IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2010-CA-01857

EQUIFAX, INC. and EQUIFAX CREDIT INFORMATION SERVICES, INC. — APPELLANTS

v.

MISSISSIPPI STATE TAX COMMISSION — APPELLEE

Appeal from the Chancery Court for the First Judicial District of Hinds County, Mississippi, Consolidated Civil Action No. G2009-884-T/1

BRIEF OF AMICUS CURIAE INSTITUTE FOR PROFESSIONALS IN TAXATION

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IN THE SUPREME COURT OF MISSISSIPPI

EQUIFAX, INC. and EQUIFAX CREDIT INFORMATION SERVICES, INC. **APPELLANTS**

v. **No. 2010-CA-01857**

MISSISSIPPI STATE TAX COMMISSION **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Mississippi Rule of Appellate Procedure 28(a)(1), undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Mississippi State Tax Commission (now Mississippi Department of Revenue), Appellee;

2. Equifax, Inc. and Equifax Credit Information Services, Inc., Appellants;

3. Brunini, Grantham, Grower & Hewes, PLLC (Louis G. Fuller, Katie L. Wallace); Alston & Bird LLP (Timothy J. Peaden, Mary T. Benton), Counsel for Appellants Equifax, Inc. and Equifax Credit Information Services, Inc.;

4. Mississippi State Tax Commission Legal Department (Stephanie R. Jones, Gary W. Stringer), Counsel for Appellee Mississippi State Tax Commission;

5. Honorable J. Dewayne Thomas, Hinds County Chancery Judge;

6. Institute for Professionals in Taxation, Amicus Curiae; and

7. Butler, Snow, O'Mara, Stevens & Cannada, PLLC (J. Paul Varner, J. Stevenson Ray, Donna Brown Jacobs), Counsel for Institute for Professionals in Taxation.

By: J. Paul Varner

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STATEMENT OF INTEREST OF AMICUS CURIAE

This brief *amicus curiae* in support of Appellants Equifax, Inc. and Equifax Credit Information Services, Inc. ("Equifax") is filed on behalf of the Institute for Professionals in Taxation ("IPT"). IPT is a Section 501(c)(3) non-profit educational organization formed in 1976 under the laws of the District of Columbia. Its offices are located in Atlanta, Georgia. IPT's organizational purposes include the promotion of uniform and equitable administration of income, ad valorem, and sales and use taxes.

The association has some 4,300 members across the United States and in Canada, representing more than 1,400 businesses. Represented within IPT's membership are numerous small businesses and most of the Fortune 500 companies. Member representation spans the industry spectrum, including aerospace, agriculture, manufacturing, wholesale and retail, communications, health care, financial, oil and gas, hospitality, transportation, and other sectors. The membership thus represents numerous corporations engaged in the provision of business services in jurisdictions throughout the United States, including Mississippi. They are directly affected by the apportionment policies employed by Mississippi and other states.

SUMMARY OF ARGUMENT

The interplay of state apportionment rules and state Administrative Procedure Act ("APA") requirements is a recurring issue of substantial sweep in the field of state and local taxation. State APAs guarantee the fundamental right of taxpayers to be given advance notice of, and an opportunity to be heard on, proposals for changing state tax policies. Advance notice, certainty, and consistent treatment are of critical concern as businesses struggle to reinvigorate their markets and work forces in this period of economic retrenchment. The dislocation costs of

changing important tax policies on an ad hoc and after-the-fact basis, reflected in the assessments at issue in this proceeding, are enormous.

Adherence to state APA rule-making mandates does not preclude changes in tax apportionment policy; it simply insists on a core principle in the equitable treatment of taxpayers–consistent and prospective application of such changed policies. While IPT concurs in other arguments advanced by the Appellants in this case, it is the import of Mississippi's APA for the subject assessments to which this *amicus curiae* brief is devoted.

