

**EQUIFAX, INC. AND EQUIFAX CREDIT
INFORMATION SERVICES, INC.**

APPELLANTS

VS.

NO.: 2010-CA-01857

MISSISSIPPI DEPARTMENT OF REVENUE

APPELLEE

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

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF ISSUES

1. Whether the trial court employed the proper standard of review when deciding this matter.
2. Whether the trial court placed the burden of proof on the appropriate party.
3. Whether the issue related to the proposed violation of the Mississippi Administrative Procedures Act is properly before this Court. If so, then whether the utilization of equitable apportionment and a market-based apportionment factor to source Equifax's income amounted to the promulgation of a rule in violation of the Mississippi Administrative Procedures Act.
4. Whether the imposition of penalties was appropriate.

STATEMENT OF THE CASE

This matter is an appeal of an order and final judgment entered by the Hinds County Chancery Court affirming income tax assessments against Equifax, Inc. and Equifax Credit Information Services, Inc. (hereinafter jointly referred to as "Equifax") and in favor of the Mississippi Department of Revenue ("Department").

Proceedings Below

Equifax was audited by the Department for the January 1, 2000 through December 31, 2003 period (the "Audit Period"). (Tr. Ex. 27-28). At the conclusion of the audit, the Department issued assessments of income tax against

the companies. (R. 334-335). On or about March 24, 2008, Equifax appealed the assessments to the Department's Board of Review which held a hearing on the appeals on August 19, 2008. Subsequent to the hearings, the Board of Review issued its Orders upholding and affirming the assessments in a reduced amount. (R. 336-337 and R. 721, ¶18).

Feeling aggrieved by the Orders of the Board of Review, Equifax appealed to the three-member Tax Commission, who after holding a hearing in the matter, issued Orders on or about May 5, 2009, upholding and affirming the assessments as previously reduced by the Board of Review. (R. 721, ¶19). Equifax paid the assessed liabilities under protest on or about May 29, 2009. (R. 721, ¶20). On or about June 1, 2009, pursuant to Miss. Code Ann. § 27-77-7 Equifax filed appeal petitions with the Hinds County Chancery Court, seeking a refund of the taxes paid under protest, which were consolidated on or about July 2, 2009. (R. 721, ¶20-21).

The trial of this matter was heard May 3-4, 2010, after which the trial court took the matter under advisement and requested proposed findings of fact and conclusions of law from the parties. (Tr. p. 201 lines 16-20). The trial court entered its Amended Order and Final Judgment in favor of the Department on November 4, 2010. (R. 812-823). Equifax filed the pending appeal with this Court on or about November 10, 2010. (R. 824).

Statement of Facts

Equifax, a Georgia corporation, is headquartered in Atlanta, Georgia, and was registered to do business, and was in fact doing business, in Mississippi during the Audit Period. (R.719, ¶2). Equifax is one of the three largest consumer credit reporting agencies in the United States and is engaged in the sale of credit information and other services to consumers and businesses. (R.719, ¶1). These services included credit reporting, information services, direct mail marketing services, risk management services, and mortgage loan processing and approval services. (R.720, ¶4). The primary services provided by Equifax are credit reports, credit scores, and fraud alerts. (Tr. p.34 line 29, p.35 lines 1-6).

Equifax provided services to customers located in Mississippi during the Audit Period. (R.720, ¶5). The sale of these services generated revenue for Equifax in the amount of \$5,275,406 in 2000, \$6,579,281 in 2001, \$5,646,283 in 2002, and \$5,178,370 in 2003. (R.720, ¶10-11). Based on these figures, the total gross receipts attributable to the sales of services provided to customers located in Mississippi during the Audit Period was \$22,679,340. (R.720, ¶10-11).

Although Equifax did not have a corporate office in Mississippi during the Audit Period, Equifax did have employees and property in Mississippi during each year included in the Audit Period. (R.720-721, ¶6, 7 and 13). Equifax's customers located in Mississippi both requested and received services from Equifax at their

Mississippi locations. (Tr. p.49 lines 4-17, Tr. p.64 lines 23-25). These transactions primarily occur electronically and take approximately three seconds on average from the time the customer requests the service (i.e. credit report, score, etc.) to the time they receive it. (Tr. p. 64 lines 11-22 and Tr. Ex. 34, p. 47 lines 2-15).

Equifax filed income tax returns with the State of Mississippi for each year included in the Audit Period and reported \$0 of taxable income in Mississippi for each of these years. (R. 820, ¶ 8). Equifax paid \$0 of income tax to the State of Mississippi for each year included in the Audit Period. (Tr. Ex. 20-25). Equifax relied on Miss. Admin. Code 35.III.8.06.402.06 and 35.III.8.06.402.09 when reporting income to Mississippi for the years included in the Audit Period. (R. 4, ¶11, R. 78, ¶11). Miss. Admin. Code 35.III.8.06.402.06 provides that service companies shall apportion their income to Mississippi using a single sales factor apportionment formula as defined in paragraph 3 of Miss. Admin. Code 35.III.8.06.402.09. Miss. Admin. Code 35.III.8.06.402.09(3)(d) provides that gross receipts from sales other than sales of tangible personal property shall be attributed to the State of Mississippi to the extent of such gross receipts which represent services or activities actually performed within the state. The result of Equifax utilizing the apportionment method prescribed in Miss. Admin. Code 35.III.8.06.402.09 results in \$0 of taxable income being subject to tax in Mississippi. (Tr. p. 151 lines 15-20).

In years prior to those included in the Audit Period, Equifax had previously reported income and paid income tax to the State of Mississippi based upon a method whereby income from services provided to customers located in Mississippi was sourced to Mississippi. (Tr. p.157 lines 21-25). Equifax never asked for nor received permission or guidance related to their abandonment of their prior reporting method. (Tr. p.155 lines 9-24).

Since 2005, Equifax has once again changed the methodology by which they report income to the State of Mississippi, and is utilizing what it terms a modified cost of performance approach. (Tr. p.96 lines 13-28 and p.155 lines 18-24). This method results in income being reported using a single sales factor where payroll is used as a proxy for sales. (Tr. p.78 lines 5-22). Equifax did not ask for nor receive permission or guidance related to their adoption of this new reporting method. (Tr. p.96 lines 13-28 and Tr. p.155 lines 9-24).

During the course of the audit, the Department reviewed Equifax's income tax returns, prior audits of the business, and various business records of the companies. (Tr. Ex. 27-28). Under the authority vested by the Commissioner of Revenue, pursuant to Miss. Code Ann. §§ 27-3-5, 27-3-13, 27-3-63, 27-3-65, 27-7-49, 27-7-51, and 27-7-79, the Department determined that Equifax's utilization of the apportionment method prescribed in Miss. Admin. Code 35.III.8.06.402.09 did not fairly reflect the extent of Equifax's business activity in the State of

Mississippi. (Tr. p.151 lines 27-29 and p. 152 lines 1-12). The income tax assessments issued by the Department resulted from the Department's reliance on Miss. Admin. Code 35.III.8.06.402.10 to use a market-based sourcing method for the apportionment of Equifax's income to the State of Mississippi for the years included in the Audit Period. (Tr. p. 152 lines 4-29). Miss. Admin. Code 35.III.8.06.402.10 provides that if the apportionment provisions of the regulation do not fairly represent the extent of the taxpayer's business activity in Mississippi, then a taxpayer may petition for or the Commissioner may require, if reasonable, the employment of any other method to effectuate an equitable apportionment of the taxpayer's income. The market-based sourcing method utilized by the Department was termed a service fee revenue factor and was determined based upon the gross receipts attributable to the services being provided by Equifax to its customers located in Mississippi. (Tr. p. 153 lines 1-11). These figures were provided to the Department by Equifax. (Tr. p. 153 lines 12-21). Although the Department was not aware of the extent of Equifax's business activities in Mississippi during the years included in the audit period, the Department staff believed that the use of the service fee revenue factor fairly represented the taxpayer's business activities of which it was aware. (Tr. p.152 lines 15-20).

The Department believed that the use of the service fee revenue factor was both reasonable and equitable based on the fact that it fairly reflected the extent of

Equifax's business activity in Mississippi, was in-line with how Equifax had previously reported income to the State of Mississippi, there had been no substantial change in the business activity of Equifax, Equifax utilized a market-based sourcing method in at least four other states, and the Department was only taxing that portion of Equifax income which was generated from services provided to customer's located in Mississippi. (Tr. p. 151-156).

SUMMARY OF THE ARGUMENT

The Chancellor employed the proper standard of review prescribed by Miss. Code Ann. §27-77-7 when hearing and deciding this matter. In accordance with this statute, Equifax bore the burden of proof in the case. The Chancellor correctly found that Equifax failed to carry this burden, ultimately ruling in favor of the Department. Equifax's claim that the Department has promulgated a new rule in violation of the Mississippi Administrative Procedures Act is not properly before this Court. Nevertheless, the Department's utilization of equitable apportionment did not constitute the promulgation of a new rule in violation of the Administrative Procedures Act. Finally, the imposition of penalties was appropriate in this case based upon Equifax's filing of returns taking an unreasonable position regarding the sourcing of its income to the State of Mississippi. Therefore, the Chancellor's order affirming the assessment of tax, interest, and penalty against Equifax should be affirmed.

ARGUMENT

A. The chancery court employed the proper standard of review when deciding this matter as prescribed by Miss. Code Ann. § 27-77-7.

Equifax filed its appeal petitions with the Chancery Court, which were consolidated into this pending action, under the provisions provided by Miss. Code Ann. § 27-77-7¹ and also asserted jurisdiction under Miss. Code Ann. § 27-77-7. Said statute provides in pertinent part as follows:

...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....**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.... (emphasis added)

It is through the authority granted by the Mississippi Legislature in Miss. Code Ann. § 27-77-7, that the chancery court has jurisdiction over orders issued by the Department. The Legislature has determined, and Miss. Code Ann. § 27-77-7 is clear, that the chancery court should give deference to the decision and interpretation of law and regulations by the Department as it does with the decisions and interpretation of any administrative agency. This Court recently reiterated the well-established standard of review applicable to appeals from

¹ Miss. Code Ann. § 27-77-7 was amended effective July 1, 2010, however the prior version in effect and controlling in this case has been cited and a copy provided in the addendum.

administrative agencies.

When reviewing orders of a state agency, the trial court and this Court are limited by the arbitrary-and-capricious standard. An appeal of an agency decision should be to determine whether or not the order of the administrative agency “(1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. (internal citations omitted).

Fidelity & Guaranty Insurance Company v. Blount, 2008-CA-01931-SC (¶ 26) (Miss. 2011).

Miss. Code Ann. § 27-77-7 was enacted in 2005. Since that time, the Supreme Court has considered only one case appealed under this section of the law, *Buffington v. Mississippi State Tax Commission*. In that decision, this Court confirmed that “[a]ppellate review of an agency’s decision is a limited inquiry.” *Buffington v. MSTC*, 43 So.3d 450, 454 (Miss.2009) citing *Hinds County Sch. Dist. Bd. of Trs. v. R.B.*, 10 So. 3d 387, 394 (Miss. 2008). Furthermore, this Court applied the established standard of review applicable to appeals from administrative agencies, citing the well-known four-part test. *Buffington v. MSTC*, 43 So.3d 450, 456 (Miss.2009) citing *Miss. Methodist Hosp. and Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So. 3d 600, 610 (Miss.2009).

