax Commission ruling and paid the tax instead of appealing to the chancery court, this court finds the Tax Commission ruling became the final adjudication.

¹² A copy of Miss. Code Ann. § 27-7-71(repealed 2005) is attached in the addendum.

¹³ A copy of Miss. Code Ann. § 27-7-73(repealed 2005) is attached in the addendum.

The Davises appealed the Board of Review's Order to the Full Commission as allowed by § 27-7-73. *Davis*, 935 So. 2d at 858 ¶2. On March 30, 2001 the Davises received the Order and had thirty (30) days to pay the assessment or file a petition and bond in the chancery court. *Id.* at 857 ¶ 1. The Davises failed to secure the appeal bond and on May 11, 2001 submitted full payment for the assessment. *Id.* at 858 ¶2. Over two years later, the Davises filed a refund claim under Miss. Code Ann. § 27-73-1, but it was denied. *Id.* at 858-59 ¶3. The court found that the Davises failure to "file a petition in chancery court 'requesting a hearing of the case on its merits' accompanied by a bond 'in a sum double the amount in controversy' rendered the Tax Commission's findings final." *Id.* at 861-62 ¶10. When the Davises chose to pursue the remedy available to them under § 27-7-73(repealed 2005), they became bound by those provisions and their failure to follow those provisions for appealing to the chancery court rendered the Tax Commission Order final, and the finality judicially foreclosed the Davises from utilizing § 27-73-1. *Id.* at 864 ¶16. *5K Farms* is consistent with *Davis*.

Finally, this issue was settled in *Akins*, No. 2010-CA-00599-SCT (2011). Section 27-77-7 requires a taxpayer to pay under protest the amount ordered by the Full Commission *prior* to filing his petition in chancery court. Allowing Khurana to proceed despite his failure to (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 authority of 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, and (3) Khurana failed to meet the conditions precedent and/or pre-suit requirements under Miss. Code Ann. § 27-77-7 to properly perfect his appeal of the State Tax Commission Orders and the chancery court erred in failing to dismiss his appeal for lack of jurisdiction and failure to state a claim upon which relief could be granted.


CONCLUSION

Miss. Code Ann. § 27-77-7 is clear and unambiguous. Khurana was required to appeal the Orders of the Full Commission (1) within thirty (30) days of the date of the Order (2) prior to filing his petition to either (a) post a bond or (b) prior to filing the petition, pay to the agency under protest the amount ordered by the Commission **and** (2) file a petition in chancery court. 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.

RESPECTFULLY SUBMITTED this the 29th day of September, 2011.

MISSISSIPPI DEPARTMENT OF REVENUE

By:



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CERTIFICATE OF SERVICE

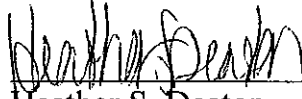
I, Heather S. Deaton, attorney representing the Mississippi Department of Revenue, do hereby certify that I have sent this date via U.S. Mail, postage prepaid, a correct copy of the foregoing Brief of the Cross Appellant/Appellee to the following:

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So certified this the 29th day of September, 2011.


Heather S. Deaton

ADDENDUM

Miss. Code Ann. § 27-77-5

Miss. Code Ann. § 27-77-7

Miss. Code Ann. § 27-7-71 (repealed 2005)

Miss. Code Ann. § 27-7-73 (repealed 2005)

Miss. Code Ann. § 27-65-42

Miss. Code Ann. § 27-65-45 (repealed 2005)

Miss. Code Ann. § 27-65-47 (repealed 2005)

Miss. Code Ann. § 27-65-49 (repealed 2005)

Miss. Code Ann. § 27-65-42

West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 65. Sales Tax

In General

§ 27-65-42. Time for collection proceeding

The amount of taxes due on any return which has been filed as required by this chapter shall be determined and assessed within thirty-six (36) months from the date such return was filed, and no suit or other proceedings for the collection of any taxes due shall be begun after the expiration of thirty-six (36) months from the date such return was filed. However, when an examination of a taxpayer's records to verify returns made under this chapter has been initiated and the taxpayer notified thereof, either certified mail or personal delivery by an agent of the Commissioner, within the thirty-six-month examination period provided herein, the determination of the correct tax liability may be made by the commission after the expiration of said thirty-six-month examination period, provided that said determination shall be made with reasonable promptness and diligence. When a false or fraudulent return has been filed with the intent to evade tax or in case no return has been filed, the amount of tax due may be determined, assessed and collected and suit or proceedings for the collection of the tax may be begun at any time after it becomes due.