LEGAL ARGUMENT

THE COMMISSION MAY NOT CHANGE THE STATE'S APPORTIONMENT POLICY FOR SERVICE PROVIDERS EXCEPT BY MEANS OF A DULY-PROMULGATED RULE

Pursuant to Miss. Code Ann. § 27-7-23(c)(2),[1] the Mississippi State Tax Commission (the "MSTC" or the "Tax Commission")[2] has by rule prescribed sales factor-only apportionment for service providers and certain other industries.[3] Section 402.09.3.d. of the regulations specifies that such receipts be assigned to Mississippi "to the extent" they "represent services or activities actually performed within this state."[4]

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[1] That statute reads, in relevant part: "any corporation or organization having business income from business activity which is taxable both within and without this state shall allocate and apportion its net business income as prescribed by the commissioner."

[2] Effective July 1, 2010, the State Tax Commission was reorganized as the Department of Revenue. Miss. Code Ann. § 27-3-1 (Supp. 2010). For consistency with the parties' references, Amicus Curiae shall use the former nomenclature.

[3] Miss. Admin. Code 35.III.806.402.06

[4] The rule reflects a deliberate choice to assign receipts from the sale of services to the location where the services are performed. While a taxpayer rendering services principally from an out-of-state facility has no or fewer receipts attributed to Mississippi, even with Mississippi customers, a service provider performing services in Mississippi has all or most such receipts assigned to the state, even though all or most of its customers are outside Mississippi.

Here the Tax Commission determined that the rule for assigning receipts based on the location where the services are performed attributed the Equifax income-producing activity in question to Georgia.[5] Tr. at 151. The Tax Commission, however, invoked Miss. Admin. Code 35.III.8.06, §402.10, which provides that:

> If the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for, or the Commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> 1. Separate accounting;
> 2. The exclusion of any one of the factors;
> 3. The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
> 4. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

A. The Adoption of a New Apportionment Policy Constitutes Rule-Making Under the Administrative Procedures Law.

The Mississippi APA, Miss. Code Ann. § 25-43-1.101, *et seq.*, draws in large part from the Model State Administrative Procedures Act adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") (now the Uniform Law Commission)[6] in 1981.[7] The Mississippi APA is "intended to provide a *minimum* procedural code for the operation of all state agencies when they take action affecting the rights and duties of the

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[5] Amended Order of the Court, p. 3. Tr. at 814; R.E. 3 at 814.

[6] The ULC initially undertook to review and revise various provisions of the Uniform Division of Income for Tax Purposes Act ("UDITPA"), including the provisions governing sourcing of receipts from the sale of services, but dropped the project in July 2009. See J. Huddleston and S. Sicilian, *The Project to Revise UDITPA*, from The Proceedings of the NYU Institute on State and Local Taxation, 2009, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Minutes/The%20Project%20to%20Revise%20UDITPA.pdf.

[7] The Model State Administrative Act was first adopted in 1946, and revised in 1961, 1981 and, most recently, in July 2010. See http://www.law.upenn.edu/bill/archives/ulc/msapa/2010_final.htm

public."[8] The Tax Commission is an "agency" as that term is defined in Miss. Code Ann. §§ 25-43-1.102(a).

A "rule" is defined in Miss. Code Ann. §§ 25-43-1.102(i) to mean, in relevant part,

> the whole or a part of an agency regulation or other statement of general applicability that implements, interprets or prescribes law or policy.

A "rule" is invalid unless adopted through the "rule-making" procedures spelled out in §§ 25-43-3.102 through -3.110.[9] Those sections articulate docket, notice, public participation (written submissions and oral comments), and rule-making record requirements, among others.

No Mississippi authority interpreting the APA definition of the term "rule" has been found, but there is substantial and persuasive authority from other jurisdictions doing so. There is, in fact, a case almost directly on point from the Supreme Court of New Jersey. *Metromedia, Inc. v. Director, Division of Taxation*, 478 A.2d 742 (N.J. 1984), arose from an assessment of state corporation business tax ("CBT") against Metromedia, a company which owned and operated radio and television stations, primarily outside New Jersey. It derived its revenue principally from advertising and that revenue generally tracked the size of the stations' audiences.