Equifax was clearly required to prove that the decision of the agency was not supported by substantial evidence, was arbitrary or capricious, was beyond the scope or power granted to the agency, or violated its constitutional rights. “The

decision of an administrative agency or board is afforded great deference upon judicial review by this Court even though we review the decision of the chancellor de novo.” *Oxy USA, Inc. v. Mississippi State Tax Commission*, 757 So.2d 271, 284 (Miss.2000) citing *St. Dominic-Jackson Mem. Hosp. v. Mississippi State Dep't of Health*, 728 So.2d 81, 83 (Miss.1998); *Mississippi State Dep't of Health v. Southwest Miss. Reg'l Med. Ctr.*, 580 So.2d 1238, 1240 (Miss.1991). Similarly, even though the chancery court conducts a de novo trial of an appeal from a decision of the Department, it nevertheless affords deference to that decision.

In fact, this Court has held that the “duty of deference derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate.” *Buffington v. Mississippi State Tax Commission*, 43 So.3d 450, 454 (Miss.2009) citing *Miss. Methodist Hosp. and Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 606-07 (Miss.2009). The Court may not substitute its own judgment for that of the agency. *Davis v. Public Employees' Retirement Sys.*, 750 So.2d 1225, 1230 (Miss.1999) citing *Brinston v. Public Employees' Retirement Sys.*, 706 So.2d 258, 259 (Miss.App.1998) (internal citations omitted). Furthermore, the Court is not permitted to make administrative decisions and perform the functions of an administrative agency. *Davis v. Public Employees' Retirement Sys.*, 750 So.2d

1225, 1230 (Miss.1999) citing *Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair*, 222 So.2d 664, 665 (Miss.1969).

It was under this controlling body of law that the chancellor made his ruling in this case, wherein he found that Equifax failed to carry its burden of proving that the Department “acted capriciously, unreasonably, or arbitrarily; nor has it abused its discretion or violated a vested constitutional right of the Plaintiffs.” The Chancellor further found that the Department “premised its Orders upon substantial evidence as well as its specialized knowledge and expertise in these matters.” There can be no doubt that the standard of review expressly provided in Miss. Code Ann. §27-77-7 was correctly applied by the chancellor in this case.

This case is distinguishable from *Tenneco, Inc. v. Barr*, 224 So. 2d 208 (Miss, 1969) and *Mississippi State Tax Comm'n v. Murphy Oil USA, Inc.*, 933 So. 2d 285 (Miss. 2006), the cases relied upon by Equifax on this issue. In fact, the appeal statute applicable to this case, Miss. Code Ann. §27-77-7 was not codified until 2005, and was a departure from its predecessor appeal statute regarding appeals from income tax assessments. Miss. Code Ann. § 27-7-73² (2004) provided that “[t]he chancery court shall have jurisdiction to hear and determine said cause or issue joined as in other cases.” The statute did not speak specifically

² Miss. Code Ann. § 27-7-73 provided for hearings and appeals from income tax assessments. This statute was repealed by Section 36 of ch. 499, Laws 2005. Sections 1 through 10 of ch. 499, Laws 2005 re-established the appeals procedures which were codified pursuant to Section 38 in a separate chapter in Title 27, 27-77-1, et seq.

as to the standard of review to be utilized by the chancery court.

While it is true that, unlike many other appeals of administrative agency decisions, where the record is made at the administrative level, the record in appeals of decisions made by the Department are now clearly made in the chancery court as provided by Miss. Code Ann. §27-77-7, the legislature nevertheless clearly intended for the Courts to give the same 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.” Miss. Code Ann. § 27-77-7(5). In fact, the title of Senate Bill 2742 which was the enacting legislation behind the codification of Miss. Code Ann. § 27-77-7 provided that it was an act “to provide the manner in which such appeals must be made” and “to provide the standards of review of such appeals.” Ch. 499, Laws 2005.

This Court has stated that

[o]ur Constitution does not permit the judiciary of this state to retry de novo matters on appeal from administrative agencies. Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designed to hear the appeal. The appeal is a limited one ... since the courts cannot enter the field of the administrative agency. The court will entertain the appeal to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4)

violated some statutory or constitutional right of the complaining party.

Mississippi Dept. of Environmental Quality v. Weems, 653 So.2d 266, 273-4 (Miss.1995) citing *State Tax Com'n v. Earnest*, 627 So.2d 313, 319-20 (Miss.1993) (citing *Mississippi State Tax Commission v. Package Store, Inc.*, 208 So.2d 46, 48 (Miss.1968); *State Tax Commission v. Vicksburg Terminal*, 592 So.2d 959, 961 (Miss.1991) (quoting *Mississippi State Tax Commission v. Mississippi-Alabama State Fair*, 222 So.2d 664, 665 (Miss.1969) (emphasis added)). Nevertheless, the Legislature through enactment of Miss. Code Ann. §27-77-7 did authorize the court to try tax appeals de novo. However, it specifically limited the scope of the court's review by expressly providing that "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."

Despite Equifax's arguments to the contrary, the Department's interpretation of the Miss. Code Ann. §27-77-7 does not render portions of it meaningless or deprive the chancellor of discretion in tax appeal cases. If the chancellor finds that the petitioner carried its burden of proving that the Department's decision was not supported by substantial evidence, was arbitrary or capricious, was beyond the power of the administrative agency to make, or violated some statutory or constitutional right of the complaining party, the chancery court would "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.” Miss. Code Ann. § 27-77-7(5). This is what the statute clearly provides “...[t]he 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.” Miss. Code Ann. §27-77-7(5) (emphasis added). In *Balouch v. State*, this Court stated:

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

Balouch v. State, 938 So.2d 253, 259-60 (¶16) (Miss. 2006). There is no question that Miss. Code Ann. § 27-77-7 is plain and unambiguous.³ The standard of review in this matter is an amalgamation of two legal principles: de novo review and deference. However, these two principles merge perfectly to provide the

³ Even though currently pending before the Court of Appeals on a Motion to Rehearing, it is noted that in case of *5K Farms, Inc. v. Mississippi Department of Revenue*, Docket No.: 2009-CA-01787-COA, 2011 WL 880401 (Miss.App. 2011) the Mississippi Court of Appeals in regard to Miss. Code Ann. § 27-77-7 stated “(t)here is no question that the language of the statute is plain and unambiguous.” *Id.* at ¶ 10.

chancery court with clear direction on how to review a decision of the Department. The Hinds County Chancery Court recognized and understood the standard provided by the Mississippi Legislature and utilized it in reaching its decision in this case.

This Court should not encroach upon the power of the Legislature and usurp the discretion given by that body to the Department, especially in light of this Court's appreciation that the duty of deference "derives from our realization that the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate." *Buffington v. Mississippi State Tax Commission*, 43 So.3d 450, 454 (Miss.2009) citing *Miss. Methodist Hosp. and Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 606-07 (Miss.2009). Nowhere is this more important than the complicated realm of state taxation.

If this Court were to adopt the interpretation asserted by Equifax in this case, the specific provision of Miss. Code Ann. § 27-77-7(5) which provides that "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" would be rendered superfluous and have absolutely no meaning. Equifax asks this court to ignore statutory language, which it is not permitted to do. This Court has found that "[a] construction which will render any

part of a statute inoperative, superfluous, or meaningless is to be avoided.” *Barton v. Blount*, 981 So.2d 299, 303 (Miss.Ct.App.2007) citing *State ex. rel. Pair v. Burroughs*, 487 So.2d 220, 226 (Miss.1986). Further, this Court has determined that it “must, if possible, read the entire statute in a way that harmonizes all of its parts consistent with its scope and object.” *Barton v. Blount*, 981 So.2d 299, 303 (Miss. Ct.App.2007) citing *McKnight v. Mound Bayou Pub. Sch. Dist.*, 879 So.2d 493, 497-98(¶ 15) (Miss.Ct.App.2004) (quoting *Ellison v. Mobile & O.R. Co.*, 36 Miss. 572, 585 (1858)).

Even if the cases of *Tenneco, Inc. v. Barr*, 224 So. 2d 208 (Miss, 1969) and *Mississippi State Tax Comm’n v. Murphy Oil USA, Inc.*, 933 So. 2d 285 (Miss. 2006) are not distinguishable from the present case, this does not mean that the arbitrary and capricious standard is not applicable where there is a full evidentiary judicial hearing in Chancery Court. In the *Tenneco* case, this Court did in fact apply this standard in upholding the Commission’s apportionment of interest expense finding “(t)he action of the Commission in so doing was neither arbitrary, capricious nor unreasonable.” *Tenneco* at 214-215. This application of the limited standard of review in an income tax appeal led this Court in the subsequent case of *Mississippi Tax Comm’n Dyer Inv. Co., Inc.*, 507 So. 2d 1287 (Miss. 1987) involving a similar appeal process for franchise tax to find:

Ordinarily the scope of judicial review of the actions of an administrative agency is limited by the familiar arbitrary and

capricious standard. The State Tax Commission is such an agency and, accordingly, both the Chancery Court and this Court were and are limited in appellate authority. See *Tenneco, Inc. v. Barr*, 224 So.2d 208, 214-15 (Miss.1969).

Id. at 1289.

As to the case of *Mississippi State Tax Comm'n v. Murphy Oil USA, Inc.*, 933 So. 2d 285 (Miss. 2006), this Court indicated that it was proceeding with the same review as used in the *Tenneco* case. See *Murphy* at 291. It stated that:

Thus, in accordance with *Tenneco*, the chancellor in this case reviewed evidence and determined the case under the authority of §§ 27-7-73 and 27-13-45. This Court must now ascertain whether the chancery court arrived at the proper determination.

Murphy at 291.

Since the *Tenneco* case applied the limited review standard applicable to administrative agencies, this Court clearly applied this standard “in determining whether the chancery court arrived at the proper determination.” Contrary to Equifax’s assertion, both the *Tenneco* and *Murphy* cases support the application of the limited standard of review of decisions of administrative agencies applied in this case by the Chancery Court below.

In a final attempt to persuade this Court that the chancery court utilized the wrong standard of review, Equifax makes a feeble effort to assert a due process argument related to the Legislature’s clear mandate that the chancery court give deference to the Department’s decisions. However, Equifax fails to cite the

seminal case, *McKesson Corporation vs. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L. Ed. 2d 17 (1990), on due process for tax appeals or acknowledge that the appeal scheme set up by the Mississippi Legislature goes above and beyond the bare minimum to meet due process requirements.