A taxpayer may apply to the Commissioner for revision of the tax assessed against him, or paid by him, at any time within thirty-six (36) months from the date of the assessment or from the date the return was filed. Unless a claim for credit or refund is filed by the taxpayer within thirty-six (36) months from the time the return was filed or assessment made, no credit or refund shall be allowed.

CREDIT(S)

Laws 1972, Ch. 405, § 1; Laws 1993, Ch. 563, § 5, eff. from and after passage (approved April 20, 1993).

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. § 27-65-45

West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 65. Sales Tax

In General

§ 27-65-45. Taxpayer rights

If any taxpayer feels aggrieved by an assessment for taxes made upon him for any year by the commissioner, he may apply to the board of review, such board to be composed of qualified employees of the commission appointed by the chairman, said application to be made by petition in writing, within ten (10) days after notice is mailed to him, for a hearing and a correction of the amount of the tax assessed upon him by the commissioner. At said hearing, the board of review shall try the issues presented, according to the law, the facts and within guidelines set by the commissioner, and shall notify the taxpayer of its determination, and if the board of review orders the payment of the tax, the taxpayer shall pay the tax, damages and interest, if any, within ten (10) days after the order is issued provided there is no application for appeal to the State Tax Commission.

If any taxpayer feels aggrieved by the decision of the board of review, he may apply to the State Tax Commission by petition, in writing, within ten (10) days after notice is mailed to him, for a hearing and a correction of the amount of the tax assessed upon him by the commissioner, in which petition he shall set forth the reasons such hearing should be granted and the amount in which such tax should be reduced. The State Tax Commission shall promptly consider the petition, grant the hearing, and notify the petitioner of the time and place fixed for the hearing. After the hearing, the State Tax Commission may make such order in the matter as may appear to it just and lawful and shall furnish a copy of the order to the petitioner. If the State Tax Commission orders the payment of the tax, the taxpayer shall pay the tax, damages and interest, if any, within ten (10) days after the order is issued. Interest shall accrue on the delinquent tax at the rate of one percent (1%) per month or part of a month from and after the expiration of ten-day period if not paid by that time.

CREDIT(S)

Laws 1932, Ch. 90, § 10; Laws 1934, Ch. 119, § 10; Laws 1938, Ch. 113, § 8; Laws 1952, Ch. 403, § 6; Laws 1955, 1st Ex. Sess., Ch. 106, § 2; Laws 1971, Ch. 464, § 1; Laws 1986, Ch. 451, § 5, eff. May 1, 1986.

Miss. Code Ann. § 27-65-47

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§ 27-65-47. Improper tax charged recoverable

Any person improperly charged with any tax imposed by this chapter, and required to pay the same, may recover the amount paid together with interest, in any proper action or suit against the commissioner for the amount paid into the state treasury, or to a representative of any municipality or county which has received any part of the tax sought to be recovered; and the chancery court of Hinds County, or of the county of the taxpayer's residence or place of business, shall have original jurisdiction of any action to recover any tax improperly collected by the commissioner and paid into any fund in the state treasury or to any municipality, county, or other taxing authority which benefits by said tax.

The chancery court, or the supreme court of Mississippi on appeal to it, may, if it be of the opinion from all the evidence that the assessment is incorrect or in part invalid, determine the amount of tax due and shall decide all questions both as to legality and the amount of the tax and enter judgment therefor.

CREDIT(S)

Laws 1971, Ch. 464, § 1, eff. from and after passage (approved March 30, 1971).

Miss. Code Ann. § 27-65-49

West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 65. Sales Tax

In General

§ 27-65-49. Relief for illegal tax burden

In any such suit, the plaintiff must allege and prove that he alone bore the burden of the tax sued for and did not directly or indirectly collect the tax from his customers. It is the declared purpose of this section to make certain that any tax refunded will go to the person who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief, and is the real party in interest. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such suit. In any suit to recover taxes paid or to collect taxes, the court shall adjudge costs to such extent and in such manner as may be deemed equitable. Either party to such suit shall have the right to appeal to the supreme court of Mississippi as now provided by law.