The standard New Jersey apportionment formula applicable to Metromedia required consideration of three factors–property, payroll, and receipts. Because Metromedia had little in the way of New Jersey property, payroll, or receipts and thus a very small apportionment

[8] Miss. Code Ann. § 25-43-3.111(1)
[9] Miss. Code Ann. § 25-43-3.111.

percentage under the standard formula, the Director invoked his statutory discretion to use an alternative method.[10]

Asserting that the advertising income was referable to the New Jersey "audience share," the Director ascribed apportionment percentages to Metromedia's net income that were nearly seven times higher than that dictated by the standard formula. While the New Jersey Supreme Court found the audience share method reasonable, it concluded that its use represented a change in policy that constituted a "rule" which the Director was required to promulgate in accordance with the procedures set forth in the New Jersey APA. The New Jersey act defines a "rule" as "each agency statement of generally applicability and continuing effect that implements or interprets law or policy."[11] That definition is less expansive than the terms found in the Mississippi APA.

In concluding that the "audience share" method was a "rule," the court emphasized the "general applicability" it would have, even though the statute conferred "broad discretion" on the Director to depart from the standard apportionment formula, and despite the fact that the Director's actions took the form of an audit assessment against one taxpayer. The method was of general applicability because the rationale for its employment–that the taxable revenue should track the audience base–would apply with equal force to other taxpayers within the television/radio industry.

The same is true of the Tax Commission's determination to apportion the income of out-of-state service providers like Equifax on the basis of customer share in Mississippi. The

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[10] N.J.S.A. 54:10A-8

[11] N.J.S.A. 52:14B-2(e).

underlying premise (that services provided from out-of-state locations are properly attributed to Mississippi based on the receipts derived from Mississippi customers) plainly is not a one-off proposition but one which would apply with equal vigor to all out-of-state service providers with a Mississippi customer base. The consistent treatment of taxpayers clearly implies general application as well. This is not a unique or unusual fact pattern or business operation within the services sector. And the Tax Commission has, in fact, employed precisely the same apportionment policy with at least four other taxpayers.[12]

The *Metromedia* court also stressed that the use of the method in question was a "change in policy." The same is true of the policy inherent in the assessment against Equifax. Without any change in the underlying statute, or in the Tax Commission's apportionment rules, a market-sourcing rule was adopted with respect to out-of-state service providers. The fact that the Tax Commission adopted this policy in the wake of other states' having done so (but through statutes and formal rule-making), and that the trend has been the subject of intensive deliberations by NCCUSL and the Multistate Tax Commission,[13] hardly seems coincidental.

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[12] Tr.Ex. 26 at 66-67. Significantly, the Tax Commission has not, however, allowed or applied the market share sourcing policy to Mississippi-based taxpayers, *id.* at 67, although it is hard to see why doing so would not also be required in order to fairly reflect their Mississippi income. If the customer base, rather than location of performance, is the appropriate determinant of how much income is properly attributable to the state, the rule should apply with the same force and effect to in- and out-of-state service providers. Whatever its resolution, this is precisely the kind of question that the Mississippi APA envisions being the subject of public notice and input.

[13] See http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Minutes/Compact%20Revisions%20-%20Uniformity%20memo%201-12-09.pdf.

B. The Discretion to Depart From Standard Apportionment Rules Does Not Change the Essential Nature of the Tax Commission's Actions as a Rule.

The Chancery Court erred in concluding that no "rule" was being created simply because Miss. Admin. Code 35.III.806, §402.10 confers discretion on the Tax Commission to depart from the standard apportionment rules, and it misstated matters in saying that the "MSTC utilized an *existing alternative method*" of apportionment.[14] The cited regulation does not require or prescribe market-based sourcing or any other alternative "method."[15] The discretion afforded the Commissioner does not relieve him of the obligation to follow the requirements of the Mississippi APA when adopting a new apportionment methodology that constitutes a "rule" under that law.[16] As the *Metromedia* opinion points out

> It does not follow that because the Director has statutory discretion, the *manner* in which this discretion is exercised is not governed by the standards that determine whether rule-making or adjudication must be followed in a given case.