Equifax does correctly state that ““(t)he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”” See *Carl Ronnie Daricek Living Trust v. Hancock County*, 34 So.3d 587, 595 (Miss. 2010). The administrative and judicial process set out in Miss. Code Ann. § 27-77-5 and § 27-77-7 does meet this requirement. Not only did it provide Equifax with a postdeprivation review before a Chancery Court after a full evidentiary judicial hearing, it also provided two (2) predeprivations reviews; one before the Review Board of the Mississippi State Tax Commission and one before the three (3) member Mississippi State Tax Commission.⁴

Under such process, Equifax was able to be heard before a final determination by the administrative agency and then before the Chancery Court after a full evidentiary judicial hearing. The application of the arbitrary and capricious standard by the Chancery Court in reviewing the actions of the

⁴ Effective July 1, 2010, the final administrative appeal review is now before the Mississippi Board of Tax Appeals, but in the present appeal where the final administrative appeal was heard in 2009, the final administrative appeal was before the three (3) member Mississippi State Tax Commission. See Tr. Ex. 1 & 2.

Department does not mean that administrative and judicial process provided is not meaningful or timely. In fact, the opportunity provided under this process to respond to the action of an administrative agency is probably more than that provided in regard to any other administrative action. Even if the taxpayer fails to present its case in the predeprivation forums, it still has the opportunity to present its arguments to the Chancery Court at a full evidentiary judicial hearing.

The United States Supreme Court has also found that there is a special deference given in determining whether a tax appeal procedure complies with due process. In the case of *McKesson Corporation vs. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L. Ed. 2d 17 (1990), the United States Supreme Court stated:

These cases demonstrate the traditional legal analysis appropriate for determining Florida's constitutional duty to provide relief to petitioner McKesson for its payment of an unlawful tax. Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause. The State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State. However, whereas "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,' " *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate

their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

McKesson, 496 US at 36, 110 S. Ct at 2250

The holding of *McKesson* and the conclusion that the process authorized under Miss. Code Ann. § 27-77-5 and § 27-77-7 meets the due process requirement in regard to state tax matters can be seen in the subsequent case of *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed. 2d 509 (1995) wherein explaining the earlier *McKesson* ruling, the Court stated:

The reluctance to interfere with state tax collection continued in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation. As long as state law provides a “ ‘clear and certain remedy,’ ” *id.*, at 51, 110 S.Ct., at 2258 (quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285, 32 S.Ct. 216, 217, 56 L.Ed. 436 (1912)), the States may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund), 496 U.S., at 36-37, 110 S.Ct., at 2250-2251. See also *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100-102, 113 S.Ct. 2510, 2519, 125 L.Ed.2d 74 (1993). (Emphasis Added)

National Private Truck, 515 U.S. at 587, 115 S.Ct. at 2354.

There is no question that the administrative and judicial review process provided under Miss. Code Ann. § 27-77-5 and § 27-77-7 is “clear and certain.” This statutory tax appeal procedure does provide Equifax with due process.

B. The trial court correctly placed the burden of proof on Equifax.

As the chancery court found, Equifax failed to meet its burden or proving that it was entitled to relief in this matter. Miss. Code Ann. § 27-77-7, the statute under which this case was filed with the chancery court, provides in pertinent part as follows:

... 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. ... 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....** (emphasis added)

The statute clearly provides that Equifax, as the petitioner in this case, bore the burden of proof in this matter. Further, the Court of Appeals recently affirmed this well-settled rule finding that “A rebuttable presumption exists in favor of the administrative agency's decision and findings, and **the challenging party has the burden of proving otherwise.**” (emphasis added) *EMC Enterprise, Inc. v.*

Mississippi Department of Employment Security, 11 So.3d 146, 150 (Miss.Ct.App.2009) citing *Cummings v. Miss. Dep't of Employment Sec.*, 980 So.2d 340, 344(¶13) (Miss.Ct.App.2008). Equifax even concedes this point in its brief, but renders that burden merely an 'initial' one.

Notwithstanding the deference given to the government agency, Miss. Code Ann. §27-77-7(4) does provide that the court "shall try the case de novo and conduct a full evidentiary judicial hearing on the issues raised. Based on the evidence presented at trial, the chancery court shall determine whether **the party bringing the appeal** 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." (emphasis added). The Chancellor conducted a de novo trial in this matter, including a full evidentiary judicial hearing, weighing the evidence presented by Equifax and finding that Equifax did not prove that it was entitled to the relief requested. To have successfully prosecuted its case, Equifax was required to prove, by a preponderance of the evidence, that the decision of the Department was not supported by substantial evidence, was arbitrary or capricious, was beyond the scope or power granted to the agency, or violated their constitutional rights. It failed to do so and judgment in favor of the Department was entered accordingly.

Equifax asserts that it met its burden by ‘showing that it reasonably relied on and complied with the Standard Formula set forth in the Regulation’, however the chancery court found that “...it is disingenuous to allege that Equifax could reasonably believe that \$0 of taxable income was a fair representation of Equifax’s business activity in Mississippi that yielded over \$22,000,000 in gross receipts....it would be unreasonable to allow Equifax to receive \$22,000,000 in gross receipts from business within Mississippi without incurring any income tax....Obviously, a determination of \$0 of taxable income within the State of Mississippi is not a fair and accurate representation of the \$22,000,000 business that Equifax conducted in Mississippi.....Clearly, the lack of any taxable income attributable to the State of Mississippi is not a fair assessment of Equifax’s income earned within the state.” (R. 812-823). Based on these findings, Equifax’s argument that it reasonably relied on or complied with the law completely ignores the chancellor’s findings in the case.

- Equifax also completely ignores the language of the appeals statute which clearly places the burden on it as the party bringing the appeal in the case. In fact, Mississippi law includes a rebuttable presumption in favor of the administrative agency's decision and findings, and “**the challenging party has the burden of proving otherwise.**” (emphasis added) *EMC Enterprise, Inc. v. Mississippi Department of Employment Security*, 11 So.3d 146, 150 (Miss.Ct.App.2009) citing

Cummings v. Miss. Dep't of Employment Sec., 980 So.2d 340, 344(¶13) (Miss.Ct.App.2008). Therefore Equifax was required to prove by a preponderance of the evidence that the apportionment method it utilized fairly represented the extent of its business activity in the state (which the Chancellor found it clearly did not); that the Department's use of an alternative method was unreasonable; and that the employment of the market-based sourcing method by the Department did not effectuate an equitable apportionment of Equifax's income.

However, if this court does find that the burden somehow shifted to the Department, the record in this case clearly reflects that the burden was met. The chancellor found that the method used by Equifax did not fairly represent the extent of its business activity in the state, nor was the method reasonable. Finally, the chancellor's finding that the constitutional claim asserted by Equifax was without merit, the crux of which was an inequity argument, clearly supports a finding that the method utilized by the Department was equitable. In fact, the chancery court noted that Equifax filed returns utilizing a market-based apportionment method in other states during the Audit Period. Equifax's argument that utilization of the same method by Mississippi would be unreasonable and inequitable is untenable and should not be accepted by this Court.

Despite, not bearing the burden in this case, the evidence presented by the Department and record made in the chancery court clearly establishes that the

utilization of an alternative method pursuant to Miss. Admin. Code 35.III.8.06.402 was appropriate and should be affirmed.

C. The claim of Equifax and the Institute for Professionals in Taxation that the Department violated the Mississippi Administrative Procedures Act is not properly before this Court. Even if it was, the Department's utilization of equitable apportionment and a market-based apportionment factor to source Equifax's income did not amount to the promulgation of a rule in violation of the Mississippi Administrative Procedures Act.

Equifax and the Institute For Professionals In Taxation ("IPT") in its Brief of Amicus Curiae⁵ filed in this appeal argue that the Departments's utilization of a market-based apportionment method pursuant to Miss. Admin Code. 35.III.8.06.402.10 constituted a promulgation of a new rule for service companies contrary to Mississippi law and in violation of the Mississippi Administrative Procedures Act. However, the chancery court found that the Department's utilization of the service fee revenue factor as a market-based apportionment method did not constitute a new rule and was done in accordance with Miss. Admin. Code 35.III.8.06.402.10.

Of even greater significance is the fact that Equifax did not raise this claim in the Complaint and Petitions filed in this matter. Mississippi is a notice pleading state. *Estate of Stevens v. Wetzel*, 762 So.2d 293, 295 (Miss.2000). M.R.C.P. 8

⁵ The Brief of Amicus Curiae of the IPT deals exclusively with the argument raised by Equifax that the actions of the Department violated the Administrative Procedures Act. The arguments of Equifax and IPT are to a certain extent redundant and will be treated together in this part of the Department's argument.

governs general pleadings. The Court in *Wetzel* held that while M.R.C.P. 8 eliminated the technical forms of pleadings required in past years, notice pleadings are still required to place the opposing party on notice of the claim being asserted. A pleading must provide sufficient notice to the defendant of the claims and grounds upon which relief which is sought. *Wetzel*, 762 So.2d at 295. There were only three counts included in the Complaint and Petitions filed with this Court, and none of them related to the Mississippi Administrative Procedures Act. (R. 2-8 and 46-52). Equifax did not file an amended Complaint and Petition. Based on this failure by Equifax, Equifax's claims related to the Mississippi Administrative Procedures Act are not properly before this court, just as they were not properly before the chancery court.

Any arguments of Equifax to the contrary are misplaced. Previously Equifax has relied upon *In re Adoption of a Minor Child*, 931 So. 2d 566, 572 (Miss. 2006), to circumvent this state's notice pleading requirements to suggest that the entry of the pre-trial order in the chancery court served to supercede the pleadings filed in this case. This case is clearly distinguishable from the matter at hand. The complaining party in *In re Adoption* cited M.R.C.P. 12(b) to assert that petitioner failed to state a claim upon which relief could be granted related to a jurisdictional issue. That is certainly not the case here. Not only did the parties specifically not submit an agreed pre-trial order to the court, as Equifax's counsel

pointed out at the hearing on the summary judgment motion, this case includes an attempt by Equifax to include a completely new claim at the eleventh hour prior to trial. (Tr. p. 4 lines 22-29). Certainly that cannot be what the Mississippi Rules of Civil Procedure anticipate or condone.

The court in *In Re Adoption* found that “[w]hen the Holmes's petition and agreed pre-trial order, which raised additional issues of fact, are read in connection with the statutory requirements of Miss. Code Ann. Section 93-15-103 and Section 93-17-7, it is readily apparent that the Holmeses have sufficiently pleaded allegations that, if proven, would entitle them to their requested relief. Therefore, the chancellor did not commit manifest error in finding the pleadings and the pre-trial order, taken together, stated a claim for relief sufficient to defeat Gloria's Rule 12(b)(6) motion.” *Id.* at 573. Here a reading of the complaint, pre-trial order, and the trial transcript provide no allegations of fact to support any claim related to a supposed violation of the Mississippi Administrative Procedures Act. In fact, the only reference to this claim at all is found in the Petitioner's list of issues in the pre-trial order which states in whole “[w]hether the Commission's utilization of the apportionment factor based solely on ‘where the taxpayer's customers were located’ constitutes a new ‘rule’ and is thus a violation of the Administrative Procedures Act, Miss. Code Ann. § 25-43-1.101 et seq.?” However, nowhere is this claim mentioned in the opening statement given by Equifax's counsel, nor in

any of the arguments made to this court at the pre-trial hearing or at trial. (Tr. p. 16-25). Further, no testimony, exhibits, or facts were put into evidence at the trial of this matter regarding the Mississippi Administrative Procedures Act, its requirements, or whether or not the Department met these requirements.