All suits to recover taxes under this chapter shall be filed within three years from the time the return was filed or from the time the assessment was made, and the court shall dismiss any suit filed thereafter.

CREDIT(S)

Laws 1971, Ch. 464, § 1, eff. from and after passage (approved March 30, 1971).

HISTORICAL AND STATUTORY NOTES

Miss. Code Ann. § 27-7-71

West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 7. Income Tax and Withholding

Article 1. Income Tax

§ 27-7-71. Taxpayer right to administrative appeal

(1) A taxpayer who feels aggrieved at any action of the commissioner under sections 27-7-49, 27-7-51, or 27-7-53, may appeal to the board of review, as legally constituted and authorized by section 27-7-79, for a hearing in the matter within thirty days from the date of said action. The board of review shall grant a hearing thereon at the earliest practical date. At said hearing, the board of review shall try the issues presented, according to law and the facts, and shall within thirty days from the date of said hearing make a determination, subject to and with the approval of the commissioner, and notify the taxpayer of its findings. Any overpayment of tax determined by the approved order of the board of review shall be credited, or refunded, to the taxpayer. Any tax deficiency, including any penalty and interest, determined by the approved order of the board of review shall be paid by the taxpayer within thirty days from the date of notification to the taxpayer, and, if said sum is not paid within said thirty-day period, the commissioner shall proceed to collect same under the provisions of sections 27-7-55 to 27-7-67 of this article; provided, that within said thirty-day period the taxpayer may appeal to the state tax commission from the decision of the board of review, as hereinafter set out.

(2) A taxpayer who feels aggrieved at any decision by the board of review, may appeal to the state tax commission by petition, in writing, within thirty days from the date of said decision, for a hearing upon the action or decision of the board of review, in which petition said taxpayer shall set forth the reasons such hearing should be granted. The state tax commission shall promptly consider the petition, grant the hearing, and notify the petitioner of the time and place fixed for the hearing. In any hearing before the state tax commission, two members constitute a quorum. At said hearing, the state tax commission shall try the issues presented, according to the law and the facts, and shall, as soon as practical thereafter, notify the taxpayer of its determination. Any overpayment of tax which the state tax commission may determine to have been paid shall be credited or refunded to the taxpayer. Any tax deficiency, including any penalty and interest, determined by the state tax commission shall be paid within thirty days from the date of notification of the taxpayer, and if said sum is not paid within said thirty-day period, the state tax commission shall proceed to collect same under the provisions of sections 27-7-55 to 27-7-67; provided that within said thirty-day period the taxpayer may appeal from the decision of the state tax commission as hereinafter set out.

CREDIT(S)

Laws 1934, Ch. 120, § 29; Laws 1938, Ch. 116, § 4; Laws 1948, Ch. 438, § 2; Laws 1952, Ch. 402, § 29; Laws 1958, Ch. 554, § 9; Laws 1971, Ch. 512, § 5, eff. January 1, 1971.

Miss. Code Ann. § 27-7-73

West's Annotated Mississippi Code Currentness

Title 27. Taxation and Finance

Chapter 7. Income Tax and Withholding

Article 1. Income Tax

§ 27-7-73. Judicial review of findings

The findings of the state tax commission shall be final unless the taxpayer shall, within thirty days from the date of the receipt of notice of such findings, file a petition in the chancery court of the county in which the taxpayer is a resident or in which the taxpayer is domiciled, or in the case of a nonresident or foreign corporation in either the county in which a place of business or property is located or Hinds County as the seat of state government, requesting a hearing of the case on its merits, which petition shall be a concise statement of the facts as contended for by the petitioner. The petition shall be accompanied with a bond, to be approved by the clerk of said court, in a sum double the amount in controversy, conditioned to pay the judgment of the court. On filing such petition, the clerk of the court shall give the state tax commission notice of the proceedings as required by law by serving the chairman of the state tax commission. The chancery court shall have jurisdiction to hear and determine said cause or issue joined as in other cases. Either the state tax commission or the taxpayer, or both, shall have the right of appeal to the supreme court as in other cases.

CREDIT(S)

Laws 1934, Ch. 120, § 30; Laws 1952, Ch. 402, § 30; Laws 1971, Ch. 512, § 6, eff. January 1, 1971.