Metromedia, 478 A. 2d at 752.

Just as the adoption of a market-based sourcing policy amounted to a "rule" under the New Jersey APA, so in Mississippi it constitutes a "rule" that must be promulgated in accordance with the mandates of the state's own APA. This new apportionment method indisputably "implements" law, specifically Miss. Code Ann. § 27-7-23(c)(2), and its "prescribes policy." Significantly, the Tax Commission interpreted the enabling statute to require a formal rule when it prescribed the "location of performance" method for service businesses. It failed to propose a rule when it changed the method to alternative market-sourcing.

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[14] Amended Order of the Court, p. 9. Tr. at 820; R.E. 3 at 820.

[15] It was correct, though, in calling market-based sourcing a "methodology." *Id.*

[16] Neither does the fact that the new policy is an extension of an existing rule matter. See *Hartford HealthCare, Inc. v. Williams*, 751 So. 2d 16 (Ala. Ct. Civ. App. 1999), holding that a new interpretation

C. Similar Actions By Other State Tax Commissions Have Been Held Invalid.

A Florida appellate court invalidated assessments based on non-rule policy in *Department of Revenue v. Vanjaria Enterprises, Inc.*, 675 So.2d 252 (Fla. Dist. Ct. App. 1996). Florida's sales tax is applicable to the rental of commercial real properties, but any property used for residential purposes is exempt from that tax.[17] The subject property was used for several purposes, one of which was considered a "residential" use within the purview of the exemption. In an audit of Vanjaria, the Department used a square footage comparison method, described in its internal sales and use tax training manual for auditors, to determine the percentage of the rents subject to tax. The Department contended that the formula was a direct application of the statute, but the court held that it constituted an unpromulgated "rule," defined in the Florida APA as a "statement of general applicability that implements, interprets, or prescribes law or policy . . . ."[18]

Because the assessment was grounded in an unpromulgated "rule," it was held to be invalid. In the court's view, "an agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule." The same may be said of the Tax Commission's market share policy for assigning receipts from the sale of services by out-of-state providers: it contemplates compliance (similarly-situated taxpayers who fail to assign receipts from in-state customers to Mississippi would, like Equifax, be subject to tax, interest, and penalties), it adversely affects the rights of out-of-state service providers with customers in Mississippi, and it has precisely the same force of law as the standard formula.

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of an existing rule is itself an APA "rule."

[17] Fla. St. § 212.031(1)(a)2.

[18] Fla. St. §120.52(16) (1987)

Interpreting a similar statutory definition of "rule" for state APA purposes, a Texas appellate court recently held that a new policy announced in two letters constituted a "rule" that had not been promulgated pursuant to the requirements of that state's APA and was therefore invalid. *See Combs v. Entertainment Publications, Inc.*, 292 S.W.3d 712 (Tex. Ct. App. 2009). The taxpayer asserted that it sold various items to parent-teacher and other school groups which resold the items to raise funds for school purposes. The Texas sales tax law exempts sales for resale and sales to exempt organizations, so Entertainment did not collect tax on its sales. For years, the Texas Comptroller's office followed a "fact-based" approach in deciding whether such arrangements were sales for resale (two sales) or were taxable sales by the brochure organization, using the school groups as their representatives (one sale). In the letters mentioned above, the Comptroller announced that the office considered all such arrangements, regardless of the terms of the contracts between the parties or other facts, to be a sale by organizations such as Entertainment through school agents, and never to constitute two sales.