Additionally, if Equifax had been allowed to amend their complaints on the eve of trial to include a claim that the Department violated the Mississippi Administrative Procedures Act, the Department would have been unduly prejudiced by not having sufficient time to assert its defenses to such a claim or put on evidence to controvert this theory. In fact, Equifax further attempted to prejudice the Department by failing to raise this claim as an issue in its response to the Department's summary judgment motion, failing to raise it in their opening statement, and failing to call any witnesses or elicit any testimony regarding the Department's promulgation of its regulations. Further, had this claim been pled by Equifax in its pleadings, the Department would have had the opportunity to assert various defenses to the claim including but-not limited to a statute of limitations defense premised on Miss. Code Ann. § 25-43-3.111(2) which provides that "[a]n action to contest the validity of a rule on the grounds of its noncompliance with any provision of Sections 25-43-3.102 through 25-43-3.110 must be commenced within one (1) year after the effective date of the rule." However, due to Equifax's

failure to comply with Mississippi's procedural laws or rules, the Department has been unduly prejudiced by the lack of opportunity to defend against this claim.

Nevertheless, if Equifax had properly asserted their claims related to the Mississippi Administrative Procedures Act, this Court should find that the Department's utilization of the service fee revenue factor as a market-based apportionment method did not constitute a new rule and was done in accordance with Miss. Admin. Code 35.III.8.06.402.10. The Department did not completely ignore the apportionment method found in Miss. Admin. Code 35.III.8.06.402.09 as Equifax and IPT would lead this Court to believe, but found that its application to Equifax did not fairly represent the extent of the taxpayer's business activity in Mississippi and therefore appropriately utilized an alternative method pursuant to Miss. Admin. Code 35.III.8.06.402.10. Further, there is no evidence to support the assertion by Equifax and IPT that the utilization of the service fee revenue factor by the Department has, or will, amount to a rule of general applicability and the record reflects no such position adopted by the Department.

In fact, the record in this case specifically addresses the application of Miss. Admin. Code 35.III.8.06.402.10 by the Department, which only utilizes it as a mechanism, when appropriate, on a case-by-case basis and after reviewing specifics related to the individual taxpayer. (Tr. p. 152 lines 4-12 and 23-25; p. 154 lines 1-13; p. 162 lines 24-27; p. 174 lines 14-24; p. 188 lines 23-29; p. 189 lines

1-7; p. 190 lines 5-6). Further, it is a tool that can be utilized not only by the Department but also by a taxpayer, which would necessitate a fact specific review of the taxpayer's business activity. *See* Miss. Admin Code 35.III.8.06.402.10.

Equifax's bold assertion that the 'standard formula simply does not apply to service companies' is completely unfounded and not supported by the record in this case. Even more outrageous is Equifax's summary argument that the Department believes that service companies should apportion income to Mississippi using market-based sourcing. This overstatement is not included in the evidence taken in this case, and Equifax cannot cite to any reference in the record that such a conclusion has been reached or espoused by the Department. What the record does reflect is that some form of equitable apportionment may need to be utilized if the particular business activity is not covered in the apportionment provisions spelled out in the regulation, but nowhere does the record reflect that market-based sourcing would be required. (Tr. p. 189 lines 9-12 and 26-29). Equifax's argument that the Department has promulgated a market-based sourcing rule subject to general application is completely unfounded therefore creating an immensely fatal flaw in its entire line of argument that the Department has violated the Mississippi Administrative Procedures Act.

Further, the only law Equifax cites in support of its argument is *Metromedia, Inc. v. Director, Division of Taxation*, 478 A.2d 742 (N.J. 1984), a twenty-five year

old case out of New Jersey, which is clearly distinguishable from this case. The *Metromedia* court found that the use of an audience share apportionment factor would have broad application to television and radio stations. In the instant matter the use of a market-based sourcing approach for a credit reporting company cannot be legitimately argued to have broad application to the service industry as Equifax and the Amicus Curiae have tried to persuade this court.

The other cases cited by IPT on this issue, *Department of Revenue v. Vanjaria Enterprises, Inc.*, 675 So. 2d 252 (Fla. Dist. Ct. App. 1996), *Combs v. Entertainment Publications, Inc.*, 292 S. W. 3d 712 (Tex. Ct. App. 2009) and *Texas Alcoholic Beverage Commission v. Amusement and Music Operators of Texas, Inc.*, 997 S.W. 2d 651 (Tex. Ct. App. 1999), are obviously from other states and have no precedential value in this appeal. Additionally, the situation in each of these cases is distinguishable from the present appeal. None of these other cases cited by IPT involve income tax or apportionment. None of these other cases involve a statutory or regulatory process as in issue in the present appeal where there is a regulation that does provide for a treatment different from that otherwise provided by the regulation “(i)f the allocation and apportionment provisions of this Regulation do not fairly represent the extent of the taxpayer’s business activity in this state.” The application of this existing regulation authorizing a different

treatment when appropriate is not the promulgation of a new rule as contended by Equifax and IPT.

A new rule is not required for the Department or a taxpayer to utilize the alternative provisions found in Miss. Admin Code 35.III.8.06.402.10, because that rule was promulgated and exists for that very reason. Equifax and IPT argue that the Department's utilization of a market-based sourcing approach for a 'standard service company' such as itself would have broad application. But the very nature of the regulation would preclude broad application of this approach because it is premised upon a multi-step review of a particular taxpayer's business and how the methods prescribed in Miss. Admin Code 35.III.8.06.402.09 work in conjunction therewith. Further, the evaluation requires the selection of an alternative method only after reviewing the specific facts and circumstances of the particular taxpayer's business activity within the State of Mississippi.

Despite the arguments of Equifax and IPT to the contrary, the Department did not completely ignore the apportionment method found in Miss. Admin. Code 35.III.8.06.402.09, but found that its application to Equifax did not fairly represent the extent of the taxpayer's business activity in Mississippi and therefore appropriately utilized an alternative method pursuant to Miss. Admin. Code 35.III.8.06.402.10. Said finding was affirmed by the chancellor and should be upheld by this Court.

Any finding to the contrary would completely erode the discretion and deference that the Legislature gave to the Department to administer the tax laws which it is duty bound to enforce. In fact, any finding by this Court that the utilization of any one particular alternative apportionment method by the Department in accordance with Miss. Admin. Code 35.III.8.06.402.10 amounts to the promulgation of a new rule in violation of the Mississippi Administrative Procedures Act would render the provision null and void and it would never be available to be used for the benefit of the Department or a taxpayer. Surely the Legislature did not intend for this act, which passed in 2003 and became effective beginning in 2005, to overcome or supercede the statutory authority it granted to the Department to prescribe methods of allocation and apportionment in Miss. Code Ann. §27-7-23(c)(2) nor to erode the authority contained in Miss. Admin. Code 35.III.8.06.402.10 that has been in existence since it was promulgated and approved by the governor in the 1980s. *See* Miss. Code Ann. § 27-7-81.

D. The imposition of penalties was appropriate.

Equifax argues that the imposition of penalties should not be upheld due to the Chancery Court's finding that it acted reasonably and without willful neglect. This argument completely ignores the court's finding that "...it is disingenuous to allege that Equifax could reasonably believe that \$0 of taxable income was a fair representation of Equifax's business activity in Mississippi that yielded over

\$22,000,000 in gross receipts.” (R.817). The trial court went on to note that “it would be unreasonable to allow Equifax to receive \$22,000,000 in gross receipts from business within Mississippi without incurring any income tax.” (R. 818). Further, the court found that “Obviously, a determination of \$0 of taxable income within the State of Mississippi is not a fair and accurate representation of the \$22,000,000 business that Equifax conducted in Mississippi.” and “Clearly, the lack of any taxable income attributable to the State of Mississippi is not a fair assessment of Equifax’s income earned within the state.” (R. 819).

To reach its conclusion that the imposition of penalties was inappropriate, Equifax hangs its proverbial hat on the court’s finding that “This Court cannot abate penalties based solely upon its disagreement with MSTC’s finding as to whether Equifax acted reasonably and without willful neglect.” However, despite the confusing nature of this language, it is clear from the trial court’s order in this case, which included repeated findings that Equifax did not act reasonably or file its returns and pay its fair share of taxes to the State of Mississippi, that the court did not in fact find that Equifax acted reasonably or without willful neglect. Equifax points to no other evidence of any such finding by the trial court.

The Department asserts that the imposition of penalties was appropriate and should be affirmed. Miss. Code Ann. § 27-7-51(3) provides “In case of failure to pay any additional taxes as assessed under this section, there may be added to the

additional amount assessed a penalty of one-half of one percent (1/2 of 1%) of the amount of the additional tax if the failure is for not more than one (1) month, with an additional one-half of one percent (1/2 of 1%) for each additional month or fraction thereof during which the failure continues, not to exceed twenty-five percent (25%) in the aggregate.” While the Department argued that this version of the statute was in effect at the time of assessment, it also proved that the actions of Equifax would have subjected it to imposition of penalty under the prior standard because their actions were not due to reasonable cause.

Unlike the law being reviewed by the Court in the *Broadhead v. Monaghan*, 177 So.2d 881 (Miss. 1960) case cited by the petitioners, the amount of the penalty at issue in this case is fixed and prescribed by Miss. Code Ann. § 27-7-51(3) at the rate of one-half of one percent of the amount of the additional tax due, per month not to exceed twenty-five percent. Therefore, the *Broadhead* case is distinguishable from the present matter as the law in that case did not set the rate of the penalty to be imposed.

Equifax failed to report any taxable income to Mississippi during the years included in the audit period, despite having employees and property in the state, and earning millions of dollars in revenue from Mississippi. The reporting methodology Equifax used in filing these returns was a departure from returns filed in previous years. Equifax neither sought nor gained permission or guidance from

the Department related to this change in the way income was being reported to Mississippi; Equifax acted unreasonably and with willful neglect in failing to do so. Equifax's actions clearly subjected them to the imposition of penalties and the trial court's affirmation of the penalty assessment should be upheld and affirmed.

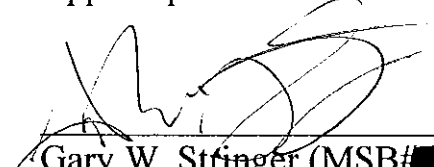
CONCLUSION

The Department submits that the ultimate result reached by the chancery court was correct and should be affirmed by this Court. Even if this Court does not agree with the reasoning utilized by the chancery court, its decision should not be overturned because an appeals court may affirm a chancellor's decision that reached the right result but for the wrong reason. *Timms v. Pearson*, 876 So.2d 1083, 1086 (¶12) (Miss.App.2004). The Chancellor's Order and Final Judgment granting judgment in favor of the Department and affirming the assessments against Equifax should be affirmed.

Respectfully Submitted:

Mississippi Department of Revenue

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CERTIFICATE OF SERVICE

I, Gary W. Stringer, 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 Appellee to the following:

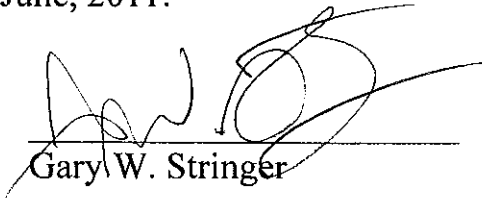
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So certified this the 9th day of June, 2011.



Gary W. Stringer

ADDENDUM

Miss. Code Ann. § 27-77-7

Miss. Admin. Code 35.III.8.06.402

ADDENDUM

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

<Section effective until July 1, 2010. See, also, Section effective July 1, 2010>

(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)

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CODE OF MISSISSIPPI RULES
35. TAX COMMISSION
003. INCOME AND FRANCHISE TAX
008. SUBPART 8: CORPORATIONS

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Current through December, 2009 (No. 149)

35 003 008. Subpart 8: Corporations

Chapter 6 Multistate Taxation.

100 This regulation is composed of three sections.

1. General topics and definitions.
2. Computation of income.
3. Methods of reporting income.

101 (Reserved)

200 General Topics and Definitions

201 Corporations Required to File

201.01 Every domestic corporation (those chartered in Mississippi) is subject to the income tax levy and is required to file annual income tax returns unless such corporations is specifically exempt from tax within the purview of Code Section 27-7-29.

201.02 Every foreign corporation (those chartered outside Mississippi) which has obtained a certificate of authority from the Secretary of State to do business in Mississippi, or which is in fact doing business, as defined, in Mississippi, regardless of qualifications, is subject to the income tax levy and is required to file annual income tax returns unless corporation is specifically exempt from tax within the purview of Code Section 27-7-29.

201.03 All corporations subject to the filing requirements of the paragraphs above must file an income tax return for each year including a tax year or years in which the corporation was inactive, did not earn any net income, or operated a part of the year. An annual return must be filed until the corporation, foreign or domestic, is legally withdrawn or dissolved.

202 Definitions

202.01 Commercial Domicile. "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

202.02 Taxpayer. "Taxpayer" means any individual, partnership, corporation, association, trust or estate, whose income is, in whole or in part, subject to a tax imposed by the Mississippi Income Tax Law of 1952, as amended, being Section 27-7-1 et seq., Mississippi Code of 1972, or any such person who is subject to the filing requirements of this Regulation.

202.03 Apportionment. "Apportionment" refers to the division of business income between states by the use of a formula containing apportionment factors.

202.04 Allocation. "Allocation" refers to the assignment of income to a particular state.

202.05 Business Activity. "Business activity" refers to the transactions and activity occurring in the regular course of a particular trade or business of a taxpayer.

202.06 Taxable In Another State. The term "taxable in another state" for the purposes of this Regulation shall mean that the taxpayer is subject to net income tax or any tax measured by net income; or the other state has jurisdiction to subject the taxpayer for tax measured by net income regardless of whether, in fact, that state exercises such jurisdiction. The definition for "subject to" income tax in another state will be determined by using the definition for "doing business" defined above and in section 203 below and in the following paragraph.

1. A taxpayer is "subject to" one of the taxes specified in the paragraph above only if it carries on business activities in another state. If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimum tax or fee for qualification, organization, or for the privilege of doing business in that state, but does not actually engage in business activities in that state, or does actually engage in some activity, not sufficient for nexus, and the minimum tax or fees bears no relation to the corporation's activities within such state, the taxpayer is not "subject to" one of the specified taxes and is therefore not "taxable" in another state.

2. Jurisdiction to tax is not present when the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. Sections 381-385.

203 Nexus

203.01 Doing Business. For Mississippi income tax purposes, the term "doing business" means the operation of any enterprise or activity in Mississippi for financial profit or economic gain. For the purposes of this regulation, the term "doing business" and "nexus" have the same meaning. Doing Business includes, but is not limited to, the following:

1. The regular maintenance of an office or other place of business in Mississippi.
2. The regular maintenance in Mississippi of an inventory of merchandise or material for sale, distribution or manufacture, regardless of whether kept on the premises of the taxpayer, in a public or rented warehouse, or otherwise.
3. The selling or distributing of merchandise to customers in Mississippi directly from a company-owned or operated vehicle when title to the merchandise is transferred from the seller or distributor to the customer at the time of

the sale or distribution.

4. The regular rendering of a service to clients or customers in Mississippi by agents or employees of a foreign corporation.
5. The owning, renting, or operating of business or income-producing property, real or personal, in Mississippi.
6. The performing of contracts, prime or sublet work, for the construction, repair or renovation of real or personal property.

203.02 A corporation doing business in Mississippi is subject to income tax even if its only operations in this state are a part of its interstate business. A foreign corporation whose only activity in this state is the solicitation of sales by either resident or nonresident salesmen is not required to file income tax returns. However, if a corporation maintains an office or other place of business in Mississippi, or if it owns income-producing property in this state, or is otherwise qualified to do business, or is otherwise certified to do business in Mississippi by the Mississippi Insurance commission, or in fact is doing business in Mississippi with respect to other activities, it is subject to tax and the requirements of filing returns.

203.03 This regulation intends to adopt a narrow interpretation of the immunity afforded by Public Law 86-272, which grants a limited immunity to a multistate company from taxation by a state if the company's activity is limited to the solicitation of orders for the sale of tangible personal property in interstate commerce.

203.04 Only the sale of tangible personal property is afforded immunity under Public Law 86-272; therefore, the selling or providing of services, and the selling, leasing, renting, licensing or other disposition of real estate, personal property intangibles, or any other type of personal property are not immune from taxation by reasons of P. L. 86-272.

203.05 For the in-state activity to be immune, it must be limited solely to solicitation (except for that activity conducted by independent contractors in subsection 203.05 paragraph 3 below). If there is any other activity unrelated to solicitation, the immunity shall be lost. Examples of activities presently treated (unless otherwise stated as an exception or addition) as either non-immune or immune are as follows:

1. Non-immune Activities: The following in-state activities will cause otherwise immune sales to lose their immunity:

- a. Making repairs or providing maintenance.
- b. Collecting delinquent accounts.
- c. Investigating credit worthiness.
- d. Installation or supervision of installation.
- e. Conducting training courses, seminars or lectures.
- f. Providing engineering functions.
- g. Handling customer complaints.

h. Approving or accepting orders.

i. Repossessing property.

j. Securing deposits on sales.

k. Picking up or replacing damaged or returned property.

l. Hiring, training, or supervising personnel.

m. Providing shipping information and coordinating deliveries.

n. Maintaining sample or display room in excess of two weeks (14 days) during the tax year.

o. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.

p. Owning, leasing, maintaining or otherwise using any of the following facilities or property in-state:

i. Repair shop.

ii. Parts department.

iii. Purchasing office.

iv. Employment office.

v. Warehouse.

vi. Meeting place for directors, officers or employees.

vii. Stock of goods.

viii. Telephone answering service.

ix. Mobile stores, i.e., trucks with driver salesmen.

x. Real property or fixtures of any kind.

q. Consigning tangible personal property to any person, including an independent contractor.

r. Maintaining, by either an in-state or an out-of-state resident employee, of an office or place of business (in-home or otherwise).

s. Conducting any activity in addition to those described in paragraph II below which is not an integral part of the solicitation of orders.

2. Immune Activities: The following in-state activities will not cause the loss of immunity for otherwise immune

sales:

- a. Advertising campaigns incidental to missionary activities.
- b. Carrying samples only for display or for distribution without charge or other consideration.
- c. Owning or furnishing autos to salesmen.
- d. Passing inquiries and complaints on to home office.
- e. Incidental and minor advertising, i.e., notice in newspaper that a salesman will be in town at a certain time.
- f. Missionary sales activities.
- g. Checking of customers' inventories (for re-order, but not for other purposes).
- h. Maintaining sample or display room for two weeks (14 days) or less during the tax year.
- i. Soliciting of sales by an in-state resident employee of the taxpayer; provided the employee maintains no in-state sales office or place of business (in-home or otherwise).

3. Independent Contractors:

a. P.L. 86-272 provides immunity to certain activities if conducted by an independent contractor that would not be afforded if performed by the taxpayer directly. Independent contractors may engage in the following limited activities in the state without the taxpayer's loss of immunity:

- i. Soliciting sales.
- ii. Making sales.
- iii. Maintaining a sales office.

b. Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as employees.

c. Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the principal shall remove the immunity.

4. Miscellaneous Practices:

a. Interstate Commerce: The only activity in the state must be in interstate commerce. If there is any other activity (except that described subsection 203.05 paragraph 2 or otherwise incidental to solicitation), then the immunity shall be lost. Requisites are:

- i. Approval of the sales must be made outside the state (except for sales by independent contractors).
- ii. Deliveries must be made from a point outside the state.

b. Incorporated: The immunity afforded by P. L. 86-272 does not apply to any corporation incorporated within the taxing state.

c. Service vs. Service: Sales of services are not immune under P. L. 86-272. If a sale consists of a mixture of tangible personal property and services, the immunity shall be lost. Examples of such mixture are:

- i. Photographic development.
- ii. Fabrication of customer's materials.
- iii. Installation of equipment.
- iv. Architectural and engineering services.

204 (Reserved)

300 Computation of Income

301 Business and Nonbusiness Income. Business income means income arising from transactions and activities in the regular course of the taxpayer's trade or business and includes income from real, tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. In essence, all income which arises from the conduct of trade or business operations of a taxpayer's is business income. The income of the taxpayer is business unless clearly classifiable as non-business income.

301.01 Non-business income means all income other than business income.

301.02 The classification of income into categories customarily used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, non-operating income, etc., does not determine whether income is business or non-business income.

301.03 Some of any type or class and from any source is business income if it arises from transactions and activities occurring in the regular course of a trade or business.

301.04 Transactions between affiliated taxpayers, groups, or parties shall be calculated on an arms-length basis. Transactions determined not to be at fair market value may be recomputed on review of such transactions or the Commissioner may prescribe an alternate method of reporting by the taxpayer.

302 Allocation or Apportionment. A taxpayer should use section 400 to determine the method of reporting income to Mississippi for its major line(s) of business. For the following items of income, when they are considered to be general or administrative income by the commissioner, the following rules should be used to determine the way the income is reported. If the income is determined to be business income it should be apportioned; those items determined to be non-business income should be allocated. If the taxpayer is using a formula method of apportionment, then the items below that are classified as business income would be included in apportionable income. If the taxpayer is not required to use a formula method of apportionment or if the taxpayer is using divisional accounting, then the items below that are considered business income shall be apportioned using a sales ratio.

302.01 The following are general rules for determining whether specific income is business or non-business income.

1. RENTS FROM REAL AND TANGIBLE PERSONAL PROPERTY. Rental income from real and tangible property is business income if the income producing property is used by the taxpayer's trade or business. If rental income is from an asset which is purely an investment, then it is non-business.