Entertainment challenged the new policy, arguing that it constituted a "rule" to which state APA rule-making requirements applied. Like the other APA definitions recited above, the Texas APA defines a "rule," in relevant part, as "a state agency statement of general applicability that implements, interprets or prescribes law or policy . . . ." Texas APA § 2001.003(6). The court thought it clear that the policy laid out in the letters indicated the Comptroller's intent to apply the relevant tax code provisions in the same manner to other brochure fund-raising firms, treating them as the seller and expecting them to take on the responsibility of collecting Texas sales tax. On that basis, the court found the policy to be a "rule" subject to APA rule-making mandates.

An earlier Texas appeals court decision makes clear that the form in which a rule is created is irrelevant. In *Texas Alcoholic Beverage Commission v. Amusement and Music Operators of Texas, Inc.*, 997 S.W.2d 651 (Tex. Ct. App. 1999), the court enjoined enforcement of two agency memoranda which stated that certain electronic machines dispensing gift certificates redeemable for prizes were illegal gambling devices. Read collectively, the *Vanjaria Enterprises* and *Combs* decisions indicate that a generally applicable agency position statement prescribing new policies, whether in a letter, training manual, interoffice memorandum, or audit assessment, constitutes a "rule" constrained by the procedural demands of the state's Administrative Procedures Act.

As earlier noted, the Tax Commission's policy under review is also of "general applicability." The Commissioner has not proposed that any taxpayer in Equifax's position would be allowed to apportion the receipts from such sales other than on the market-sourcing methodology. For that office to take a different tack with similarly-situated taxpayers would be to concede that the Tax Commission follows no policy at all in departing from the standard apportionment formula prescribed by its own rules, but assigns receipts arbitrarily on a case-by-case basis. The Equifax assessments manifest the existence of a new, standing "rule" that applies to all businesses selling services into Mississippi from facilities outside the state's borders. The rationale common to all such taxpayers is that using the "location of performance" method in the existing MSTC rule would understate such taxpayers' income-producing activities in Mississippi.

That is a policy choice other states have made. But unlike the Tax Commission, those states have put that policy into place through legislation or APA-compliant rule-making. Putting

aside constitutional considerations, Mississippi is as free to adopt a market-sourcing methodology for receipts from services as any other jurisdiction, but the Tax Commission is bound to follow the dictates of the state APA in doing so.

CONCLUSION

The stance reflected in the Tax Commission's assessments against Equifax and other taxpayers is manifestly a "rule" of recurring application. Every out-of-state service provider selling services into the Mississippi market from locations outside the state will be expected to attribute the receipts from such services to Mississippi in calculating their Mississippi income tax liabilities--under threat of assessment of tax, interest, and penalties. The Chancery Court's own description confirms the point: "MSTC determined that a *market-sourcing method* was the appropriate *methodology* . . . ," one the Tax Commission described as a "service fee revenue factor" based on the presence of "customers located in Mississippi." It is thus an ongoing "rule" of general applicability that will apply to the segment of the service industry falling within those criteria. The new "rule" is standard for all similar taxpayers, not a result or Tax Commission order that is fact-specific to Equifax alone. The new Mississippi "rule" reflected in the subject assessments is a new "methodology" that says the Mississippi customer base is the measure of "the extent of the taxpayer's business activity" in the state for service providers like Equifax.

That methodology is not expressed in the extant rule, nor a direct application of it, and taxpayers have not been afforded the protections of the Mississippi APA–advance notice, an opportunity for comment, and prospective application–with respect to the new apportionment method. Such new policies must come into being in accordance with the strictures of the Mississippi APA so that affected taxpayers have their opportunity for participation in the

adoption of tax policies that affect them and are put in a position to accommodate such new policies free of unexpected assessments of tax, interest, and penalties. IPT therefore respectfully urges the Court to reverse the decision of the Chancery Court and declare that any such change in Mississippi's apportionment policies may be effected only through the rule-making procedures spelled out in Mississippi's Administrative Procedures Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day caused to be delivered by first class mail a true and correct copy of the foregoing Brief Amicus Curiae to the following:

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This, the 29th day of March 2011.

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