2. GAINS OR LOSSES FROM SALES OF ASSETS. Gain or loss from the sale, exchange or other disposition of real, tangible, or intangible personal property constitutes business income if the property while owned by taxpayer was used in the taxpayer's trade or business, or was used to produce business income, regardless of whether the asset has actually produced income. However, if such property was utilized for the production of non-business income, the gain or loss will constitute non-business income.

3. INTEREST. Interest income is business income where the intangible, with respect to which the interest was received, arises out of or was created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the intangible is related to or incidental to such trade or business operations. Business income shall not, however, include interest income on loans to subsidiaries or affiliates which are not organized under the laws either of the United States, or any state, district, territory or possession thereof.

4. FOREIGN SOURCE INTEREST.

a. Interest that is derived from a source outside of the United States, or any state, district, territory or possession of the United States is non-business interest.

b. In general, all other interest is business income. A partial listing for illustrative purposes of interest that is considered to be business income is interest on accounts receivable, certificates of deposit, money market accounts, tax refunds, and municipal obligations. Municipal obligations of the state of Mississippi are exempt.

5. DIVIDENDS.

a. Dividends are business income where the stock, with respect to which the dividends are received, arises out of or was acquired in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the stock is related to or incidental to such trade or business operations. Business income shall not, however, include foreign source dividends realized from stock ownership in a corporation not organized under the laws either of the United States, or any state, district, territory or possession thereof.

b. Dividends from domestic, unitary, and controlled subsidiaries are business income. Dividends from foreign, non-unitary, and/or non-controlled corporations are non-business income. Dividends from Domestic International Sales Corporation (DISC's) are business income. For treatment of dividends from a Foreign Sales Corporation (FSC's) see the regulation on FSC's. Dividends from a DISC are business income to the extent actually received, not deemed as is used for federal purposes. Descriptions of domestic, controlled, and unitary corporations are as follows:

i. DOMESTIC. Means any corporation organized under the laws of the United States, or any other state, territory or possession thereof.

ii. CONTROLLED. In this context, controlled is defined as being:

* Where one corporation owns more than 50% of another corporation; or

* If ownership by one corporation of another is 50% or less, then the question is whether the first corporation

has effective control of the second. If the first corporation does not have effective control of the second, then dividends paid by the second corporation to the first is non-business income. For example, if the first corporation owns 40% of the second corporation, but the remaining 60% is owned by one entity unrelated to the first corporation, then the first corporation does not have effective control. But, if the first corporation owns 40% of the second corporation, and the remaining 60% is owned by the thousands of unrelated shareholders, each with a small percentage, then, in that circumstance, the first corporation would have effective control. If a corporation is controlled or effectively controlled, then the dividends may be business income, depending upon whether this corporation is also domestic and unitary.

iii. UNITARY. In general, unitary depends upon the extent that the different entities have been integrated into one economic operation. Some of the items to be considered include autonomy of officers and directors of the different corporations; lines of business; number, size, and type of inter-company transactions, and jointly used services such as accounting or tax department. The above list is not all inclusive. It is only for the purpose of illustrating some of the points to be considered in determining whether the entity paying the dividends is unitary with the entity receiving the dividend.

6. PATENT AND COPYRIGHT ROYALTIES. Patent and copyright royalties, including royalties from non-patented items such as "know-how", technical assistance, and use of product name, are business income where the patent or copyright arises out of or was created in the regular course of the taxpayer's trade or business operations, or where the purpose for acquiring and holding the patent or copyright is related to or incidental to such trade or business operations.

7. MISCELLANEOUS INCOME. In general, miscellaneous income, such as scrap sales or collections of bad debts written off, is business income.

8. EXCEPTIONS. Royalty income from mineral production must be allocated to the state where production occurred. Partnership income is allocated directly to the state where the partnership gross income or loss occurred.

303 Allocation of Non-Business Income. Non-business net rents and royalties from real property are allocated to the state where the property is located.

303.01 Non-business net rents and royalties from tangible personal property are allocable to this state: (i) if and to the extent that the property is utilized in this state, or (ii) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

303.02 The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in this state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year.

303.03 CAPITAL GAINS AND LOSSES. Non-business capital gains and losses from sales of real property are allocable to the state where the property is located.

303.04 PROPERTY. Capital gains and losses from sales of tangible personal property are allocable to this state if the property had a situs in this state at the time of sale, or the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

303.05 INTANGIBLE PROPERTY. Non-business capital gains and losses from sales of intangible personal property are allocable to this state, if the taxpayer's commercial domicile is in this state and the intangible has not acquired a commercial, business or actual situs in another state, or the taxpayer's commercial domicile is not in this

state, but the intangible has acquired a commercial, business or actual situs in this state.

303.06 INTEREST AND DIVIDENDS. Non-business interest and dividends are allocable of the state of commercial domicile.

303.07 PATENTS AND COPYRIGHTS.

1. Patent and copyright royalties are allocable to this state if and to the extent that the patent or copyright is utilized by the payer in this state, or if to the extent that the patent or copyright is utilized by the taxpayer in a state in which the taxpayer is not taxable and taxpayer's commercial domicile is in this state.

2. A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state.

3. A copyright is utilized in a state to the extent that printing or other publication originates in the state.

304 Consistency and Uniformity in Reporting. In filing returns with this state, if the taxpayer departs from or modifies the manner in which income has been classified as business income or non-business income in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

400 Methods of Reporting Income.

401 Basis of Filing

401.01 TOTAL ASSIGNMENT OF INCOME. If the business activity of a taxpayer occurs within this state, and if by reason of such business activity the taxpayer is not taxable in another state, the total net income (or loss) of the taxpayer shall be assigned to Mississippi.

401.02 DIRECT OR SEPARATE ACCOUNTING.

1. Any taxpayer, taxable both within and without this state, which maintains or could maintain books of account detailing allocation of receipts and expenditures reflecting clearly the business income attributable to property owned or business done in this state, shall determine Mississippi net business income on the basis of direct or separate accounting.

2. Non-allocable general administrative expenses, and non-allocable net business income derived from sales of capital assets, interest, dividends, rents, royalties and other non-allocable business income shall be apportioned to Mississippi on the basis of a sales ratio.

3. In the case, however, of contractors, the non-allocable general and administrative expenses apportioned to this state shall be determined by using the ratio between Mississippi direct job cost and total direct job cost.

4. If at the discretion of the Commissioner a sales ratio does not fairly apportion the above items of income and expense, another ratio, such as an asset ratio, may be required.

5. If a taxpayer feels that a sales ratio does not fairly apportion the above mentioned income or expense among all business activity, then the taxpayer may make application in writing to the Commissioner. This application must explain why the sales ratio does not fairly apportion and specify the ratio that the taxpayer wishes to use. The taxpayer shall not use this other ratio unless approved in writing by the Commissioner.

401.03 ALLOCATION OF INCOME. Any taxpayer subject to the taxing jurisdiction of this state shall allocate non-business income or loss within and without this state in accordance with the further provisions of this Regulation. All expenses connected with earning non-business income, such as interest, taxes, general and administrative expenses and such other expenses relating to the production of non-business income, shall be deducted from gross non-business income. Non-business interest expense shall be computed by using the ratio of non-business assets to total assets applied to total interest expense. To the amount of non-business income allocated to this state, there shall be added the amount of net business income assigned, directly allocated or apportioned to this state under the other provisions of this Regulation to establish Mississippi taxable income.

401.04 APPORTIONMENT OF INCOME. If the business activity in respect to any trade or business of a taxpayer occurs both within and without this state, and if by reason of such business activity the taxpayer in another state, portion of the net income (or net loss) arising from such trade or business which is derived from sources within this state shall be determined by apportionment in accordance with the further provisions of this regulation, where direct or separate accounting of net income or loss is not feasible.

401.05 DIVISIONAL ACCOUNTING. If the business activity of a taxpayer is conducted on a divisional basis and a division or divisions of the taxpayer are "doing business" within this state, the Mississippi taxable income of the taxpayer, where separate accounting is or can be maintained on each division, shall, at the election of the Commissioner, be determined on a divisional accounting, nexus is determined on a company-wide basis. Therefore, any division that has activity in Mississippi must compute its Mississippi taxable income using the proper method for that division. (Example: If Mississippi has nexus on a corporation because of one division's activity in the state, and a second division is a manufacturing division with only destination sales into Mississippi, then the second division shall apportion a share of its income or loss to Mississippi, even though, if it were a separate legal entity, it would not be required to do so.) The following shall apply to divisional accounting:

1. If the total net business income of a division or divisions of the taxpayer is derived solely from business activities in Mississippi and such division or divisions, when considered the same as a separate entity, are not taxable in another state, the total net business income derived from a trade or business activity of such division or divisions shall be directly assigned to Mississippi. Business income, on a company-wide basis, derived from sales of capital assets, interest, dividends, rent and royalties shall be apportioned to Mississippi in the ratio that total sales of the included division or divisions bears to total company-wide sales everywhere. Non-business income of the taxpayer shall be allocated to Mississippi in accordance with the further provisions of this Regulation.
2. If the business income of a division or divisions of the taxpayer is derived from business activities both within and without the state and by reason of such business activities such division or divisions, when considered the same as a separate entity, are taxable in another state, Mississippi taxable income shall be computed and determined as follows:
 - a. The total net business income derived from a trade or business activity of each division doing business in Mississippi shall be determined on a divisional direct or separate accounting basis. In determining the net business income for each division, a proportionate part of non-allocable general and administrative expenses may be deducted by using the ratio that total sales (gross receipts) of each division bears to total company-wide sales (gross receipts).
 - b. Business income, on a company wide basis, derived from the sale of capital assets, interest, dividends, rents and royalties shall be apportioned to each division in the ratio that total sales (gross receipts) by the division bears to total company wide sales (gross receipts).
 - c. The amounts determined in the above paragraphs, shall be combined of each division. If more than one division

is involved, separate combinations are required for each division.

d. To the combined amount determined in the previous paragraph, for each division, there shall be applied the apportionment formula specified in this Regulation for the trade or business activity of the division. Separate computations are required for each included division. The amount so apportioned to Mississippi for each division may be combined to determine the total apportioned amount of business income of the taxpayer assignable to Mississippi.

e. The non-business income of the taxpayer shall be allocated to Mississippi in accordance with the further provisions of this Regulation.

f. The total of the amount apportioned and the total of the amount allocated for all divisions when combined, shall constitute the Mississippi taxable income of the taxpayer.

401.06 CONSOLIDATED OR COMBINED RETURNS. See Regulation on Consolidated and Combined Returns.

402 Computation of Basis of Filing.

402.01 Business Income of Producers of Mineral or Natural Resource Products.

1. Taxpayers engaged in the trade or business of producing oil, gas, other liquid hydrocarbons, sulphur, coal, sand, gravel and other mineral or natural resource products, except timber, shall determine Mississippi net business income from such activity on a direct or separate accounting basis. The Mississippi gross business income from the production of mineral or natural resources shall include:

a. Sales of natural or mineral resources produced in Mississippi and sold in this state;

b. The market value, at the time of transfer, of all natural or mineral resources produced in this state and transferred by the taxpayer to another state for sale, refining, processing or manufacturing, provided that if the natural or mineral resources are sold by means of an "arms-length" transaction prior to refining, processing or manufacturing, the market value prescribed herein shall not exceed the selling price; and;

c. The market value, at the time of transfer, of all natural or mineral resources produced by the taxpayer in Mississippi and transferred to a refinery, processing plant, or manufacturing facility of the taxpayer in Mississippi.

2. A natural resource product shall be deemed to be sold in Mississippi if it is located in this state at the time title thereto passes to the purchaser. In the absence of specific proof of value of natural resources at the time of transfer from the state, the value of natural resources at the time of production shall be determined in accordance with the methods prescribed for the determination of "gross income from the property" for purposes of percentage depletion for federal income tax purposes.

402.02 Business Income of Contractors

1. The net business income of taxpayers engaged in the business of contracting shall be accounted for and assigned directly to this state for each contract performed within this state. Taxpayers engaged in the business of contracting both within and without the state shall determine such job cost which cannot be specifically allocated to the Mississippi contract by multiplying such non-allocable business-related expenses in the ratio that Mississippi direct job costs bears to total direct job costs.

2. Where a contract is performed partly within and partly without the state, the net business income assignable directly to Mississippi shall be determined by first deducting from the total contract receipts those job costs directly allocable to said contract and then deducting a pro-rata part of expenses which cannot be directly allocable to any contract, said pro-rata part to be determined by using the ratio between the contract direct job costs and the direct job costs of total contracts. The net business income from the contract, thus determined, shall then be apportioned to Mississippi in the ratio that receipts from said contract allocable to Mississippi for sales tax purposes bears to the total receipts from said contract. In the event that no allocation has been or can be made of the Mississippi gross receipts from said contract for Mississippi sales tax purposes, and the Mississippi gross receipts from said contract cannot otherwise be determined, then the apportionment of the net business income from the contract to Mississippi shall be made by such reasonable method as is acceptable to the Commissioner.

3. In the case of a prime contractor, who enters into a contract with a subcontractor for the performance of all or part of a contract within the State of Mississippi, both prime contractor and subcontractor are required to report any and all income from such contracts.

4. The net business income derived by a contractor from gains or losses from sales of capital assets, interest, dividends, rents and royalties shall be apportioned to Mississippi by multiplying such net business income by a receipts factor, the numerator of which is the total receipts located, assignable, allocated, or otherwise having a situs in this state during the tax year, and the denominator of which is the total receipts of the taxpayer everywhere during the tax year. In the case of sales of capital assets (buildings, land, depreciable machinery and equipment, stocks, bonds, etc.) receipts, for purposes of the receipts factor, shall include only the net gain or loss resulting from such sales of capital assets.

402.03 Business Income of Airlines. If an airline has any activity other than simply passing over this state, then it is "doing business" in this state and is required to file a return. The net business income of an airline company which has not been directly assigned, allocated or excluded as otherwise provided by this Regulation shall be apportioned to this state as provided in this section.

1. PASSENGER TRAFFIC INCOME. Business income from passenger traffic shall be apportioned to this state in the ratio that Mississippi revenue passenger miles bears to the total revenue passenger miles. The numerator of the ratio shall be computed by multiplying the number of revenue-producing passengers carried on flights landing or taking off within this state by the number of miles flown over the state by such flights. The denominator shall be determined by multiplying the total number of revenue-producing passengers carried by the total number of miles flown by flights carrying revenue-producing passengers.

2. CARGO TRAFFIC INCOME. Business income from cargo traffic and other classes of traffic shall be apportioned to this state in the ratio that Mississippi revenue ton miles, or other units of cargo transported, multiplied by Mississippi miles flown bears to the total of such elements of the factor. The numerator of each of such ratios shall be computed by multiplying the number of revenue-producing tons, or other units of cargo carried on flights landing or taking off within this state by the number of miles flown over this state by such flights. The denominator of each of such ratios shall be determined by multiplying the total number of revenue-producing tons, or other units of cargo carried, by total number of miles flown by flights carrying such revenue-producing cargo.

3. ALTERNATIVES BASIS. Business income of an airline company, or business income from any class of traffic of an airline company, may, as an alternative to the requirements of the paragraphs above, be apportioned to this state in the ratio that Mississippi flight miles bears to total flight miles during the tax year. The numerator of such alternative ratio shall be computed by multiplying the number of miles flown over this state by such flights. The denominator shall be determined by multiplying the total number of revenue-producing flights by the total number of miles flown by such flights.

4. In all of the apportionment formulas above, mileage from states here the taxpayer is not "doing business" will not be included in the apportionment formula.

402.04 Business Income of Motor Carriers. If a motor carrier picks up, delivers, services equipment, or has any activity other than simply passing through this state, then it is "doing business" in this state and is required to file a return. The net business income of motor carriers which has not been directly assigned, allocated or excluded as provided by this Regulation shall be apportioned to this state as provided in this section.

1. PASSENGER TRANSPORTATION. Business income from the transportation of passengers shall be apportioned to this state in the ratio that Mississippi revenue passenger miles bears to the total revenue passenger miles of the taxpayer during the tax period.

2. FREIGHT TRANSPORTATION. Business income from the transportation of freight or cargo shall be apportioned to this state in the ratio that Mississippi revenue ton miles to the total revenue ton miles of the taxpayer during the tax period.

3. PASSENGER-FREIGHT TRANSPORTATION. Business income of taxpayers engaged in the transportation of both passengers and freight shall first make a breakdown of the business income between passenger traffic and freight traffic by using the several ratios between gross revenue from each class of traffic and the total gross operating revenues. Business income from each class or traffic shall then be apportioned to this state in accordance with the two paragraphs above.

4. ALTERNATIVE BASIS. Business income of a motor carrier, or business income from any class of traffic of a motor carrier, may as an alternative to the requirements of the paragraph above, be apportioned to this state (A) in the ratio that Mississippi vehicle miles bears to total vehicle miles of the taxpayer during the tax period, or (B) in the ratio that gross receipts from trips beginning, ending, or passing through Mississippi bears to the total gross receipts.

5. In all of the apportionment formulas above, mileage from states where the taxpayer is not "doing business" will not be included in the apportionment formula.

402.05 Business Income of Certain Utilities. The net business income of taxpayers operating a railroad, express service, telephone or telegraph business, or other form of public service, other than public service companies specifically provided for elsewhere in this Regulation, which has not been directed to this state as provided by this Section.

1. FORMULA. Business income of public utilities shall be apportioned to this state in the ratio that gross operating revenues within Mississippi during the tax year bears to total gross operating revenues everywhere by the taxpayer during the tax year.

2. GROSS OPERATING REVENUE WITHIN MISSISSIPPI. The term "gross operating revenue within Mississippi" means an equal mileage portion of revenue such as ton miles, passenger miles, message miles, and the like as received for interstate business from activity in this state whether such business originates, ends, or passes through Mississippi to this result, there shall be added the Mississippi portions of all intrastate revenue.

3. ALTERNATIVE. In cases where the amounts of gross operating revenues within this state cannot be accurately and adequately determined, the Commissioner may prescribe a method for otherwise apportioning business income in Mississippi. Only methods provided in this regulation may be used without the prior approval of the Commissioner.

402.06 Business Income of Retailers, Wholesalers, Service Companies and Lessors. The net business income of retailers, wholesalers, lessors and other service companies, merchants, traders, vendors, or dealers buying, selling or

renting, other than those specifically provided for elsewhere in this Regulation, which has not been allocated, directly assigned, or excluded as otherwise provided, shall be apportioned to Mississippi by multiplying such net business income by a single sales-factor apportionment formula as defined in subsection 402.09 paragraph 3 of this Regulation.

402.07 Business Income of Pipelines. The net business income of a pipeline company which has not been allocated, directly assigned, or excluded as otherwise provided in this Regulation shall be apportioned to Mississippi by multiplying such net business income by a fraction, the numerator of which is the property factor plus the payroll factor, as defined in subsection 402.09, paragraphs 1 and 2 of this Regulation, plus the traffic miles factor, and the denominator where is three (3).

1. TRAFFIC MILES FACTOR. The term "traffic miles" means the movement or transportation of one barrel of oil, one gallon of gasoline, or one thousand cubic feet of natural or casinghead gas for a distance of one mile. In cases where MCF mileage units cannot be determined, then capacity mileage of the pipeline in Mississippi to total capacity mileage everywhere shall be used. Capacity mileage shall be determined by squaring one-half (1/2) of the diameter of each size of pipe and multiplying by the mileage of that size of pipe with a total computation for each in Mississippi as compared to the total of such computations everywhere.

2. PIPELINE COMPANY DEFINED. A pipeline company means any taxpayer engaged in the trade or business of moving, conveying or transporting through a system or conduit of pipes any crude oil, natural gas, refined petroleum products, minerals or any other mineral products to a point of delivery either in, out or through Mississippi, and irrespective of whether such products of goods belong to the taxpayer or to others. The term includes transmission lines and connecting field and storage lines.

402.08 Business Income of Manufacturers

1. MANUFACTURERS SELLING PRINCIPALLY AT WHOLESALE. The net business income of a taxpayer, engaged in the trade or business of manufacturing and selling principally at wholesale, which has not been allocated, directly assigned, or excluded as otherwise provided in this Regulation shall be apportioned to Mississippi by multiplying such net business income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, as defined subsection 402.09, paragraphs 1 and 2, and (c) of this Regulation, and the denominator of which is three (3).

2. MANUFACTURERS SELLING PRINCIPALLY AT RETAIL. The net business income of a taxpayer, engaged in the trade or business of manufacturing and selling principally at retail, which has not been allocated, directly assigned, or excluded as otherwise provided in this Regulation shall be apportioned to Mississippi by multiplying such net business income by a fraction, the numerator of which is the average of the sum of property and payroll factors plus the sales factor, as defined in subsection 402.09, paragraphs 1 and 2 of this Regulation, and the denominator of which is two (2).

402.09 Apportionment Factors

1. Property Factor Defined.

a. Except as otherwise provided, the property factor of the apportionment formula for each trade or business of the taxpayer shall include all real and tangible personal property owned or rented by the taxpayer and used during the tax period in the regular course of such trade or business. The term "real and tangible personal property" includes land, buildings, machinery, stock of goods, equipment, and other real and tangible personal property, but does not include such properties owned or rented and used for general and administrative functions, transportation equipment (automobiles, trucks, and trailers, aircraft and other mobile equipment), coin or currency, or properties used

in the production of non-business or exempt income. The includable property in the property factor shall include the average net book value of property owned, plus the value of rented property computed as provided in the "valuation of rental property" portion of this section of the Regulation.

b. **PROPERTY USED IN THE PRODUCTION OF BUSINESS INCOME.** Property shall be included in the property factor if it is actually used or is available for or capable of being used during the tax period in the regular course of the trade or business of the taxpayer unless expressly excluded. Property held as reserves or standby facilities or property held as a reserve source of materials shall be included in the factor. Property or equipment under construction during the tax period (except inventorable goods in process) shall be excluded from the factor until such property is actually used in the regular course of the trade or business of the taxpayer. If the property is partially used in the regular course of the trade or business while under construction, the value of the property to the extent used shall be included in the property factor. Property used in the regular course of the trade or business of the taxpayer shall remain in the property factor until its permanent withdrawal is established by an identifiable event such as conversion to the production of non-business income, its sale or its abandonment.

c. **NUMERATOR.** The numerator of the property factor shall include rented by the taxpayer and used in this state during the tax period in the regular course of the trade or business of the taxpayer. Property in transit between locations of the taxpayer to which it belongs shall be considered to be at the destination for purposes of the property factor. Property in transit between a buyer and seller which is included by a taxpayer in the denominator of his property factor in accordance with his regular accounting practices shall be included in the numerator according to the state of destination. The value of transportation equipment such as automobiles, trucks and trailers, aircraft, etc. shall be excluded completely from the property factor.

d. **DENOMINATOR.** The denominator of the property factor is the total of such property described in the above three paragraphs wherever located during the tax year.

e. **VALUATION OF OWNED PROPERTY.**

i. Property owned by the taxpayer shall be valued at net book value. As a general rule "net book value" is deemed to be the original cost of the property less the depreciation as reflected on the books of the taxpayer and includes the net book value of subsequent capital additions or improvements to the includable property as well as adjustment or partial disposition thereof, by reason of sale, exchange, abandonment, etc.

ii. Inventory of stock of goods shall be included in the factor in accordance with the valuation method acceptable for federal income tax purposes and used by the taxpayer for book purposes.

iii. Property acquired by gift or inheritance shall be included in the factor as its net book value as reflected on the books of the taxpayer.

f. **VALUATION OF RENTED PROPERTY.** Property rented by the taxpayer is valued at eight times the net annual rental rate. The net annual rental rate for any item of rented property is the annual rental rate paid by the taxpayer for such property, less the aggregate annual subrental rates paid by subtenants of the taxpayer.

g. **SUBRENTALS.** Subrents are not deducted when subrents constitute business income because the property which produces the subrents is used in the regular course of a trade or business of the taxpayer when it is producing such income.

h. **ANNUAL RENTALS.** "Annual rental rate" is the amount paid as rental for property for a 12-month period. Where property is rented for less than a 12-month period, the rent paid for the actual period of rental shall constitute the "annual rental rate" for the tax period. Where a taxpayer has rented property for a term of 12 or more

months and the current tax period covers a period of less than twelve months, the rent paid for the short tax period shall be annualized. If the rental term is for less than 12 months, the rent shall not be annualized beyond its term. Rent shall not be annualized because of the uncertain duration when the rental term is on a month to month basis. Annual rent is the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use of the property. Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Hence, the net book value of leasehold improvements shall be excluded in the factor.

i. **AVERAGING PROPERTY.** As a general rule the average value of property owned by the taxpayer shall be determined by averaging the values at the beginning and ending of the tax period. However, the Commissioner may require or allow averaging by monthly values, or other periodic values, if such method of averaging is required to properly reflect the average values of the taxpayer's property for the tax period. Averaging by monthly values, or other periodic values, will generally be applied if substantial fluctuations in the values of the property exist during the tax period or where property is acquired after the beginning of the tax period or disposed of before the end of the tax period. Averaging with respect to rented property is achieved automatically by the method of determining the net annual rental rate of such property.

2. **Payroll Factor Defined.** Except as otherwise provided, the payroll factor of the apportionment formula for each trade or business of the taxpayer shall include the total amount paid by the taxpayer in the regular course of its trade or business for compensation during the tax period. There shall be excluded from the payroll factor amounts paid as compensation for general and administrative functions and amounts paid for the production of non-business or exempt income.

a. **PAID.** The total amount "paid" to employees is determined upon the basis of the taxpayer's accounting method. If the taxpayer has adopted the accrual method of accounting, all compensation properly accrued shall be deemed to have been paid. Notwithstanding the taxpayer's method of accounting, at the election of the taxpayer, compensation paid to employees may be included in the payroll factor by use of the cash method if the taxpayer is required to report such compensation under such method for unemployment compensation purposes.

b. **COMPENSATION.** The term "compensation" means wages, salaries, commissions and other form of remuneration paid to employees for personal services. Amounts considered paid directly include the value of board, rent, housing, lodging, and other benefits, or services furnished to employees by the taxpayer in return for personal services, provided that such amounts constitute income to the recipient under the Federal Internal Revenue Code. Payments made to an independent contractor or any other person for personal services rendered for the taxpayer may, with the approval or requirement of the Commission, be classified as compensation.

c. **EMPLOYEES.** Except as otherwise provided, the term "employee" means any officer of a corporation, or any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee. Generally, a person will be considered to be an employee if he is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act.

d. **NUMERATOR.** The numerator of the payroll factor is the total amount paid in this state during the tax period by the taxpayer for compensation.

e. **DENOMINATOR.** The denominator of the payroll factor is the total compensation paid everywhere during the tax period.

f. **Compensation paid in this state.** Compensation is paid in this state if any one of the following tests, applied consecutively, are met:

- i. The employee's service is performed entirely within this state.
 - ii. The employee's service is performed both within and without the state, but the service performed without the state is incidental to the employee's service within the state. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction.
- g. If the employee's services are performed both within and without this state, the employee's compensation will be attributed to this state:
- i. If the employee's base of operations is in the state; or
 - ii. If there is no base of operations in any instance in which some part of the service is performed, but the place from which the service is directed or controlled is in this state; or
 - iii. If the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed but the employee's residence is in this state.
- h. The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of this trade or profession at some other point or points. The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

3. Sales Factor Defined.

- a. For the purpose of the sales factor of the apportionment formula for each trade or business of the taxpayer, the term "sales" means all gross receipts derived by the taxpayer from transactions and activity in the regular course of such trade or business during the tax period which have not been directly assigned, allocated or excluded as provided in this Regulation. The following are rules for determining "sales" in various situations:
- i. In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "sales" includes all gross receipts from the sales of such goods or products held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales, less returns and allowances, and includes interest income, service charges, carrying charges, or time-priced differential charges incidental to such sales. Federal and state excise taxes (including sales taxes) shall be included as part of such receipts if such taxes are passed on to the buyer or included as part of the selling price of the product.
 - ii. In the case of cost plus fixed fee sales or service contracts, "sales" include the entire reimbursed cost, plus the fee.
 - iii. In the case of a taxpayer engaged in providing services, "sales" includes the gross receipts from the performances of such services including fees, commissions, and similar items.
 - iv. In the case of a taxpayer engaged in renting real and tangible property "sales" includes the gross receipts from the rental, lease, or licensing the use of the property.

v. In the case of a taxpayer engaged in the sale, assignment, or licensing of intangible personal property such as patents and copyrights, "sales" include the gross receipts therefrom.

vi. In the case of business income derived from interest and dividends, such receipts constitute "sales".

vii. In the case of business income derived from the sale of capital assets (sale of equipment used in business, sales of stocks, bonds, etc.), such receipts constitute "sales" but only to the extent of the gain realized from such sales.

b. SALES OF TANGIBLE PERSONAL PROPERTY ARE IN THIS STATE. Gross receipts from sales of tangible personal property (except sale to the United States Government) are in this state:

i. If the property is delivered or shipped to a purchaser, within this state regardless of the f. o. b. point or other conditions of sale, or

ii. If the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state of the purchaser.

iii. Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

iv. Property is delivered or shipped to a purchaser within the state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

v. The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of purchases, delivers to or has the property shipped to the ultimate recipient within this state.

vi. When the property being shipped by a seller from the state of origin to a consignee in another state is diverted while enroute to a purchaser in this state, the sales are in this state.

vii. If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

viii. If a taxpayer, whose salesman operates from an office located in this state, makes a sale to a purchaser in another state in which the taxpayer is not taxable, and the property shipped directly by a third party to the purchaser, the following rules apply:

* If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in such state.

* If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

c. SALES OF TANGIBLE PERSONAL PROPERTY TO THE UNITED STATES GOVERNMENT ARE IN THIS STATE. Gross receipts from the sales of tangible personal property to the United States Government are in this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state. For purposes of this Regulation, only sales for which the United States Government makes direct payment to the seller pursuant to the terms of a contract constitute sales to the United States Government. Thus, as a general rule, sales by a subcontractor to the prime contractor (the prime contractor being party to the contract with the United

States Government) do not constitute sales to the United States Government.

d. SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY ARE IN THIS STATE. SECTION 27-7-23(c)(3) provides for the inclusion in the numerator of the sales factor, gross receipts from transactions other than sales of tangible personal property (including transactions with the United States Government). Under this section gross receipts are attributed to this state if the income-producing activity is performed wholly within this state. Gross receipts, with respect to a particular item of income, derived from income-producing activity performed within and without this state shall be attributed to this state to the extent of such gross receipts which represent services or activities actually performed within this state.

e. INCOME-PRODUCING ACTIVITY DEFINED. The term "income-producing activity" applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profits. Accordingly, the income-producing activity includes but is not limited to the following:

- i. The rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service.
- ii. The performance, execution or subletting of a construction contract by the taxpayer to whom a construction contract has been awarded.
- iii. The sale, rental, leasing, or licensing or other use of real property.
- iv. The rental, leasing, licensing or other use of tangible personal property.
- v. The sale, licensing or otherwise of intangible personal property.

f. SPECIFIC APPLICATIONS. The following are special rules for determining when receipts from income-producing activities described below are in this state:

- i. Gross receipts from the sale, lease, rental or licensing of real property are in this state if the real property is located in this state.
- ii. Gross receipts from the rental, lease or licensing of tangible personal property are in this state if the property is located in this state. The rental, lease, licensing or other use of tangible personal property in this state is a separate income-producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this state during the rental, lease or licensing period, gross receipts attributable to this state shall be measured by a ratio of the time the property was physically present or was used in this state bears to the total time or use of the property everywhere during such period.
- iii. Gross receipts for the performance of personal services are attributable to this state to the extent such services are performed in this state. Usually where services are performed partly within and partly without this state, the services performed in each state will constitute a separate income-producing activity; in such case the gross receipts for the performance of services attributable to this state shall be measured by a ratio of the time spent in performing such services in this state bears to the total time spent in performing services everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which produced such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, as for example, time expended in negotiating the contract, is excluded from the computation.

iv. In the case of a construction contract performed partly within and partly without this state, gross receipts attributable to this state shall be the amount of the construction contract allocable to Mississippi for Mississippi sales tax purposes.

g. NUMERATOR. The numerator of the sales factor shall include the gross receipts attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incidental to such gross receipts shall be included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

h. DENOMINATOR. The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts directly assigned, allocated or excluded by the provision of this Regulation.

i. UNIFORMITY. It is the purpose and intent of this Regulation to include in both the numerator and denominator of the factors described in the above sections only those properties, payrolls and sales which are comparable.

402.10 Other Provisions. 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.

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